INJURY

The Politics of Product Design and Safety Law in the United States

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TO MY PARENTS

Evelyn and Sudhir Jain

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Preface

A few years ago, at a seminar on the typewriter and the material production of literature, I remarked on the way that typewriters had been the primary means by which women entered the labor force. The response was silence. Even more intriguing was a colleague's comment on litigation stemming from keyboard-induced injuries. This latter comment gnawed at me as I made the long commute home over the Santa Cruz mountains. Suing? Over a repetitive strain injury? By reputation I knew that Americans sued each other. And having lived in the United States for a year I had by that time seen several news stories on the phenomenon. Though they tended to dismiss such lawsuits as frivolous, I became curious about the logic that must have rendered them legible within some larger legal and social system.

The more I inspected injury lawsuits, the more intrigued I became. First, there were the stories themselves: the seemingly endless number of ways that human sentience came under siege through everyday products. Then there were the various narratives employed to make sets of arguments about the agency of objects and people in the law: how could it not matter that someone was *drunk* when his door handle malfunctioned as his car hit the median? How could a particular Wal-Mart parking lot be defectively designed when it looked like every other suburban parking lot? How could a damage award against a huge corporation, intended to be punitive in virtually every statement and theory of tort law, be reduced to a paltry sum because it infringed on a corporation's constitutional rights to due process?

Then there always seemed to be an edge of investigative reporting to this research. Newspapers invariably got the facts wrong, misreported crucial details, or squashed the legal analysis into a space that required the amputation of all the interesting parts. In a sense, injury law—this central site of American culture making—was invisible through its overrepresentation in popular culture.

But most important, recorded opinions and archived complaints provide an astonishing testament to the ingenuity of plaintiffs who were in so many ways the losers to the technologies that "progress" tendered. In 1905 after ten-year-old Branch Lewis Jr. was hit and killed by an automobile on an Atlanta street, his mother brought a potentially revolutionary complaint. She sued Mr. Amorous, the owner of the vehicle, for allowing an unlicensed young man to drive his car, which she described as "a large and heavy machine, capable of going at a

great rate of speed." This was the mark she left. We know nothing else about her—whether she was white or black, rich or poor, whether she had other children, where her husband was, or whose idea it had been to bring the complaint. Yet the complaint, and the legal opinion that dismissed it, articulate the competing interests of American industry and commodity ownership of the period. Social and technical forces collaborated to render a nearly inevitable ruling against Lewis. But the complaint registers a possibility that things might have been otherwise—that an alternative world that recognized the dangers posed by automobiles was once imaginable. In *Lewis v. Amorous*, had the judge, the court, or the logic been otherwise—had responsibility for the dangers of autos been placed with owners in the way that Lewis was suggesting—the United States would be a very different place. The legal archive is filled with such imagined other worlds.

As my research continued, I also began to note on the one hand a high political content, one that can at times seem to verge on an arbitrary application of logic and rules. This effect is what Duncan Kennedy has termed the "bad faith" of law. On the other hand, Americans still believe—albeit amid great cynicism—that there is such a thing as "the law" and in its inherent justness, finality, and ultimately, transparency. This was indicated to me in the response I received to a funding application to analyze tobacco trials, in which a reviewer wrote, "[T]his issue is already being resolved through legal channels," as if those legal channels themselves were beyond scrutiny. This faith in the transparency of the law, despite its frequent demonstrable bad faith, infuses everyday life in America.

Anthropologists write about strange cultural phenomena, and the American culture of litigation certainly fits this mandate. At cocktail parties it became clear to me that Americans, too, find it a bizarre cultural practice. Everyone has a story to add, some deadly serious, some funny: relatives with long, drawn-out deaths from cancer and emphysema; friends killed in and by sport utility vehicles; bizarre warning labels on recent purchases; grandparents undergoing needless surgery. Injury, causation, and agency are central to personal agendas, consumptive behaviors, and life in America.

Then, as I was writing, a strange thing began to happen—Canadians began suing each other in greater numbers. They began both literally suing each other and using litigation as a convenient device to explain why certain things were happening—why playgrounds were being torn down in Toronto, or why school trips were being phased out in Vancouver. In real civil questions—such as what kind of warnings should be placed in outdoor nature parks or what would be appropriate supervision on school trips—litigation (or fear of litigation) has become the vernacular explanation for a series of decisions that may have more straightforward, predictable, or democratic arenas for debate. And so what are Canadians and, increasingly, Europeans importing? I believe that in importing American injury law, other countries import more than a simple logic, more than a commonsense way of understanding and explaining. Injury law presents an entire infrastructure for thinking about social relations. More, it provides a powerful index of the defensive responses to privatization of interests in health and welfare.

Finally, as I studied design process in more detail, it became clear that the American world of commodities is produced in highly speculative contexts in which designers imagine potential users—from their size to how they might take up new products. Corporations control budgets and imagine various bottom lines (including one for potential lawsuits). These are always approximations. As approximations, with built-in sets of agencies structuring what they can and cannot do, objects can only ever simulate a full consumer fantasy. An airbag inspires the notion that it will increase safety for all consumers, but, in fact, it will "work" better for some people and actually pose a threat to others, depending on human factors such as height. Thus, injury provides a way to analyze the social discrepancies inherent to material culture and often missing from anthropological and science studies theories of human and object interaction.

In a nation committed to consumerism as a means of expressing economic and social citizenship, injury provides both a shocking moment of disjuncture and a predictable outcome of design and market systems. Any culture will have to address the problem of what to do when its members are physically wounded and to what extent health for its own sake will be a goal of the society. But in the United States, a country with no universal national health care and yet a well-developed rhetoric of individual well-being, injury law has a unique valance. It offers people not only an opportunity to tell their stories and have their day in court, but for some, a means of survival. It also poses as a highly rational and formalized arena for sanitizing and then adjudicating the messy and contradictory sets of goals, ideals, and desires of commodity culture. The location of injury and its distribution powerfully bring into view the dynamics of contemporary American culture as it undergoes further privatization in the arenas of welfare and health care.

The number of people who have talked to me about this project and shared their expertise in the many areas this research has required are too numerous to mention. I was inordinately lucky to meet so many people along the way who shared, indulged, or forbore my work.

Quite simply, the book would have taken a different and lesser form without the sustained critical readings of a number of colleagues and friends: Aneesh Aneesh, Nick Blomley, Erica Bornstein, Deborah Bright, Wendy Brown, Victor Buchli, Nancy Chen, Elizabeth Churchill, Jim Clifford, Kris Cohen, Jane Collier, Ruth Schwartz Cowan, Angela Davis, Rozita Dimova, Paula Findlen, Michael Fischer, Carla Freccero, Janet Halley, Donna Haraway, Caren Kaplan, Matthew Kohrman, Jake Kosek, Steve Kurzman, Celia Lowe, Samara Marion, Bill Maurer, Catherine Newman, Joy Parr, Jason Patton, Alain Pottage, Elizabeth Povinelli, Matt Price, Hugh Raffles, Teemu Ruskola, Jeffrey Schnapp, Derek Simons, Mimi Sheller, Vivian Sobchack, Lucy Suchman, Anne Stott, Marilyn Strathern, Neferti Tadiar, Miriam Ticktin, James Todd, Sherrie Tucker, Martha Umphrey, Nina Wakeford, Ann Weinstone, and Sarah Whatmore.

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INJURY

FIGURE 1. Joel Pett, CWS / CartoonArts International.

Introduction

Injury in U.S. Risk Culture

Referring to a class action in which several black youths sued McDonald's for the injury of obesity, this political cartoon spoofs the American turn to litigation as a means of solving economic and social issues.[1] By juxtaposing one of the plaintiffs in what became known simply as the "McDonald's obesity suit" against third world famine, the cartoon poses a rich set of paradoxes: a large American with a bag of food set against a malnourished subaltern with an empty bowl offering the naïve advice to use an already suspect litigation strategy in the face of the "genuine" complexity of poverty. Furthermore, the astronaut-like precision of the U.S. flag hints at a past American greatness besmirched by the impropriety and ubiquity of injury lawsuits—a once great nation now littered with empty soda cups. The satire, then, parodies the misplaced confidence of this woman and her black vernacular appeal to litigation.[2] Can litigation be the answer to the web of problems that includes obesity, famine, and global politics? Is obesity not the only one of these issues that can at least be attributed to personal responsibility? To consume is American. To sue is American. In the interstices of these positions lies a culture of injury only hinted at in the layers of this cartoon. Herein lies the central theme of this book.

For parents of an infant injured by a poorly designed baby carrier, for someone who loses a spouse after a door lock failure, or even for someone who wants to lay blame for accidental pregnancy after spreading contraceptive jelly on toast, tort law is an obligatory passage point. It is the place one must go to have injuries recognized, health care bills paid, and moral outrage salved. The arena gives form, if only in a highly structured and artificial way, to deep-seated anxieties about the body, technology, consumption, agency, and injury.[3] In this way, throughout the twentieth century injury law has held a critical place in the United States to a degree unmatched in any other country, and it remains a key infrastructure for negotiating the responsibilities that manufacturers should have in product design, given the ease with which human flesh is injured.

In many ways, as legal theorists such as Laura Nader and Richard Abel have argued, tort law offers a radical potential for social justice.[4] Waves of cases, typified recently by a group of litigants whose children

were accidentally killed by guns, result from frustration with federal regulation of industry and attempt to enforce the development of safer designs through litigation. Similarly, resource-intensive lawsuits have had striking success in bringing attention to cigarettes, asbestos, Agent Orange, and the Dalkon Shield where other methods of regulation have failed. These cases demand careful consideration because they take seriously—and assert—the right that injury law promises: the right of consumers not to be injured by mass-produced consumer objects. These cases raise the politics of design through issues such as how easily features such as safety locks and ballistics fingerprinting could have been and could yet be integrated into handgun designs or how guns are purposely made attractive to young children or to those with potentially criminal intent. Indeed, groups such as the National Rifle Association and the tobacco industry have lobbied hard to ensure that their products have been exempt from the regulatory reach of federal agencies. Furthermore, specificities of American culture such as the high cost of medical care and a regulatory system open to political suasion, as well as a tort system that unlike in Canada or Europe allows for high punitive damages, has led several tort theorists to argue that after bad accidents many Americans have no choice but to litigate.[5] In these "activist" senses, tort law can be understood as a back door, private way of regulating dangerous products when the government refuses to do so.[6]

While injury law demands to be understood in the context of a battery of civil rights advocacy strategies, this activist standpoint has also obviated a more thorough analysis of the cultural politics of injury and the ways that injury law and product design produce American subjects. The famous American tort cases, as well as the more modest ones I examine closely in this book, illustrate that the law does far more than recognize, measure, and compensate injuries. It does the political and social work of determining what will count as an injury and, ultimately, how it will be distributed through product designs.

In these ways, close and contextualized readings of legal texts can lead us beyond the question of efficacy in realizing the stated goals of the institutions addressed to the problem of injury and toward an analysis of how physical injuries are made material (made to count), how they circulate, and how their distribution creates the material conditions of everyday life. This shift in analysis, in which I interrogate not only how the law adjudicates claims of product defect and personal injury, but how legal entities (guns, consumers, injuries, defects) are constituted allows us to better examine how the law is deeply political in ways that are central to and constitutive of American citizenship, consumerism, wounding, and the distribution of responsibility. These

central cultural and political questions are merely glossed over by these laws; they determine who pays for and what counts as national progress. But further, they sustain the separation and individuation of the consumer as the very basic tenet of consumer capitalism, allowing for the liberal chooser who rationally selects the items he consumes. This allows for the logical step of understanding injury as a by-product, not central to production and consumption.

Injury laws pervade American consciousness as a central and unique drama, one whose complexities are often posed in the media and blockbuster films as parodies of pure good meeting pure evil. The form of the trial pits private citizen against huge institution, with law structured as a neutral seeker of the facts and objective adjudicator. It so well captures—and structures—an American framing of right and wrong that fact-based suits are played out again and again in films such as *A Civil Action* and *Erin Brockovitch*. Tort laws "make sense" to Americans in a way that tends to mystify Canadians and Europeans. Tort laws hold a peculiarly vital place in the United States, given—undoubtedly as a result of—the lack of universal health care coverage, the dearth of regulatory bodies (and so the hint that bodies are used as guinea pigs or canaries), and the particular qualities of money, which can mutate in purpose from compensation to punishment, while so easily mutating again through desire and greed. These laws also fit within an individualized notion of American citizenship, understanding injury not as a structural premise of capitalism and a condition of its possibility but as an accidental side effect—a problem that can be rectified at the level of the individual and the particular facts of her case. Nevertheless, American injury culture is produced and consumed in a global economy, one in which injury and risk can also be outsourced to poorer nations who are willing to use pesticides or child labor.[7]

In its vernacular reiteration in popular domains such as film and media, the law is a powerfully interpellative discourse, posing cross-cutting narratives of the "small guy" versus the "vast corporation," and the "valid" versus the "frivolous" case.[8] Both of these accounts indicate that though appealed to as an objective adjudicator of facts, legal institutions addressed to the law of personal injury offer powerful social technologies for deciding how (and which) human wounding will carry political, economic, and social weight. These two narrative axes also begin to hint at the complexities of popular understandings of injury law. As Elizabeth Povinelli argues in the context of state recognition of race and rights in Australia, the difficulty of law as a primary conduit for politics is that "moral obligation—moral sensibility—is exactly where critical rationality is not."[9] Since institutions addressed to injury law pose as both moral *and* rational, they remain susceptible

to political manipulation. This is evidenced by well-publicized iconic cases such as the "McDonald's hot coffee case," in which an elderly woman was burned by a cup of hot coffee and sued McDonalds.[10] The misinformation campaign that followed this case, *Leibeck v. McDonald's Restaurants*, and the related pathologization of the "ambulance chaser" demonstrate the high stakes in conditioning how this form of private judicial activism will be understood by the American public.[11] Individuated injury claims, while providing an outlet for private justice, can be picked up and ridiculed in formats easily translated into sound bites by parties interested in conservative tort reform, whereas the complicated stories that lead to complaints such as *Leibeck* do not tend to translate so well. Further pitfalls of assuming the validity and efficacy of the stated goals of the law include an erasure of the problematic case-law approach, which enables single judges to make far-reaching and value-laden precedents. Other issues lie with legal assumptions that injuries can be narrowly traced to single products and incidents and that large punitive awards serve as sufficient deterrents.

Despite their central role in the production of American culture, in themselves these laws provide us with only an emaciated language with which to understand the material world and its relations with human sentience, or corporate capitalism and its human costs. In this book, then, I step outside of the questions of frivolous cases and junk science to offer an examination of how injury laws determine how human wounding and risk subjectivities are distributed both prior to and through litigation.[12] As I will analyze and argue in detail, legal trials structure narratives about injuries and differences; they are a key site at which a common sense about object use, design, and consumer expectations is both constituted and articulated. They are central to the valuation and reproduction of consumer culture.[13]

Injury takes seriously the ways that commodity design harbors assumptions about sociality, behavior, and human action. This observation has been well noted in recent work in material culture studies, which has recognized that objects "acquire their full significance only if one takes account of their double role in both the 'practical' order, which includes social arrangements for maintaining life, and the 'expressive' order, which creates hierarchies of honour and status, and which enjoys priority over the former."[14] What this dichotomy glosses over too quickly is the way in which human and nonhuman actors always act in themselves only partially and always within fields of distributed agency. Thus in the chapters that follow, I trace the ways in which humans and non-humans act among one another, implicating each other to constitute safe or dangerous passages through everyday

life. In these passages, wellness and wounding will always be at play within various cross-cutting hierarchies.

Injury law inserts itself into these fluid relations, separating out the terms through which agents will be understood, responsibility distributed, and inequalities recalibrated. In assuming that injury is always incidental to American culture, tort law and its promise of reparable harms redistribute human wounding—already distributed through the prior machinations of consumption and capitalism—with vast implications of whose bodies the costs of progress fall into. This insertion is constitutive: should cars, or certain kinds of cars, be crashworthy by definition in a 45 to 0 miles-per-hour side-impact crash? For what size person?[15] What if the driver was drunk or not wearing a seatbelt? What if she slipped under the airbag? Should she have done more research before buying the car, or should she have depended on the automaker or the agencies in charge of auto safety? What if the vehicle was advertised as being safe for everyone, but what if each car had a warning sign that stated that people under five feet tall should not sit in the front seat?

In one sense, wounding itself brings a mode of attention to objects into being. Heidegger noted this point with his famous example of the carpenter's tools, in which objects only emerge as separate from the craftsperson when something goes wrong.[16] But injury law furthers this distinction—one depended on also in consumer capitalism. Injury laws provide a discourse through which the fluidity of everyday interactions are stilled, and thus they allow the analyst to understand how its categories are made sensical. Thus, these laws can be understood as a mechanism for maintaining, reproducing, and challenging unequal social relations—continually setting and resetting the acceptable relations between markets and bodies—isolating the body as an atemporal artifact from the temporality, the process, of the acculturated self. Injury laws present a moment through which to understand how bodies, products, and their agencies are consolidated and attributed and, through time, how regulations recursively enable the coding of these assumptions through product design.

The cartoon at the beginning of this chapter presents one example in its illustration, albeit in crude terms, of the recursivity of bodies consolidated through consumption. A group of young, racially marked individuals were either targeted or otherwise vulnerable to the consumption of certain products, which in this case, they claim, made them fat and unhealthy. They then attempted to stabilize this identity—as fat and unhealthy—at a place from which they could claim to be "injured," and assert their rights to citizenship vis-à-vis claims to the right *not* to have been injured. The court, on the other hand, under-

stood these teenagers to have been freely choosing agents who partook too liberally in an everyday part of American culture. As the wide debates about obesity, health, and mass-produced food that this case spurred demonstrates, the law itself—as a process, a body of rules, an administration, a group of people—is ill-equipped to handle the grand social questions about markets and human wounding that are presented to it.

The Book

As a legal term of art, "injury" is structured by a concept of rights. Deriving from the Latin "in" meaning against, and "jus," meaning something done against the right of another person, injury was described by Blackstone in 1768 as an "infringement of private rights."[17] This is the basic structure that the term has held through the centuries, with the crucial difference that now each person holds the rights to his or her own body (rather than in the early century, say, when a husband held the rights to his wife's body).[18]

Legal theorists seek to balance how the importance of the body will be weighed in terms of economic and technological notions of progress and profit, such that manufacturers will ensure that their products are reasonably safe. They do this in a variety of ways that vary from cost-benefit "tests" to theories based on insurance models, as I will outline later in this chapter. When these equations have caused "unjust" losses, reallocation takes place through compensatory damages, which cover the costs of the injury (medical, loss of consortium, pain and suffering, and so on). In the case of egregious misconduct, such as premarket knowledge of a serious defect or fraudulent advertising, a court may decide to award punitive damages as way of literally "punishing" a company. The injury law requires the physical body to come to the table as a preceding artifact being reclaimed after having been unjustly altered. This reclamation is an act of citizenship both in the individuated terms of literally reclaiming the body through compensation and in the ways referred to by certain tort scholars as fulfilling one's social duty to keep corporations honest. Thus the physical body serves as the collateral for the "justness" of that culture such that certain practices—child labor, dumping toxic waste—become morally reprehensible or unacceptable. (The necessity for these can be outsourced to other areas of the global economy.)

But if we take the body—wounded or well—as a material repository of culture on every level of the onion, from language to gender to health to education and behaviors, the political and economic sense of

such claims makes less sense. If this is the case, who or what is the preceding subject that does the work of claiming, and what is being claimed? A consumer culture will have palpable interests in maintaining a strict division between subjects and objects, for the distinction does the work of maintaining the liberal framework of the free consumer-chooser.[19] But if we understand these distinctions between subjects and objects as far from self-evident, as problematic temporal and discursive formations, we will be better able to consider how injury laws themselves—including their human (lawyers, plaintiffs, judges, clerks) and nonhuman participants (amicus briefs, complaints, texts, restatements)—are key actors in the cultural reproduction of material difference.

This paradox of the acculturated body, or the ways that state and corporate power negotiate physical bodies, entitlement, costs, and progress, can be approached through a recollection of the importance of materiality to governmentality. In his explication of governmentality, Michel Foucault traces the way in which power gains its influence through subject formation. Control over a contemporary citizenry is gained not through repression and punishment, as it once was, but through the subject's own interpellation into regimes of conduct. He further focuses on the capacity of the material world to distribute power as an instrument of governmentality: "one governs *things*. . . . The things, in this sense, with which government is to be concerned are in fact men, but men in their relations, their links, their imbrication with those things that are wealth, resources, means of subsistence, the territory with its specific qualities . . . and finally men in their relation to those still other things that might be accidents and misfortunes such as famine, epidemics, death, and so on."[20] As the subsequent chapters of this book demonstrate, what will count as rational conduct or what is taken as common sense privileges certain forms of behavior and modes of citizenship. This book is not about whether or not a person "truly" was injured or hurt, but presents a fine-grained analysis of the specifics of several injury claims in light of their roles in governmentality.

The legal infrastructure for adjudicating injury brings us back to the Durkheimian paradox. Americans are required to examine and explain each injury accident in isolation—as an event that could have not happened. As Durkheim writes in *Suicide*, although we cannot know in advance how many people will commit suicide each year, we can predict with tremendous accuracy that several thousand people will. The paradox, then, to which I return below, is that while injury laws tend to understand each wound as an avoidable side effect of American economics—and can sometimes be translated into a legal injury deserving of compensation—they miss the structural ways that wounding is cen-

tral to American society. Approximately 45,000 people will die—violently—in car crashes this year, no matter how avoidable each of those crashes may retroactively be understood to have been. Thus, in this book I take this effect seriously to ask how, if we understand human wounding to be a central feature of capitalism, the "accident" or "side effect" lens of injury laws affects how suffering is both distributed and made legible.

In the chapters that follow, I focus on elucidating different aspects of this argument through an analysis of several different objects, injuries, and legal struggles. In the remainder of this chapter, I examine more fully the ways in which injury laws have circumscribed and addressed the rise of consumer technologies and human wounding. In chapter 1 I lay out in further detail the paradoxes of what I am calling American injury culture. I work out what I understand to be some of the key consequences of this specifically American way of understanding injury. To do this I juxtapose the "rhetorical effect" of law—or the way in which it sets out injury as the exception to normal exchange patterns—and the "inequality effect" of material culture—by which I mean the ways in which fields of production and consumption are simultaneously wounding *and* enabling. Furthermore, injury itself is a productive force. In chapters 2, 3, and 4, I analyze, respectively, the short-handled hoe and its attendant back injuries suffered primarily by Mexican American laborers; the computer keyboard and repetitive strain injuries suffered by typists; and mentholated cigarettes and the injuries suffered by African American smokers.

The chapters that follow are not intended to be case studies; they do not set about to prove or reiterate the arguments I lay out here. Read as a collection, each illustrates different facets of what I have called injury culture. Read individually, each documents a history of the present, or a genealogy of how particular injuries and objects have come to be understood at particular moments.

Terminating Accounts

In some ways, a radical assumption inherent to product liability law is one that has been strongly stated in science and technology studies—that nonhumans are, as Bruno Latour argues in many contexts, "nothing more than discourse, totally expressible in other media."[21] The Berlin key is one of several examples Latour uses to demonstrate this point. As a key with a peculiar design, the Berlin key fits into a specialized lock. This lock can be programmed by a building manager so that on one setting, after the key is extricated the lock will remain locked

on both sides, and on another setting, the lock will remain unlocked on one side. In that sense, argues Latour, the key does nothing except "carry, transport, shift, incarnate, express, reify, objectify, reflect, the meaning of the phrase: 'lock the door behind you during the night, and never during the day.'"[22] For Latour, in this case, design is a transparent translation process.[23] The key materially inscribes the demand's compliance such that the human factor is removed: the manager will no longer have to post directions as to how the door should be left and depend on tenants to obey. The key, then, inhabits and expresses the door-locking agency. In an historical analysis of airline accident investigation, historian Peter Galison makes a similar point. Through tracing the ways that accident reconstruction explains cause, Galison concludes that "there is an instability between accounts terminating in *persons* and those ending with *things*. . . . It is *always* possible to trade a human action for a technological one: failure to notice can be swapped against a system of failure to make noticeable."[24] These arguments help us understand how agency is encoded in the design of objects: the lock and key that *itself decides* whether it will be left locked or unlocked, or the fluorescent dye that *did not make itself* adequately seen thus causing the pilot not to notice a mechanical failure. However, the transfers of agency and responsibility are not as straightforward as these explanations suggest, for they do not provide analysis of how designs and legal infrastructures in decoding, or translating agency, draw on and produce various kinds of inequities.

Injury law accepts, even predicates, the Latourian contention that objects are "full of people." Galison's suggestion that the premise that "actors" or sets of agencies can be stabilized as an end point for explanation is also inherent to this mode of adjudication. A legal defense team aims to tell a story in which objects are self-evident—the manufacturer has built a product that has been properly made and that must be responsibly used. The defense seeks to erase any misfit between the object and its life world and foreground the users as bad actors. Plaintiffs, on the other hand, foreground an object as an actor that embodies manufacturer carelessness or malevolence.[25]

These projects require acts of translation whereby the intentions of and expectations for human and nonhuman actors are made to correspond. Jacques Derrida put this quandary of translation in a way that could be used to further unpack the moral problem of human and nonhuman agents: "To address oneself to the other in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigor, it is not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law of an implicit third) but even excluded by justice

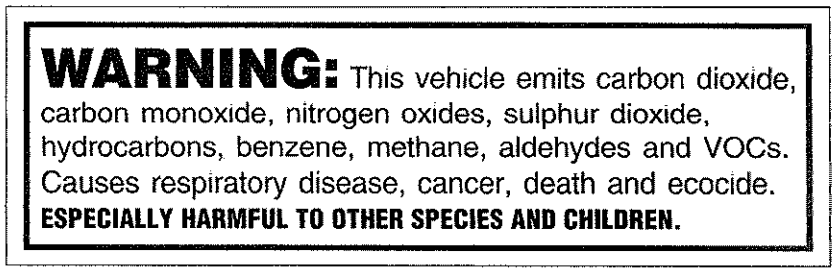

FIGURE 2. Produced by World Carfree Network, http://www.worldcarfree.net

as law . . . inasmuch as justice as right seems to imply an element of universality."[26] At issue, then, is not only what objects say but who gets to translate that "voice" and how. What are the terms for the object's intelligibility? Like any translation, this is an ethical issue.

Whether the plaintiff's behavior or the corporate mediated object will be held "responsible" for a given wound (will the wound translate into an injury?) constitutes the most basic question of injury law. The initial premise of injury law is based in this commonsense assumption that objects can be separated from and judged against behaviors. Therefore, plaintiffs' lawyers tend not to believe in accidents or acts of god—they locate the person who made a decision to save some money and make the tunnel too narrow, resulting in a client's paralysis; or someone (or an institution) who decided not to warn about or add a coloring to a poisonous gas, resulting in a client's chronic asthma; or someone who carelessly replaced a brake pad, resulting in a fatal car accident. The plaintiff's job is to show precisely how messages of danger "should" have been encoded into products and how the consequences of materialized decisions were visited on specific, real people and not statistical futures. In other words, the various theorizations of personal injury law offer different moral codings of how agency in design will be determined and accepted.

But further analysis shows that this retroactive storytelling is misleading, since the physical and behavioral "fit" between any one object and any particular person is only one of many factors that go into design in a market economy.

Designers and engineers—builders of the material world—make assumptions about users. As FXPal designer Elizabeth Churchill says, "We simulate." Designers approximate users and possible worlds in the process of materially intervening in the future through their distribution networks. This is a simple idea at the outset. But in a mass market, a designer will have multiple and contradictory interests at play

in the creation of these simulations. For one thing, even if safety and ergonomics were high on a list of important design components, a mass market will require catering to averages. To take a well-known example, drivers are assumed to be between 5'6" and 6'4" and a driver seat and airbag will be designed accordingly. In this case, drivers' height becomes a category of risk distribution. Or, in other design decisions having nothing to do with safety, a particular color or shape will be thought to harbor the desires of the imagined consumer. Or, as tobacco companies found in the 1950s, a cigarette will be found to sell better when it contains more nicotine.

So within this vast pool of design and marketing concerns, the imagined users and their activities will be approximated, simulated, and, through a successful product, to some extent, effected. Similarly, the "corporation" (as a set of individuals acting within a body of economically and legally proscribed interests) will add its own limits and desires to the process in accordance with profit motives and regulation. The airbag may have to have, according to the National Highway Traffic Safety Administration (NHTSA), two speeds for faster or slower crashes; the seatbelt buzz may be purposely annoying to try to prevent further regulation (the buzz says, "Look what we had to do *to you* in order to comply with the last crazy set of regulations"); or the assumptions about the size of occupants may need to be altered in response to an outcry about children's deaths. Marketers will add their narratives to the object: they may teach consumers how to use it (no ice in beer, please), or lend imaginative worlds to the product (people will make space for your SUV), or educate potential users (you will be safer with your airbag). These strategies may be based on expensive niche market research.[27] Furthermore, as design historians such as Ruth Schwartz Cowan, Adrian Forty, Joy Parr, and Ellen Lupton have shown in detail, designs will often narrow and fix possible worlds based on banal or pernicious stereotypes.[28] Ultimately, designs embody possible worlds and distribute potentials on multiple levels for social and physical enabling and wounding.

Similarly on the consumptive side, consumers conjure through their purchases (for themselves and other around them) the promises of material and semiotic worlds. One short driver may attempt to simulate safety when she decides to purchase a particular car, while another, having slipped below the inflated bag, may find that she did not fit the designers' correlates for imagined safety and thus die in a low-speed crash. A cyclist may find that the cars around her move faster when their drivers feel that they are safer with their new airbags. In short, consumption harbors fantasies about the self in particular social and physical roles, always in a network of assumptions, ideals, desires, and

fears. Bodies assume designs and designs assume bodies. Through these assumptions and simulations, safe or dangerous passages through everyday life evolve.

In this product design perspective, injury (in both the legal and vernacular sense) is precisely that place at which the approximations of some combination of these actors have predictably and unpredictably not "fit" and the human part of the equation has absorbed that misfit. As an inevitable consequence of inexact processes of simulation, injury provides a moment of disjuncture in which object expectations are breached. It potentially threatens, in the most radical way, the entire basis of economic rhetoric that insists that production and consumption take place in the interests of the common social good, and therefore produces a need for a rational logic of determining compensation: this trope of compensation is continually renegotiated through the various theories of injury law, as I will explain later in this chapter. Within this trope the isolation of the subject is, in legal logic, what allows for an injury to be counted in market terms such that the injury can in some sense be, as Elaine Scarry writes, "undone" through the monetary award that will in a rough sense "buy back" what it has taken.[29] The spectre or the trope of compensation stands at the far opposite end of the potential profitability of production, and there sticks its ideal of deterrence.

As a counter to this threat to economic rhetoric, product liability law offers only two sites of explanation and blame within this slippery network of design and use: person or thing. Thus, struggles over what will count as "good" design also harbor assumptions about what will count as rational behaviors.[30] A trial in the business of determining if a hamburger or stepladder was negligently or dangerously designed will also need to figure out if the product was eaten in moderation or climbed when the user was sober. One way for defendants to protect themselves through this translation exercise is to write their intentions clearly on the product; this directive is known as the product warning, and it remains the easiest and cheapest way to alter a product's "design" to try to avoid the injurious misfit.

Consumers in the United States who began smoking before 1965, when warnings were introduced in small print on one side of the package, have had considerably greater success than plaintiffs who began smoking later. This success tends to show that the warning, "Caution: Cigarette Smoking May Be Hazardous to Your Health," has been understood by juries as sufficient to give consumers adequate information and to leave open the possibility of rational choice. Each lawsuit, as it builds on others through the system of precedent, focuses assumptions such as these about reasonable behaviors, further consolidating

FIGURE 3. Canadian cigarette package warnings.

what will count as rational behaviors and whose interests these will privilege.[31] As I will demonstrate in detail in the following chapters, enormous amounts of discursive energy frame and consolidate what will count as rational behaviors and whose interests these will privilege. This ability to create the norms of rational behavior constitutes the cumulative built-in ethics of injury law. Further, the cumulative effect of these judgments recursively stabilizes design in ways that literally allow for the creation of certain material worlds over others. That car owners or manufacturers were never consistently held accountable for design in pedestrian injuries and deaths, for example, meant the deaths of hundreds of thousands of pedestrians through the century were "accidental," though avoidable.

The legal question, then, reflects the kinds of anthropological concerns raised by the Berlin key and the airline crash explanations raised by Latour and Galison: what kinds of intentions fill objects—are they pernicious or benign? This question is at base about the co-constitution of humans and nonhumans and first, who should bear responsibility

for the ostensibly intractable qualities of each, and second, who gets to devise the explanations about responsibility. But if one takes, as serious play, Latour's contention that there exists no logical division between subjects and objects, how would an object such as a cigarette, like the Berlin key, be "totally expressible in other media"? How might the cigarette "translate" to English? Most certainly, "Please give RJR (and by extension its employees, employees' gardeners, employees' children's teachers, and the 'economy' more generally) a little money each day for as long as you live." Again, quite clearly, "I need a home for particles that disintegrate as I am smoked, and your mouth, throat, and lungs, will do the job nicely." These concepts are materially inscribed in the commodity form of the cigarette as an object whose social function is to be smoked. But the cigarette itself would not express its terms in the moral language of injury, as in "I want to 'hurt' you," or "My presence in your lung will cause grief to those around you." Rather, the cigarette through its own agency causes a series of reactions that then bring the smoker into new social and material relations: hospitals, experimental cancer treatments, sociological studies on smoking, litigation. Counterreactions in this case included targeting less educated groups for its products, covering up medical evidence of product failure, halting research of "safe cigarettes," and establishing its own channels to publicize false medical research.

But the cigarette itself does not care to injure. Even the industry, for all its duplicity and counter to its actual actions, would not *want* to wound, let alone kill, a consumer. Rather—if a corporation could have its own desires—it would want to keep consumers returning to the product. That the corporation could not stop wounding as a matter of course was merely an unfortunate side effect of its main aim, which was to make money for its shareholders. We might also say that the cigarette does not itself precisely injure (in the legal sense). Rather a relation of its particles and a human lung will likely result in the growth of another entity: a cancer. This cancer will change the way that the human is noticed in social networks. Some of these networks will now interpellate the human as a potential member of a class for a class action, understand her as a site for experimentation for new cancer drugs, or perceive him as a bad investment for a life insurance policy. Another social network will notice the capacity of that cancer to take from its host friendship, consortium, and labor power, and may attempt to locate a site for compensation against this loss.[32] Thus to have a wound or an accident translate to an injury and thus a set of responsibilities requires this lineup of recognitions and intelligibilities. The legal "injury" (if the company loses the suit) is not per se the cancer, but a legal attribution. In the 1980s and 1990s, no one doubted that Rose

Cipollone's cancer was caused by tobacco smoke. Nevertheless, courts wrangled over whether or not the tobacco companies should be responsible for her death. The legal question was one of interpretation: should the responsibility for the wounding she suffered by smoking convert through the courts to an infracted right not to have been injured? To make the wound intelligible, the law demands a convincing enrollment of the terms of injury itself, and often these terms are contingent. Before the activism of MADD popularized the notion that drunk driving was legal homicide, drunk driving deaths were just accidents; before *Unsafe at Any Speed* and the regulation of windshield glass, car occupants regularly (and accidentally) were beheaded in low-speed crashes in what was popularly called the "glass guillotine."[33]

Injury is a project of translation through which the co-constitutive effects of agency are interpreted and distinguished. This translation exceeds the terms of responsibility (object or person) itself and thus the political charge to the translation project. Through the process of litigation, the cigarette can potentially be socially registered as a new form of actor in the world that not only needs to be transported, marketed, held in a certain way, kept dry—but also one that injures. Precisely this movement in the 1990s allowed parties to cohere under categories such as those injured by smoking, those unaware of smoking's dangers, those vulnerable to or targeted for more dangerous cigarettes, and those who suffered from secondhand smoke.[34] These laws are part of the network through which the cigarette—as an object that both can and cannot be traced back solely to the corporation—becomes a political actor in the world and spawns stakes in its economic, injuring, and sociopolitical meanings.[35] Thus if objects and laws are standardized and if people and objects are always only partial—implicating each other in day-to-day life—the wounded people who come to the law for compensation are different in layered ways that identity and subordination theories cannot capture. To get at this, we need to go beyond Latour.[36]

The legal framework is an actor, or merely an adjudicator, in the injury drama. As Francois Ewald writes, "[T]he fact that bodily damage can . . . be transformed into a cash price may lead an insured person to speculate on his or her pain, injury, disease or death, so as to extract the maximum profit from them."[37] This profit motive is only one of a number of possible intentions a plaintiff may have in launching a suit. Others include a desire for public recognition that a person has been "wronged" or a desire to make similar injuries less likely in the future. Furthermore, the existence of the equation to begin with may encourage new behaviors, thus undermining the purported goals of injury

law itself. Thus, the suit itself is a primary actor in the injury drama—as much as it mediates, it constitutes how injury is understood. As an actor, a lawsuit isolates certain moments within injury culture and defines those as key in framing what injury will mean.

Attempts to terminate accounts in persons or things shift with varying understandings of material and rhetorical articulations of the product on the body. A potential plaintiff may be at different times (or at the same time) a defensive smoker and an outraged litigator, or he may move among positions of choosing, addicted, medical, and legal subject. Each of these will work within promises, fantasies, or attempts to gain various abilities, freedoms, communities, and rewards. But when subjects shift so fluidly among agentive moments—liberal chooser, wounded consumer, ill citizen with or without a health insurance plan, injured litigant—who and where is the preceding subject? Which of these positions are descriptive, and which are constitutive of the legal positioning? Where and from whom is the injury of, say obesity, to be claimed? Is it poverty, poor health and physical education, bad parenting? Who is at fault? Parents, the McDonald's Corporation, Ronald McDonald, the state, the food industry, the public health system, the American Medical Association for its continuing lobby against socialized medicine? Are increasing obesity- and fast food-related diseases simply to be accepted as a result of so-called American lifestyles and choices, and to be distributed invariably among poor communities of color? The point here is precisely that explanations can*not* interchangeably terminate in persons or things. Human and nonhuman agencies are not parallel and interchangeable in some larger system, but affect the quality and potential of civil action and the material quality of human action. As subjects are constituted through and by objects, the legal institutions addressed to the law of personal injury separate and articulate distinctions just long enough to interpret what the stakes are in maintaining these boundaries. Lawsuits act rather than arbitrate, consolidate contestants rather than solve health and design questions, trade rather than decipher.

In one of the few accounts that critically investigates the product liability trial, Elaine Scarry uses grander claims for the political ramifications of termination points of explanation. For Scarry, the stakes lie in the very nature of the human body and the nature of the artifice.[38] Injury law confronts the most basic political and economic questions in a culture that bases most of its indices of success on increasing the production and consumption of "goods." The question scholars such as Latour, Galison, and Scarry leave us with is this: what does the location of cause tell us about power relations, and how do these attributions recursively make material worlds?

Agentive moments mutate as easily as bodies, but which ones "count" and which bodies matter? How are different facets of injury (race, gender, defective design) stabilized? Subjects and objects are continually remade through practice. Thus, concepts such as harm, work, and race are contingent and change over time and space. In this project I trace specific histories and phenomenologies of contingent interactions to analyze how, through these interactions, inequality is projected onto and absorbed by others in product design and consumption, and then how this interaction is picked up again by those who want to redefine it (advocacy groups, lawyers, lawmakers, capitalists, lung tissues, scientific studies) in the courtroom—this time as injury.

Because each of the issues I take up in subsequent chapters could easily overflow the bounds of a book, I have limited the arguments in each carefully. Nevertheless, each offers both a particularity and universalism that I intentionally leave open for now. For example, the cigarette, it has been claimed, is a unique product in that it injures as a matter of course when used as intended and, furthermore, that nicotine is addictive exactly contravenes the definition of rational behavior. Eve Sedgwick takes this paradox a step further, beyond the cigarette and to "the present discursive constructions of consumer capitalism," in which "the powers of our 'free will' are always already vitiated by the 'truth' of compulsion, while the powers attaching to an acknowledged compulsion are always already vitiated by the 'truth' of our free will."[39] In this locution, one that as an open question will underwrite the analysis posed in this book, the cigarette is not unique. It writes large the addictive underpinnings of consumption in the United States,[40] and the fetished commodity separated from the conditions of its production and consumption.

Recursive Objects

Critical commentators on the injury problem in capitalism have tended to focus on the productive side of the equation. Marxist interpretations of injury try to determine how much labor power, for example, can be "taken" from the always already injured worker. In these accounts, the problem of commodity production is one of injury produced by production itself. For example, Adam Smith recounts in his famous pin factory analogy how a laborer working at one of a number of total procedures available in machinic culture "generally becomes as stupid and ignorant as it is possible for a human creature to become."[41] This necessary wounding of the worker is required by the growth of social wealth and, indeed, according to Smith, operates in the worker's favor

as he emerges from the process as the well-heeled consumer.[42] Smith weighs injury against the benefits of increased production and finds the trade-off worthwhile.

On the other hand, Elaine Scarry locates class difference in the materiality of the physical body: "[T]he problem of the haves and have nots is inadequate to express its [class's] concussiveness unless it is understood that what is had and had not is the human body."[43] In this tradition of thought, one that I will expand on, inequity is materially grounded in the body itself. In this sense, wounding and inequality are inextricable: the former an expression of the latter. In thinking about production, as Scarry is describing Marx's ruminations on capitalist production, the problem of wounding emerges as one of physical takings through labor: the workers' compensation laws instigated after Marx's death might be read as an attempt to codify how much of a worker's physical body may be spent in the process of production. "Excess" wounding will count as injury.

Workers' compensation schemes and product liability laws share the same basis in torts, though the former has followed a different historical trajectory. It is well known that the accident rates in early industrialism were unbelievably high. In 1913 there were 25,000 industrial fatalities and 700,000 injuries resulting in more than four weeks of disability among the 38 million workers in the United States. To put this another way, between 1907 and 1912, ten percent of male deaths were caused by industrial accidents.[44] Still, injured workers had little success in obtaining compensation for five key reasons. First, laborers had to be able to hire experts to show proof of proximate cause. Second, the "fellow servant rule" provided that if an accident was caused by another employee, the employer could not be blamed. Third, it was understood that the worker assumed any risks associated with the job by accepting employment. Fourth, the employer could avoid liability if he could show any contributory negligence on the part of the worker.[45] Finally, employees could be fired for bringing a suit.[46]

Between 1885 and 1910, most states enacted employer liability laws that considerably weakened the previous barriers to the tort system. The new availability of legal redress to workers hastened the development of a workers' compensation system in the 1910s, and between 1913 and 1920 all but eight states passed workers' compensation laws.[47] In a detailed historical study, Anthony Bale outlines the ways in which the passage of state workers' compensation laws in the 1910s resulted from the interplay of four factors. In addition to the huge number of worker injuries and the activist class politics of the period, the rising and uncertain costs in tort trials made it desirable for companies to drastically lower awards even if it meant paying a higher percentage

of claims. Finally, and crucially, corporations realized that the fault discourse inherent to tort trials was an explicit critique of the morality of production. The substitution of the explicitly no-fault discourse of workers' compensation allowed companies to continue a paternalistic language of worker responsibility and accidents.[48] The Occupational Safety and Health Act (OSH Act) of 1970 was the first federal regulation to give workers the right to be free from danger, although many commentators argue that the executive agency in charge of implementing the act, the Occupational Health and Safety Administration (OSHA), has largely failed to do so.[49]

To give an example of the vast difference between workers' compensation and product liability law, consider a case in which a twenty-five-year-old worker was severely injured when her arm was pulled into a six-bladed bolt-making machine. Through a workers' compensation claim she was eligible for a maximum of $34,600 and was unable to sue the employer.[50] However, when she brought suit against the manufacturer of the machine for negligent design, the jury awarded her $3.5 million.[51] Thus, vast differences exist between workers' compensation, which is a no-fault insurance system, and tort law, which is a fault-based compensatory system based in the assertion of the right not be injured by the everyday products one uses.[52] As the tort scholar Robert Rabin writes, the former is "grounded in a collective model emphasizing needs-based benefits for a community of victims," while the other is "grounded in an individual entitlements model of compensating for harm on a case-by-case basis."[53]

The extreme difference between compensation and litigation reflects a difference in social models of what constitutes adequate compensation and how this compensation will be decided.[54] But it might also be used to examine the different universes of production and consumption. While production has injury embedded in it, consumption is generally not theorized in these terms. Injury is generally figured as being incidental to, or accidental to, consumption, and the history of injury law has been led by progressive liberals who have laudably—and often under great pressure not to do so—wanted to maintain a semblance of consumer autonomy in the face of an increasingly complex world of objects in which consumer choices were understood as becoming increasingly technical, difficult, and shrouded by puffery. Compensation for harm, rather than the needs-based benefits of workers' compensation, has meant that awards can include compensation for costs already paid by medical insurance (collateral goods); compensation for pain, suffering, and other non-fiduciary losses; and, most potentially lucrative for a plaintiff, punitive damages. Since the legal job of punitive damages is to punish, and since there is broad latitude

given to juries and judges to set them, these damage awards can run into the millions of dollars where very deep pockets are involved. It is worth noting as more than a caveat that by far the majority of the highly publicized and ridiculed punitive damage awards are in fact reduced by the judge and then further reduced through the appeals process.[55]

Astonishingly, though tort is recognized as a major site for public policy on public health and industrial production, the problem of injury continually overwhelms and overflows the case-by-case approach of the law. Thus, though so many dimensions of human activity collapse into this venue, little rigorous critical thinking exists among tort theoreticians about the cultural ramifications of the case law approach and its methods. For example, tort historian Edward White's comment that tort law's "integrity, and its amorphousness as well, can be linked to the place of injury in American life"[56] may seem unduly tautological. What *is* the place of injury in American life? Certainly more than a link to the place of injury, tort law structures what counts as injury in American life.

Though the details can become quickly overwhelming, the generic features of the law are straightforward. Torts covers civil injury claims as broad as libel and workers' compensation; here I focus on product liability, or the law of defective products. These cases are brought in civil courts by plaintiffs who claim that ordinary products injured them in the course of ordinary use. Plaintiffs' lawyers will not charge an initial fee but will take roughly 30 percent of any settlement or jury award. Thus for plaintiffs' lawyers the hint of a gamble requires a negotiation between bread-and-butter and risky but potentially high-paying cases. Manufacturers will have in-house lawyers or will hire attorneys on a fee basis. Furthermore, claims of loss are tightly circumscribed: a person may sue about her own injury or a spouse's death, but a bid for recovery can often not be made by a gay partner and never by the sandwich maker who loses a customer because of the customer's injury. This latter point is not trivial, for it taps into law's history of distributing and legitimating personal relationships, and thus how suffering can be made to legitimately translate and transfer.[57]

Theories of product liability law abound, and the minutiae threaten to swallow the unsuspecting scholar. The most promising way to read these theories, though, is through the different assumptions that each carries about requirements for responsibility in design and use of products and as attempts at disciplining objects and behaviors through competing notions of responsibility and choice and, more globally, over the human costs of capitalism. Through these assumptions emerge conceptions about what will constitute negligence on the part

of either party, how proximate cause will be determined, and what responsibilities inhere to the project of manufacturing. For example, strict liability theories seek to distribute the costs of injury to those most able to pay, as well as to deter the marketing of unsafe products. Therein, the equation implies a distributive claim that responsibility for an injury that may be statistically inevitable (an overstepped ladder) should be shared among those who benefit from a product and negligence in design need not be demonstrated by the injured party. The more recent formulation of "reasonable alternative design" (RAD), on the other hand, switches the responsibility back to the plaintiff to prove that a product could have been made more safely within reasonably similar conditions such as cost. The claim there is that individuals need to more carefully consider their behaviors in industrial culture, and if they do so, individual injuries will be avoidable. Strict liability is plaintiff friendly, while RAD favors the defendant's interests.

The history of product liability law taught in American law schools treks through a fascinating series of cases that offer a genealogy of the core elements of tort: negligence, proximate cause, defect, contracts, and damages. Key cases are relied on to teach the main theories of the law and how they were articulated by judges and taken up by lawyers. Thus, law is taught through precedent in a way analogous to the practice of law itself. It pays particular heed to certain key cases and their mind-boggling and mundane anecdotal details. For example, *MacPherson v. Buick* would be excerpted to demonstrate the extension of a notion of the privity of contract such that an occupant of a defective vehicle can sue a manufacturer. In his recognition that the "reliance [of a consumer] on the skill of the manufacturer was proper and almost inevitable,"[58] Judge Cardozo acknowledged the complex economic relations of industrial production that resulted in the lack of consumer expertise on all the products he or she would buy and use. This noting of the disempowerment of consumers—as products became more specialized and complex and consumers were more dependent on advertising than research—became the seeds of twentieth-century product liability law.

MacPherson would be followed in 1928 by *Palsgraf*, perhaps the most famous of the early tort cases. In this case, a passenger dropped an unmarked package filled with dynamite as he was being assisted by a railway worker. The dynamite exploded, causing a scale to fall on Mrs. Palsgraf's head as she waited at the other end of the station. Reversing the lower court's "but for" (but for the event, Palsgraf would not have been injured) decision, Judge Cardozo ruled that the series of events that resulted in a scale falling on Mrs. Palsgraf's head was simply too distant to allow recovery. For that, *Palsgraf* has taken its place along a

series of other cases in tort textbooks as a way of explaining the competing notions of proximate cause and duty, and for his "activist" stance, Cardozo took his place among famous judges who contoured the laws.

A case book such as Franklin and Rabin's *Tort Law and Alternatives* would then move to introduce the concept of strict liability, which made its appearance as a theory in 1944 with *Escola v. Coca-Cola Bottling Co. of Fresno*.[59] In justifying an award to a woman who was injured when a Coca-Cola bottle unexpectedly exploded in her face, California Supreme Court Justice Traynor wrote in his concurrence, "I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover . . . it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings."[60] Here he appealed to the demands of public policy to fix responsibility, even without negligence, "wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[61]

So, in reading hundreds of these cases and their commentaries, the assiduous law student learns the structure of a legal case. The student learns how to name certain kinds of injuries, defects, expectations, implied and stated warranties, and problems with product warnings, and how to argue these within certain legal logics and theories. A year or two later as a practicing lawyer, she will use the same method of reviewing case history to locate legal theories and decisions to cite as precedent in her own briefs, petitions, and complaints. As a young plaintiff's lawyer she will collect evidence, sometimes sifting through hundreds of boxes, having been drowned in files by a defendant hoping that she may miss something. Doing work for a senior attorney, she may, as Dan Bolton did while working on an early silicone breast implant case, discover the smoking gun and go out on her own and make stacks of money. She will then learn to put together compelling stories about corporate misdeeds and human suffering. One set of these stories will fit into the legal parameters of a complaint (under what legal theory should IBM be responsible for a secretary's repetitive strain injury)? Another set will aim to sway jurors who will be confronted with the contradictions of rational languages of cost-benefit, stunningly disfigured people, huge corporate profits, and desperation.

By filing a suit using one of a variety of product liability legal theories, a plaintiff registers a complaint against the way that injuries have been distributed—specifically, that in this case he was injured—and attempts to claim back an ability to fully partake in civil society—namely, as a consumer. In other words, he seeks a financial settlement.

The right being claimed varies depending on the theory of liability used. A plaintiff might claim that he should not have been injured, period. A drill is easy enough to build properly and no one should be injured by a faulty drill. Or, the plaintiff might argue that since his was the one of the 600 inevitable injuries, he should gain compensation on a cost-spreading theory. The court may argue that 600 burn victims was a fair calculation, and in order to properly spread the costs of these inevitable injuries, compensation would be due. Or the court might argue that 600 injuries was a fair calculation, and given factors such as the cost of the product, compensation will not be due. Or, as in the famous *Grimshaw* case in which Richard Grimshaw was horribly burned in a Ford Pinto, the court may decide that the company's initial calculation of burn deaths was immoral and that with simple design changes there would have been far fewer burn deaths. But regardless of the calculus of morality and efficiency used by the state, the plaintiff claims a vernacular right not to have been injured by an everyday product.

Another message is buried alongside this genealogy of law: what counts as reasonable objects and reasonable behaviors evolves jerkily though the combined logic of many judges' ideas and ideologies—not all of which make internal (let alone collective), logical (let alone moral) sense. In his classic rebuke to the notion that judges simply apply laws, Edward Levi points out that terms such as "negligence" do not emerge in law as fully fledged universal touchstones but rather "must be given meaning by the examples to be included under it."[62] In *An Introduction to Legal Reasoning*, he outlines the example of "inherently dangerous" objects to examine how cases are grouped as similar in order to apply precedent.[63] The category "inherently dangerous" included at one historical moment a loaded gun and an exploding lamp, but not a defective coach, while at another it contained poison, gun powder, and a spring gun, but not an " 'iron wheel . . . although one part may be thicker than another.' "[64] At stake in these categories were assumptions about what a consumer could take for granted: that a loaded gun would not fire willy-nilly, but not that an iron wheel would consistently roll at speed under the weight of a carriage.[65]

These deployments of object expectations in turn categorize human behaviors and the actions of a "reasonable person" or "average man." For example, in the 1921 case *Hynes v. New York Central Railroad Company*, a boy who had been swimming in public waters climbed onto a plank used for diving by neighborhood children and owned by a railroad company. While on the plank, "high tension wires from one of the railroad's poles fell, striking him and flinging him into the river to his death."[66] Was he a trespasser or a bather in public waters? The

lower court denied recovery on the basis that he was a trespasser. On appeal, Judge Cardozo "simply redefined the boy's status from that of a trespasser to that of a bather in public waters, thus enabling him to apply the protections accorded to such persons."[67]

Among these categories, each of which disciplines subjects and objects in relation to one another, terms such as "defect," "knowledge," and "inherent" take on different valances in differing judges' approaches. In studying the use and emergence of legal trends through cases, it becomes apparent retrospectively that, as Susan Stewart writes in a different context, "the law hovers."[68] Certainly the law hovers among ideological, moral, and economic predilections. But the fact that cases *could* go either way does not mean that they will arbitrarily do so. Trends in compensatory awards emerge that tend to follow the race, class, and gender interests of judges. For example, early cases of rape were understood to be damage done to a man's property. Similarly, convincing evidence shows that compensation follows lines of difference already structured through race, gender, and class, tending to undercompensate members of suspect classes for comparable injuries.[69] This difference in awards is underwritten by a logic that assumes the "value" of a body is already reflected by its compensation on the labor market—a person making more money will be awarded more money for categories such as lost wages. But it also has to do with a politics of sympathy, how judges and juries empathize with plaintiffs and value their bodies, lives, and work. It can also be about shared knowledge. Consider a 1900 ruling that was made before workers' compensation had emerged from the law of torts. Judge Holmes did not allow a plaintiff to recover when a hatchet fell on him from a defective rack, even though the plaintiff had informed the employer and asked him to change the situation. Holmes's assumption was that the plaintiff had known about—and condoned by virtue of continuing the job—the dangerous circumstance.[70] Not until a new moral framework for understanding workers' injuries—one that resulted from decades of hard and dangerous work of labor activism—did this situation change.

After reading several hundred cases one might conclude with legal scholar Duncan Kennedy that "some part of judicial law making in adjudication is best described as ideological choice carried on in a discourse with a strong convention denying choice, and carried on by actors many of whom are in bad faith."[71] Ideology parading as rational language rings through the product liability tome of opinions. The way that objects and bodies are rhetorically stabilized as meaningful entities on a case-by-case basis embodies assumptions about ideology, empathy, and proper behaviors in different contexts and encodes them in terms of objects. Assumptions about reasonable persons are encoded

into technological relations in terms such as "jaywalker" or "negligent manufacturer" in ways that allow a disciplining of these subjects. But a case law approach to disentangling fault and blame in injury accidents has a peculiarity that is not quite covered by Kennedy's charge of bad faith. Consider that while each car accident will be retroactively considered avoidable by law (if the driver had paid more attention to the slippery road, if a manufacturer had properly installed the axle), the number of annual accidents can be accurately forecast. Francois Ewald, writing on insurance, considers this theoretical quandary of accidental happenings and statistical inevitability: "When put in the context of a population, the accident which taken on its own seems both random and avoidable . . . can be treated as predictable and calculable."[72] Product liability law, even in its theorizations underwritten by insurance (such as strict liability), is not a structural response to injury. In case law each accident is necessarily understood as a precise set of events that can be traced back to a series of actions and that could, therefore, have turned out differently.[73] Nevertheless, collectively, through thousands of cases by more and less important courts and judges, trends emerge as to what "counts" as injury in law.[74]

Product liability's technocratic understanding of injury mirrors engineering approaches to this process of calculating cost-benefits: the width of Golden Gate Bridge weighs directly against a prediction of how many injuries will occur; a narrower bridge will correlate with more traffic fatalities. The law's job is to patrol these equations and decide that either the engineers did a fine job of calculating and the injury costs will be borne by the injured, or that injury was inevitable but too expensive to foreclose and the cost will by borne by all users of the bridge through the distributive capacity of the engineering company (or that the accident was more directly caused by drunk driving than by the width of the bridge).[75] Any given life is infinitely valuable, but as a future abstraction, the width of the bridge is understood as the necessary economic trade-off.[76]

Integral to this trade-off between lives and progress is a determination of what will count as a product failure, and what will be relegated to the category of side effect. In the court, these decisions are at once central (through the capacity to materialize injury by turning it into a line item in the calculation of a project cost) and pushed to the side, since it is up to the defendant to decide when those costs get too high and to wait to see what happens at trial. Thus, in legal discussions on injury law, a key slippage occurs between what among organizational theorists is called "high reliability" and "normal accident" theories. High reliability theorists, such as Aaron Wildofsky, claim that even in large organizations, if management is good enough (an attainable

goal), accidents will not happen. An accident is a result of predictable and reparable failure. Normal accident proponents, such as Charles Perrow and Scott Sagan, claim that accidents are an inevitable contingency of any management system.[77] This debate has been most vociferously broached by political scientists engaged in international security issues; however, it also illuminates the politics of injury in capitalism.

This language of transaction central to product liability roughly poses a superimposition of high reliability and normal accident theory, though individual theorists integrate them differently. Commentators such as Marshall Shapo would argue that the goals of the law are to deter negligence in design through a market theory of injury that makes injurious design too expensive for manufacturers. According to this view, laws also acknowledge that injury will be inexorable (*someone* will overstep the ladder, engineering that would reduce accidental death is just too expensive) and thus put forward the cost-sharing proposition: since injuries are inevitable, those most able to pay for them should do so. This latter supposition basically presents an insurance theory. Guido Calabresi, in his influential 1970 book *The Cost of Accidents*, which was written at the height of the pro-plaintiff locutions of strict liability, proposed that the principal goal of accident law should be to fairly reduce the costs of accidents—the latter both in terms of total accident costs and the costs of prevention.[78]

This approach has come under attack by outspoken critics such as Peter Huber, who rues the overzealous use of law and its difficulty adjudicating what will count as scientific evidence. (To be fair, Huber seems to present a willful caricature of Calabresi's arguments.) He writes, in one of his widely read critiques of what he calls "junk science," "Mainstream science often offers little more than speculation about the true causes of cerebral palsy and other birth defects. . . . What then? Whatever we do (many an overeager Calabresian quickly concludes), we must do *something*. Perhaps the scientist who claims ignorance is just too cautious. The rules must therefore be changed, so that the oxymoronic scientist—the one too cautious to sound a specific alarm quite yet—will not stand in the way of the oxymoronic lawyer—the one whose extreme caution impels him to rush in at once."[79] Huber stops short of calling for increased regulation or study of chemicals before they are widely used, limiting his invective to the misuse of inexact science and law rather than to an understanding of risk or the culture of blame.[80]

It is not my aim here to play very differently oriented commentators against each other, or to examine in any detail the strengths and weaknesses of the diverse pro and con positions on the law. The key point is that tort law, by its very structure, assigns injuries to the status of accidental entailment, inevitable by-product, or statistical cost of the benign activity of capitalist market exchange, production, and consumption.[81]

In its case-by-case approach to injury, tort law attempts to reconstitute adequate market relations where someone has been injured. This assumption underpins product liability theories and tests across the spectrum, from cost-benefit and risk-utility to implied warranty and consumer expectations. These theories accept that the proper role of the law is to compensate individuals for injuries that weighs avoidability in the terms of singular events against the integral and unavoidable costs of the free market. So while product liability (at least in the theories that tend along insurance lines) admirably harbors the dual aim of cost spreading and deterrence, it relies on the key assumption that behaviors of people and objects can (and will) be determined, predicted, and, moreover, retrospectively interpreted. Equally, its mode of compensation assumes that monetary awards can be weighed against sentience, and that from those weights, estimations, and forecasts, product manufacturing decisions can be made. Thus it predicates not only that body parts can be traded, albeit inexactly, in the marketplace (that injuries can be compensated for), but that commodities evenly circulate among sovereign subjects who can—and according to commentators such as Abel and Nader, have a moral imperative to do so—insist on their rights not to be (or not to have been) injured.

Many legal theorists express exasperation over the way that tort law negotiates injuries. The standard set of critiques is as follows. Litigation is resource- and time-intensive; a typical suit takes about five years to resolve. For that reason, the vast majority of product liability cases are settled out of court. However, settlements often seal records and thus the supposed deterrent effect of the law is lost; other potential litigants do not have access to important information. Moreover, when cases do go to court and punitive damages are awarded, they have to be vast to fulfill their punitive impulse when set against large or even mid-sized corporations. Thus, awards may often seem at once tiny in their actual punitive effects (if set at, say, one day's net profit for a particular product) and massive when compared to an individual plaintiff's injury. For that reason tort law has been criticized as creating a lottery, or windfall, justice system in which only a few of the hundreds or thousands injured by, say, Bronco II rollovers will recover an award equivalent to the one significantly reduced from the original $290 million awarded to Juan Romo in 2002.[82] Others will settle out of court for much less, will not have the resources to sue, would sooner just forget it, were killed in similar crashes but will not have qualifying dependents, or will meet unsympathetic courts and juries. But even an apparent windfall can be misleading if defendants claim bankruptcy

as they have in many high-profile class action cases, such as the Dalkon Shield case. In addition, the punitive effect of tort (namely as a deterrent) has been edged out by the widespread use of insurance and the limitations on punitive damage awards of some states, as well as the use of cost-benefit to simply factor in the corporate losses that may result from bad design.[83] In Texas, for example, punitive damages cannot account for more than four times the compensatory damage unless actual malice has been found by the jury, and recent rulings by the U.S. Supreme Court have in general instated punitive caps to single-digit multiples of the compensatory awards.[84]

But these valid and longstanding critiques miss the crucial way in which the larger teleology of technical and economic progress at stake assumes that the material body can stand as a sort of gold standard or collateral for an economic exchange system, where in the trial, the body asserts itself in its retroactive claims through law not to have been injured. Thus the trial forces the question of how economic development or progress may proceed in light of its costs for individual citizens. The citizen's body becomes, rhetorically, the placeholder—the limit—for corporate behavior. So on the one hand, in tort, the body is presented as that rhetorical and material entity whose well-being underscores the reason for production and whose injury marks the limits of a system whose profit motive is well understood to clash with public health. This materiality and singularity of the citizen-body contrasts rather markedly with the everywhere and nowhere of the corporation. In the cartoon that initiated this chapter, a bag of French fries stands in for the diverse set of interests that designed, marketed, and sold it. Thus even this cartoon shows how the body and the corporation, or the body and the economy, are simply not equals in the way that the plaintiff v. defendant would have the competition structured. There is no there, there; the corporation works within an economy with its own interests. And so while the corporation is made up of individuals, in itself it is impossible to locate as an agent responsible for injury. Analysis of this problematic will form the kernel of chapter 1. But the further point is that when critics accept this rhetorical positioning of the body from the liberal framework of injury law, as do Nader and Abel, they accept the logic of the law itself and thus adopt the denunciatory framework that accepts a logic of reparable harm. This logic misses the broader role of the injury laws in American culture.

Injury laws' failures are inevitable because unlike corporate marketers, they do not account for the wounding premises of consumption and thus cannot count them within the fold of injury. Thus, I have here shifted the terms by which tort law can be understood. In recognizing that law takes place within and also deeply constitutes injury culture,

injury can be understood in less instrumental terms that can perhaps allow for a more radical understanding of things like health and inequality in the United States. American-style tort systems, no matter where they are adopted, hinge on more than just a set of laws; they operate within a whole moral universe for thinking about rights and wrongs in the context of health, progress, economics, and commodity exchange.[85] As other countries begin to adopt piecemeal the American approach to tort law, it is crucial to expose the moralism and the mindless expansion of legalistic appeals, because these take place within a range of specifically American cultural forms that include its unique privatized health care system, its culture of regulation, its legal assumptions about corporate personhood, and its media practices. American law cannot be imported in isolation.[86]

Structure of the Book

Although I have primarily used tort law to set out the parameters of the discussion on injury, the cases I read here articulate injury through a variety of legal venues. In part, then, what the collection of these injuries and objects illustrates is the problematic way in which legal institutions addressed to the law of personal injury force a division among types of product use and the way the resulting injuries will be understood in the domains of civil rights, workers' compensation, or product liability. These overlaps among activities divided into work and leisure have two major consequences. The first is simply that issues of choice, design, and governmentality vastly exceed such preconceived notions as worker- and consumer- (in thinking about workers' compensation and product liability) or race-based injury (in thinking about civil rights claims), even as particular complainants are forced to appeal to one of these. Second, one of injury law's foundational notions, that of the "inherently dangerous" object, remains nearly a nonsensical concept. Justice Traynor of the California Supreme Court noticed that objects in themselves are not dangerous—they can only be considered dangerous when in use. However, plaintiffs with other complaints have not been so lucky. As the chapters will show, inherent danger carries many slippages and is vastly open to rhetorical manipulation. Is McDonald's food only inherently dangerous when eaten? Is the computer keyboard only inherently dangerous in certain work situations? Are airbags inherently dangerous only for certain sized people?

In chapter 1, I expand on the notion of American injury culture. This introduction and chapter 1 are intended to be read together as complementary parts of my argument. In chapter 2, I analyze how the agricul-

tural tool of the short-handled hoe became the pivot point of the struggle for a new recognition of Mexican American farm workers in the late 1960s and early 1970s. Relying on transcripts of the hearings and interviews with lawyers from both sides, I examine the way that Mexican American bodies had been paired with the short hoe as an efficient system and the tool was seen as a natural fit with perceived traits of the Mexican American body. Farm worker and activist Frank Bardacke relates a joke told by whites involved in agribusiness: "What do you get when you cross an octopus and a Mexican? I don't know, but it sure can cut lettuce."[87] This joke plays on possible technological improvements of the Mexican body—always already better at cutting lettuce than a white body—as an instrument of production. This discursive framework was ultimately interrupted through administrative hearings and the California Supreme Court. In chapter 3 I examine the wave of lawsuits about computer keyboard–induced repetitive strain injury (RSI) in the 1990s, and I examine the assumptions on which these complaints were dismissed. In the 1980s RSI emerged as an epidemic that was structured through the configuration of a particular relationship of women's hands at the typewriter, the erasure of women's work as work, and fantasies that imagined the computer as an instrument in the project of thinking and that thus erased the work of computer input altogether.

In chapter 4 I turn to the problem of cigarettes. Evidence reveals that menthol may increase the dangers of cigarettes—and on this basis an African American group sued tobacco corporations claiming discrimination, through target marketing, based on the Civil Rights Act of 1866. This strategy, as opposed to the more ubiquitous use of product liability law, raises a host of crucial issues having to do with niche marketing, product design and innovation, and generic liability. Moreover, it demands that we seriously question assumptions about inclusion and assimilation in commodity culture.

Thus, inequities presented to and through the law are not simply blind spots—the law is not "racist"—but they present occasions to examine assumptions about subjectivity that sometimes fracture along familiar lines of race or gender, and other times require us to broaden the scope of how commodity objects create new kinds of categories of inequity.[88] After all, consumptive decisions not only affect producer and consumer but also shape inhabited worlds.

As these chapters will show, laws force plaintiffs to locate blame in isolated ways, through moralistic claims, from a state that has profound—and shifting—interests in how equations about economic and public health are recognized. Injury claims that cannot be set in sociopolitical contexts but have to be individualized and attenuated to fit

legal precedent and formality can make them remarkably easy to dismiss on narrow grounds. Furthermore, these cases help to make evident how the material world constitutes difference, and then how these differences tend to be—but are crucially not always—recursively consolidated through court decisions. Production, consumption, and circulation of objects create and sustain inequality in central ways that cannot be understood, let alone compensated through the moral and material logic of repairable harm premised by injury law.

In fact, given the instability of legal claims, lawyers themselves will try to settle cases rather than take them to court. The grounds for this are complicated, in part because of the unpredictability of juries and the huge work burden and expense of the trial. Both plaintiffs and defendants are often interested in maintaining the privacy of matters—related and unrelated—that risk being aired publicly. These are matters of strategy, but the more pertinent point here, and one that each of the chapters that follows will further examine, is that injury claims can also be very difficult to articulate in legal terms. The courtroom is not a Habermasian ideal speech arena in which complaints can be made and carefully debated, but a highly constrained place in which only certain social relations and motivations can be made to count. Furthermore, through the U.S. legal system's reliance on stare decisis, or the cumulation of previous decisions, both parties are dependent on the political biases of judges and their particular interpretations of legislation, the Constitution, and their self-perceived role in meting out justice. This flexibility of law makes it such a broad and fascinating—if potentially disingenuous—field of play. But in its narrowing of the terms of debate, the law can disempower.

Justice and the law are simply two different concepts: judges come to the table with their own ideas and background; plaintiffs and defendants can have vastly unequal resources; legislation and legal opinions change in ways that often favor those who are already empowered against those who suffer various forms of structural disadvantage.[89] Furthermore, the rhetoric employed to discuss law is infused with a putative morality, making it seem like the law's ultimate work is to allocate justice rather than set the terms for what will constitute justice. Particularly for plaintiffs, who may "truly believe they have a good case" and thereby distinguish themselves from others who launch the frivolous cases that are the stuff of the media, insisting on the law as inherently just can be at once self-serving and disempowering. The expanding appeals to the law, then, often fail to address the layering of differences and inequalities that constitute physical injuries. In that sense, the culture of injury law in the United States ties integrally to a larger American injury culture. *Injury,* therefore, analyzes law's struc-

turing of injury claims, premising that how these claims become legible ultimately affects how material health is understood and distributed. Rather than smoothly and simply resolving the problem of injury, legal equations and practices obfuscate understandings of how objects move and are made meaningful within American cultural politics. I argue that these laws, through the way they force us to locate blame, the way they force us to seek legal expertise, the way they individualize claims, the way they are reported through the lens of frivolous cases or brutal corporations, the way they emerge from a broader and uniquely American culture of injury—in short, the way they narrow our modes of perception and apprehension of injury—make us less able to make the connections and trace the networks of our civil and political lives. They narrow moral and political horizons. Thus, rather than reading product liability for its potential to right the wrongs of bad product design, I believe it can more valuably be understood through an analysis of how it creates and sustains social inequality in its retroactive context of judging design.

But if legal equations and practices obfuscate understandings of how objects move and are made meaningful within American cultural politics, they also solidify them in ways that present an opportunity to better understand the problem of how objects carry agency, how claims about that agency are made, and how the ostensibly objective discourses of injury law understand and distribute these claims.

Chapter 1

American Injury Culture

EVEN AMID OUTCRIES of litigation gone mad and tort reform, an ineluctable optimism weaves through the promises of injury law. If only *in this one instance* the Coke bottle had not shattered. Or had the railroad crossing signal not *this one time* malfunctioned just as a train was passing through. If Ford had not lapsed when it negligently designed *just* the Bronco II with a propensity to roll over. In injury law's discourse, misfortune or catastrophe always seems to be precisely incidental to American capitalism, and the role of law is to, where appropriate, salve injuries through the compensatory award.[90] The law asks of the suffering placed before it, was this caused by an "injury"? Injury means not a vernacular wounding but, quite specifically, the violation of a right with physical wounding as a result.[91] Injury laws determine when an individual's right not to be injured has been infracted by incidents caused by poor design, lack of warnings, or corporate malevolence. Within the case law archive, plenty of slippage exists in how theories, statements, and forms of law are applied in various cases. Nevertheless, together, they can be taken as a measure of how human physical bodies are valued in calculating what will count as "fair" commercial practice in a society in which knowledge of everyday designs are simply beyond the ken of the average consumer. The goal of human well-being, no matter how abstract, must have some rhetorical, if not material, purchase in any social economy that wants to pass as democratic, and thus injury law can be understood as one of the foundational discourses on which American capitalism as an adequate, even "good," basic theory for a political economy depends.

Heated debates exist in the field of tort law as to the specificities of product liability law, but its most basic tenet presumes that producers should not profit from commodities that hurt consumers. Therefore, the law exists to determine, in a case-by-case way, how the capitalist system's physical takings should be distributed and, thus, when the costs of what will be called economic progress should remain with the individual (through her own suffering, medical payments, disability) and when they will be redistributed to the manufacturer of a product (through compensation). Understanding how the law distributes responsibility, both in its theories and in practice—and in any given com-

modity-consumer interaction and in the larger scheme of how they are understood—can lead to a better understanding of a key preoccupation of anthropologists: how designed objects carry meaning, and how they constitute social positions that can be both consolidated or altered through their social circulation.

In the United States, law is primarily understood as an objective system of adjudication, and yet, as I argued in the introduction, a more accurate appraisal would understand it as one of the infrastructures that calibrates, in highly specific contexts, acceptable relations between persons and things. In this sense, an analysis of injury laws can shed much light on what medical anthropologists have described as social suffering, or how suffering is differently distributed. The facile dismissals of injury law on both the left and the right threaten to obscure the crucial role of injury law itself as primary among precisely those mechanisms that distribute suffering.

Injury offers a particularly rich juncture to study American cultural narratives for the way it negotiates consumption and health, two of the great themes on which American notions of progress and dominance rest, and yet two goals that sit uneasily together. I want to push the analysis of injury further through several material threads that animate what I call American injury culture. These I have gathered in what follows under three headings: economy, body, and citizenship. As a way of contextualizing these issues, in the first section I present a reading of *Grimshaw v. Ford*, the most famous of the cases resulting from the exploding gas tanks of the Ford Pinto. By thinking about, in the second section, how public health and economic health play out against each other in the United States, and in the third section how American bodies might be understood to harbor culture, I want ultimately to think about the problem of citizenship.

The way in which injury law recognizes human wounding forces acknowledgment of a major cultural paradox: law, as a primary means of calibrating what will count as negligent injury production, forces the plaintiff to bring a complaint that takes the form of harm as an exceptional form. Thus, unlike on the production side of American capitalism, which through workers' compensation harbors the means of balancing what will count as acceptable injury, on the consumption side injury is always already exceptional. The compensation system thus brooks attention from both the ways in which consumption injures as a matter of course and the ways in which injury itself is a productive force. Examining the question of design more closely, as I do in the following chapters, allows for a more careful deconstruction of the baselines of equality set out in law that pose as neutral and universal. It thus allows for first, a more subtle analysis of both the ways in

which product design harbors difference and enables certain people to count differently as subjects—with more or less agency and political prerogative—and second, the way in which injury law recuperates injury into wholeness, and thus acts within the more fundamental political goals of consumerism. Injury law forces the injured subject into the position of *having* an injury that can be traded in the sphere of law, rather than acknowledging subjects as differently enabled by the material world of consumerism.

This argument turns on what I will call the "rhetorical effect" of law and the "inequality effect" of material culture. I will outline what I mean by the former first.

In weighing the responsibilities of producers and consumers, interpreters of legal doctrine and precedent rely on particular notions of normative "whole" bodies: sovereign choosers of similar body types, with similar abilities to rationally use products. (In each of the following chapters we will see, for example, efforts on the part of defense attorneys to show the bodies in question as uniquely susceptible to hurt and thus lay blame on the bodies rather than the products.) Thus, injury laws tend to accept quite unabashedly the tropes of American consumer culture, which also rely on a distinction between reasonable persons and an array of selectable, consumable objects.[92] The separation between human choosers and inert things is a necessary, even foundational, element of both consumer capitalism and injury law.

In the eyes of injury law, the human body comes to the table to claim its injury as a prelegal artifact. In this way, the plaintiff comes not as a subject made through American education, consumer objects, advertising, and other cultural processes, but as a physical embodiment of a "gold standard" for American capitalism. In this rhetorical sense, the integrity of physical bodies stands in for the hard currency that underlies the "real" value of the system, and when these bodies are ruined the system is, in some small way, called to task through the trope of compensation.

But this rhetoric will always already miss the broader structure of American injury culture, for in requiring this move to litigation on the part of the plaintiff, the law maintains the formal integrity of capitalist exchange in the form of exceptionalism (*if only this one time . . .*). In this sense, the tropes of tort law itself, which adjudicate between rational users and defective products (or product warnings) and irrational users and reasonable designs, and furthermore between punitive damage and individuated financial windfall, radically depend on at least two central categories presented by American consumer culture and, particularly, I will argue, the strong role of corporate interests in American culture. First, both the consumptive and legal systems depend on

a belief (at least in rhetoric) in the human ability to master the material world through proper design and proper use, one which I will suggest over the course of the book is highly problematic for many reasons but primarily for the way it forces a distinction between persons and things. Second, compensation becomes the device for reinstalling the conditions for the prior economic agency of both plaintiff and defendant; compensatory awards might be read as the ultimate abstraction of money and the ultimate commodification of the body. Furthermore, the trope of compensation undergoes constant reappraisal. What kinds of—and whose—wounds should be compensated? How many millions of dollars does it take to "punish" a multinational corporation? Or according to a recent Supreme Court decision that severely restricts punitive damage awards, why should punitive damages be limited to single-digit multiples of the compensatory award? Why should a company be held responsible for selling hamburgers when the problems of obesity are so much more complicated than the simple existence of high-fat foods? The constant interrogation of and battle over the purpose and configuration of compensation evidences the rhetorical and material slippage between money and value, hurt and injury, pain and acknowledgment, identity and inequity, behavior and rationality. But moreover, it becomes a key channel for voicing debates about the value of the physical body in the economy, what will count in the calculation of the economic good, and in whose interests these will take place.

Thus, injury law consolidates a rhetoric of, on the one hand, unrelenting agency as the underpinning promise of American consumer capitalism and, on the other, that injury is incidental to American systems of production and consumption—or at the very least (and only among the most liberal strict liability theorists) about equal opportunity injuring. Within this logic, the more injury cases are argued (win or lose), the more strength is gained by interests that are also struggling to maintain distinctions between persons and things that rank the agency of consumers over the co-constitution of citizens and consumers. It is this reflection and consolidation of consumer culture that gathers under the rhetorical effect of law.

I juxtapose this rhetorical effect of the law with another facet of the injury problem, which I call the "inequality effect" of material culture. Bodies and things can never be distinct in the ways coded by the legal infrastructure—they are always entangled and co-constituted. Indeed, subjects come into being only through series of relations with the material world. Further, fields of production and consumption carry within the fold of their practices both wounding *and* enabling. This play between wounding and enabling in its multiple levels produces relations of inequality in at least two ways. First, hierarchy is a central feature

of consumptive inducement. Part of the inducement is that it tends to work: the expensive sport utility vehicle does intimidate and endanger other drivers—as advertised. The red lipstick does encourage a certain mode of attention—as advertised.

Second, the distribution of the wounding effects of capitalism is not incidental but is a central feature of an economy in which injury, too, produces economic growth. I am not arguing that enabling and injuring is a zero-sum game, as Ivan Illich does in his classic study of human and automotive energy use, *Energy and Equity*.[93] I am suggesting that this dynamic of enabling and wounding centrally structures, specifically through objects, the dynamic between inequality and injury.[94] Celeste Langan has put a similar point this way: "Capital-intensive technologies of amplification . . . have so altered social being that even the unimpaired (but also assisted) body has the character of a disabled subject."[95]

Thus, in the juncture between the rhetorical effect of law in which the body stands in as the collateral for something called economic progress, and the inequality affect of material culture, in which a spectrum with difference on one end and injury on the other is produced and amplified through the material world, design and law live in an uneasily recursive relationship. Where design that injures people is not noticed, those people come to be defined by their injuries: the farm worker and his gait, the secretary and her hormones, the smoker and his cotanine levels.

A return to the automobile airbag illustrates this point. Women tend to be more at risk of being injured and killed by automobile airbags designed for "average sized males" because they tend to be shorter.[96] This funneling of risk toward shorter people coincides with the way in which people identified as female have been virtually defined, constituted, and subordinated *as women* through relentless cultural and material iterations of the car and its role over a century of American culture. Thus an airbag lawsuit will hinge on two injuries: the social injury of the increased physical risk of subordination carried through the design of airbags (not to mention the loaded identity of a woman driver), and the physical injury of the actual injury or death. Only when this double injury occurs can she, or her estate, sue for this airbag defect. She may be lucky enough to win, and she may even beat the statistical odds of compensation awards that consistently value men's bodies more highly than women's.[97] But the piecemeal basis of the law does not address the fact that auto designers are still overwhelmingly male, that automobile ergonomics are overwhelmingly coded to average male bodies, and thus, statistically, in the same accident a female will be more injured than a male, or that the car has been used system-

atically in the normalization of a version of heterosexuality through which women tend to be subordinated.[98] This unevenly distributed wounding does not reduce to the categorical terms of race, class, and gender but moves among and within various social distinctions as descriptive, constitutive, and characteristic. It is like a fog over American lives: inner-city horizons full of fast food restaurants, pedestrians required to walk unprotected in front of high radiator grills at speed, and cigarettes and candy marketed specifically to children.

When that disability or identity in the form of subordination (short people, African Americans, pedestrians, and so on) is attached to individual bodies rather than to the physical and social environment that structures it, the coding of bodies by the environment becomes obscured in ways that are only further hidden by institutional discourses such as injury law. Thus I want to think more fully in this chapter about what it might mean in a larger sense to claim the right not to have been injured that is held out as the promise of law. I want to consider the limits to those claims and, further, how they structure the ways that injury is understood. If we accept the injury-producing component as integral to American culture, how do we think about citizenship?

Seen through the inequality effect, injury presents a radical opportunity to better understand how the material world in general—and commodity culture specifically—constitutes identities and distributes injuries. Examining tort law in this context, then, allows us to see not only its own limits but also the ways it has framed discussions of how injury carries meaning. The use of tort as the primary means of understanding injury has had two crucial political consequences. First, it shifts attention away from politics into increasingly individualized stances. This happens even in its own attempts to be critical or to take on activist cases, such as gun litigation. Second, it affirms the distinction between persons and things, thus making a critique of the centrality of liberalism and consumerism to citizenship ever more difficult.

Contrary to the 60 percent of Americans who apparently believe that accidents could be avoided altogether,[99] I argue that accidents and physical injury are social facts. My contention is that legal languages for understanding an epistemology of injury will never capture—and thus never be able to adequately compensate for—the ways that injury circulates on so many parallel levels of the present discursive constructions of consumer capitalism. To illustrate this, I present the argument in three sections. First, I examine the way in which the law is called on to directly and unabashedly adjudicate the interests of individuals and public health against the broader interests of the economy. Second, I examine how physical citizen bodies become repositories of this ambivalent valuation of health as a social goal. Finally, I turn to think

more critically about links among consumption, citizenship, and inequality in an economy in which health is at once a foundational rhetoric and at odds with the institutions ostensibly in charge of maintaining that health.

Grimshaw

The notorious *Grimshaw* case well illustrates the problems of injury culture and injury law that I analyze in this book. The key insight that the case and the subsequent legal debates about it demonstrates is the way in which the logic of the case and the terms of the debates were based on the very logic posed by Ford as a way to understand the injuries wrought by the Pinto. This is notable, since the public outrage in the 1970s was precisely about the corporate logic that led Ford to calculate the value of the human lives that would be lost because of the design and to Ford's subsequent decision not to make inexpensive improvements to the design of the gas tank. While Richard Grimshaw won the case, Ford won—and continues to win the battle of defining the composition of the terms of defective design, risk, and consumption.

In May 1972, Lily Grey, age fifty-two, was driving her six-month-old Ford Pinto with her thirteen-year-old neighbor, Richard Grimshaw. The car stalled in the middle lane of Interstate 15 in San Bernardino, California, due to a carburetor malfunction. When it was rear-ended by another car that had slowed to between 28 and 37 miles per hour,[100] the Pinto's fuel tank was pushed forward into the passenger compartment and was punctured by bolts on the way. The Pinto burst into flames. Grey died two days later in the hospital, and Grimshaw received multiple burns that left him horribly and permanently scarred even after seventy rounds of surgery. A jury attributed the injuries to the poor design and placement of the gas tank, and awarded the Grey estate $559,680 for wrongful death and Richard Grimshaw $2,516,000 in compensatory and $125 million in punitive damages. The latter sum was reduced by the court to $3.5 million as a condition for denial of a new trial. These awards were affirmed on appeal and the Supreme Court denied a hearing.[101]

Richard Grimshaw gained a vast eminence compared to the other 500–900 people killed in Pinto fires or half million people killed in car accidents in the United States during the eleven years between his crash and the ultimate appeal decision.[102] The key issue for the public, as for the jury, was the fact that Ford knew—before the Pinto went into production—about its tendency to burst into blames in low-speed rear-end collisions (as low as 25 miles per hour) as well as about a variety

of simple solutions that would have cost between $2 and $11 per car to implement. A document introduced in the trial gained some publicity in a popular *Mother Jones* exposé. The document illustrated that preproduction, Ford had calculated the costs of future burn deaths and injuries. "According to the document, the added safety provided by the device would have resulted in the avoidance of 180 deaths and another 180 serious burn injuries. Setting $200,000 as the value of life and $67,000 as the value of injury avoidance, the document calculated the total safety benefit at $49.5 million, much less than its $137 million cost."[103] The design change was deferred—explicitly as a cost-saving measure.[104]

The late tort scholar Gary Schwartz believed that the near mythic status of the Ford Pinto case rests on two key exaggerations or misconceptions that were parleyed by the press. His thinking outlines what has now become the rational perspective on the case and reflects widely held assumptions about the role of tort law more generally. The argument runs as follows. First, he claims that the design deficiency of the fuel tank was massively overstated. He argues that "when occupant fatalities from all highway causes are considered, the Pinto performed respectably,"[105] although he does agree that cheap design changes would have made the car much safer. Thus, he says that since *all* cars had major design failures that could have been rectified, why pick on the Pinto? The second public overstatement of the case resided in Ford's calculation of the worth of human life. The significance of Ford's cost-benefit report was overrated, he contends. Schwartz considers Ford's figure "within the range of expected and acceptable advocacy."[106] Each of these hesitations is worth considering here, not only with regard to the Pinto but in light of the auto industry and safety more generally, for they are at the core of a crucial safety—engineering—business triangulation.

Grimshaw was tried as a consumer expectations case; that is, the jury was instructed that a product is defective in design if it has failed to perform as safely as an ordinary consumer would expect when used as intended. During the trial, another formulation of product liability law, the risk-benefit test, was announced by the Supreme Court. Schwartz comes to his analysis of the Pinto case "convinced that risk-benefit analysis is not only proper, but just about essential."[107] Thus, he retroactively inspects *Grimshaw*, giving full consideration to a risk-benefit test, nevertheless realizing that public opinion tends to view the calculations inherent to risk-benefit as distressing—especially in the face of badly injured victims facing a jury.

Schwartz first considers the specific problems of demanding product warnings for complex mechanical commodities such as automobiles,

when consumers would likely be faced with lists of warnings and would not have the specialized knowledge required to make use of them. Taking the Pinto figures seriously in considering a possible risk-benefit analysis of the case, he asks, "[W]hat is the actual significance of, say, a $10 safety figure?" As the beliefs that surround the Pinto case would have it, "all consumers would or should be willing to spend $10 each so that a few deaths might be avoided." But he goes on to show that while this may make sense if many lives are saved, the position becomes analytically weaker when only five lives are saved. In that case, each life would be worth $20 million, and "unless consumers are extremely risk averse, one would expect them to be unhappy with that expenditure."[108] Thus, at a certain point one is forced to consider the "magnitude of the safety gain" and measure it against the costs that will mount as more modifications are considered.

The question, as Schwartz poses it, of how much a life is worth may deserve consideration in its own right. However, it becomes much more useful when considered in the wider context of contemporary automobile design, the safety movement, and government regulation—and this is precisely where Schwartz's analysis becomes problematic. Although public outcry focused on the calculation tables, the controversy of the case was indicative of a broad-reaching frustration about the facility with which automobile companies could consistently make overwhelming profits by making such decisions. For example, Schwartz takes NHTSA as the "public's representative." But regulatory agencies are highly political bodies.[109] In fact, by 1976 NHTSA was virtually hamstrung by the litigation of manufacturers who contested every one of its regulatory attempts. Ford had particularly targeted the fuel integrity standard—one of several standards NHTSA was struggling to mandate at the time—and Ford's monumental lobbying campaign against that standard had already delayed it for six years. NHTSA was so bogged down that finally the standard was mandated by Congress in response to the public outrage over the Pinto.[110] Schwartz furthermore assumes an implicit negotiation between auto consumers and Ford through an implicit risk-benefit decision that manifests in consumer habits. In fact, while Ford could accept an extra $5 in profits, a consumer did not have the opportunity to make the calculations of $5/hundred lives or $10/two lives. To make this argument, then, falsely assumes both that automobile manufacturers have the ability to calculate how consumers will value safety and that other costs such as profit, salaries, and design work can be factored out, calculated, and somehow limited or controlled. These assumptions confuse economic decisions based on stock valuation and social decisions based on social well-being.

The existence of an equation such as risk-utility requires that both risk and utility can be isolated, calculated, and then weighed against one another.[111] Two major problems exist with this assumption, however. First, only certain costs are put in social terms and spread (as risks) while others, such as styling costs, are determined solely on the basis of profit. The risk-benefit "test" has no means of understanding the ways in which costs of risks and profits are distributed and borne.

Second, this is a legal rather than an engineering framing of the question. Put in engineering terms, safety features of a machine are not "added on": in good engineering they are an integral part of the design itself.[112] That cheap changes could have been made to a finalized design to avoid a certain number of traffic deaths was central to *Grimshaw.* The legal debate over the design focused on the addition of piecemeal improvements such as bladders, covered bolt heads, or shifting the tank. But the issues were all of a piece: the poverty of the bumper, which was less substantial than the bumper of any American car produced then or later; the lack of rear reinforcement bars; and the exposed flange and row of exposed bolt heads that were sufficient to puncture the gas tank all colluded with other highway geometries to make a deadly low-speed crash. The formulation of a risk- or cost-benefit equation assumes that safety is something "added" to an auto design retroactively. This is a deeply ingrained but problematic assumption about products more generally.

Therefore, to put the question in terms of a trade-off between safety and cost—or in terms of the additional cost of safety—is to take it from Ford in the way that the company chooses to handle design and engineering questions. Why do some "extra" expenditures count as going to the consumer while others are just part of remodeling the car for profit? Why could it not be accepted as definitive content that a car is something that can be hit at 30 or 50 or 70 miles per hour and will not burst into flames? The court could have more specifically acknowledged NHTSA's inability to set standards and stated that fulfilling NHTSA's standards were not necessarily to be taken as the benchmark for "safe enough" design in a product liability suit. While it essentially acknowledged this by using a consumer expectations test, it might have provided some precedent to foreclose the regulatory intent defense.

But the further problem of the risk-benefit logic is that it suggests a rationalization and a linearity of technology development and trade-offs that simply do not exist. For most of the twentieth century, auto manufacturers have made it clear not only that safety does not fall with their primary goals but that their reasoning behind adding various safety devices is emphatically not one of a simple cost-profit settlement. Recall that in the 1950s, seatbelts were the best-selling optional

device in automotive history. Nevertheless, they were not offered for long, and, furthermore, when they were removed, the industry launched one of the most successful misinformation campaigns in U.S. history: safety doesn't sell.[113] Schwartz ultimately misses not only the public investment in this struggle, one that is pivotal to understanding the Ford Pinto case, but also the critical way in which the various legal theories depend on different definitions of and tolerances for injury production. The real myth of the Pinto is that Americans "choose" how safe their automobiles are and that they do so in a context unsullied by car culture itself.

While both the court's and Schwartz's views of *Grimshaw* present radically different ways of understanding how the costs of the crash should be distributed, both still balance terms under which human bodies will carry value; how the body itself will maintain its place as the collateral, the gold standard, of what counts as fair market exchange; and how injury law should set and reset the terms for injury as an economic externality. In what follows, I examine the stakes of this rhetoric of injury law more closely.

Economy

One of the key understandings of product liability law is that a paradox exists between economic growth and human health, and therefore certain checks are required for the kinds of objects that can be put in the marketplace. The Supreme Court opinion denying the FDA's mandate to regulate the tobacco industry offers one recent example that demonstrates how clearly this trade-off has been articulated.[114] The majority opinion in *FDA v. Brown and Williamson* understood cigarette regulation as one of major "economic and political magnitude" and analyzed it as such, even arguing in essence that cigarettes are *too* dangerous to be regulated by the FDA.[115] The majority stated that since cigarette companies never claimed that they were selling a drug, the FDA should not be able to regulate the industry. Furthermore, both willfully ignoring the history of the political finagling of the cigarette industry and dubiously solidifying the "intent" of the state, the court held that the government had explicitly organized a distinct regulatory scheme focusing on labeling and advertising while informing consumers of the dangers of cigarettes, and thus it was never the congressional intent for the FDA to regulate.[116] The dissent, however, used public health, rather than economic health, as its organizing principle. The dissent therefore claimed that cigarettes fall under the FDA's ambit since the manufacturers' claims for a product are not the only—or even

defining—characteristic of what makes it a drug. The dissenting opinion notes that "sometimes the very nature of the material makes it a drug," and even more radically, sometimes the "circumstances surrounding the distribution of an article" will affect how it is understood.[117] As we see here, whether economic or public health is the central goal has vast ramifications for how objects and behaviors are defined by judges: is the cigarette a drug or an ordinary product?[118]

I want to argue that a better understanding of this paradox between economic and public health is central to understanding how injury is managed and contained in American culture. In *Rule of Experts*, Timothy Mitchell paraphrases a key post-structural insight in his argument that the "principle of abstraction on which the order of law depends can be generated only as the difference between order and violence, the ideal and the actual, universal and the exceptional. But the violent, the actual, and the exceptional—all of which the law denounces and excludes, ruptures itself from and supercedes—are never gone. They make possible the rupture, the denunciation, and the order. They are the condition of its possibility."[119] In a similar vein, I want to argue that in American injury culture, understanding the economic-public health paradox is central to understanding how injury laws organize, frame, and ultimately lead us toward the "but for" assumptions with which I opened this chapter when ultimately, the kinds of calculations made by corporations about design and death rates, as we see in *Grimshaw*, are considered normal and acceptable behaviors. Regardless of one's position on the morality of such calculations, the fact that they exist articulates that moneymaking and human externalities in the United States are at odds and that the notion that progress improves the lives of all citizens will need some serious rhetorical shoring up.[120] Injury is designed in at the beginning and designed out at the end of the economic process of production.

The health care industry of the United States provides a ground-level view of the biopolitical paradox I raise here. The United States has a unique system of health care provision that fully enlivens the contradictions among public health, economic health, and health provision as a market good. How a nation understands basic medical care bears heavily on its notions of citizenship.

In the United States in 1998, private health insurance premiums ranged from $3,000 to $14,000 per year for a family of four,[121] and in 2002 health expenditures reached an average of $5,440 per insured person in addition to Medicare paycheck deductions.[122] Despite this, the United States has fewer physicians, hospital beds, and nurses per 1,000 people than the OECD average.[123] In 2002, 15.3 percent, or "43.6 million people were without health insurance coverage during the entire year."[124] These statistics can be compared easily to those of Canada, which has an equivalent—arguably higher—level of service, although in Canada care is offered to all legal residents with an average per capita spending of $2,791.[125] Slightly less than half of this is covered through insurance premiums, which range by province.[126]

The American health care system is uniquely costly compared to that of other advanced nations for three key reasons: the high cost of administration; physician and other personnel salaries; and "hardware," or pharmaceutical, service and hospital care costs. Studies have consistently shown that a for-profit system, such as that in the United States, will inevitably lead to higher administrative costs than government-run systems, and this is certainly borne out by comparison.[127] Health administration in the United States, on a per capita basis, is three times that of Canada.[128] On average, doctors in Canada and Germany earn significantly less than half as much as their U.S. counterparts; physicians in Austria, France, and Britain less than one-third as much; and physicians in Finland, Norway, and Sweden just one-fourth as much In addition, "the price of many U.S.-manufactured drugs under patent is 30% to 50% lower in Canada and other countries."[129]

The sheer economic power of this industry has created vast income disparity where the remunerations accorded to businesses related to health care create obvious stakes in maintaining an expensive health care industry. For one thing, 11.8 million Americans, or 9.1 percent of all workers, hold jobs in the field of health care.[130] The American Medical Association, which by the mid-century had become the "most powerful interest group in America," has lobbied consistently against government-run medical insurance. It branded insurance "un-American" in the 1920s; had a study of health care removed from the Social Security Bill in 1935; and launched its campaign against Truman's attempt to enact an insurance program by using vast financial resources, hardball tactics, and social prestige.[131]

These figures do not include the quite extraordinary, if invisible, personal and company time spent comparing, selecting, and administering care plans. They do not include the immeasurable psychic costs of job insecurity or having to stay with a job for medical insurance—particularly for people who have been seriously ill. Furthermore, they elide the extremity of the individuation of these high costs: the primary cause of personal bankruptcy in the United States is unpaid medical bills.[132] Studies report that between 300,000 and 500,000 families in 1999 filed for bankruptcy for reasons of illness or injury.[133]

Injury is good for the economy. The Bureau of Economic Analysis estimates that health services add $589.8 billion to the total GDP.[134] Car crashes alone constitute a multibillion-dollar industry. Motor vehicle

collisions in 2000 had an economic cost, or "value," of $230.6 billion—2.3 percent of the U.S. GDP. This figure is based on 41,821 fatalities, 5.3 million non-fatal injuries, and 28 million damaged vehicles.[135] Similarly, the pharmaceutical industry pumps billions of dollars into the economy, albeit in ways that are not based in the good of public health.[136] The noted physician Marcia Angell has written, "The marketing budgets of the drug industry are enormous—much larger than the research and development costs. . . . According to its annual report, Pfizer spent 39.2 percent of its revenues on marketing and administration in 1999; Pharmacia & Upjohn is reported to have spent about the same. The industry depicts these huge expenditures as serving an educational function. . . . The conflict of interest is obvious."[137]

On this level of health and value, nothing has changed since Ralph Nader wrote in 1966 that "[i]t is in the post-accident response that lawyers and physicians and other specialists labor. This is where the remuneration lies and this is where the talent and energies go."[138] Another way to look at this, as Robert Proctor does in his book tracing the history of cancer research, is that research based in cure has not only trumped, but overwhelmed research in prevention in terms of budgets, prestige of work, and remuneration. As he points out, "No one's boat is rocked if our goal is to keep the carcinogen while searching for a cancer cure. . . . Basic research has produced . . . surprisingly little in the way of successful treatments and even less that is of relevance to prevention."[139] These debates about health care, insurance, cost, and marketing generally take highly moralistic tones in advocacy-based debates. However, I am not arguing that human health *should* particularly trump economic health. Rather, I am aiming to point out a series of unresolved paradoxes that result when these two primary rhetorical goals are placed in conversation and competition, and further noting the effects of the way in which these infrastructures tend to commodify injury, rather than value health.

Thus, another key irony in this contest lies in the way that the corporate side of the equation is able to absorb individuals into the project of consumerism precisely in such a way that it is difficult to do anything *but* work in the interests of American injury culture. Private sector jobs have become increasingly well remunerated in comparison to other jobs while the costs of "basic needs" such as housing, medical insurance, and education have increased dramatically. On the other hand, work for private health, rather than in the interests of public health, is vastly more prestigious. On the level of the individual middle- and upper-class worker, this means that the benefits package offered by the oil company lobbying against environmental protection measures that aim to protect human health tends to be better able to

pay for an employee's chemotherapy than the package offered by the organization working to better understand the links between environmental degradation and human cancers. Finally, a crucial move in the last decade has been in the alliance of real and imagined social welfare on corporate well-being. The phasing out of pension plans and public education has meant the reliance for a larger portion of the citizenry directly on the stock market for retirement plans, college savings funds, and everyday well-being—things that a generation ago would be affordable through student loans, summer work, and pension plans. An anxious population is easy to tap into for the fears of corporate well-being.

The economy and its rewards have hardened, as it were, around these structures of value and reward. Every once in a while the apparent callousness of this version of economics emerges in the public eye. Philip Morris's 2001 report that calculated that the early death of smokers *saves* the Czech economy $24–30 million provides one recent illustration.[140] While this report spurred an international outrage when presented in defense of claims that the company should pay reparations to the Czech government, it made the point that health costs, injury costs, and life costs variously translate into economic terms. Allying the costs of ill health and premature death to economic remuneration will always be problematic and political, since life itself is expensive and the costs of injury are slippery.

The broader point is that for every level of the onion, injury in the United States is unreservedly saturated in money. The effects of inflated medical costs surge through the economy, only to fracture in quarrels over dividing up this increasingly large sector. As doctors and insurers charge higher rates, medical compensation awards will be higher and lawyers paid on contingency will receive more. As corporations grow, claims for punitive damages that will actually be deterrent will have to be higher. As punitive damages increase, they will likely continue to be lowered on appeal (and thus lose their punitive force) and be perceived either as unfair or as creating a lottery system of justice. In either case, punitive awards will be open to ridicule and in turn will be used to sell newspapers. Everybody wants a slice of the injury pie.[141]

Examples from Canada and Europe suggest that serious injury rates and their dire personal consequences can be both lowered overall and made less expensive by allowing everyone access to health care and increasing product and corporate regulation, thus undermining the two key rationales for the legal injury infrastructure.[142] So when we say that injury is good for or costly to the economy, we make judgments about how it forces individuals into a game of distributing resources.

In the United States, the redistribution of these resources requires that the physically injured body itself is the collateral of capitalist production—and in so doing, it implies that the safety and health of the citizen will ultimately act as the gold standard of economic production. With the material body as collateral, the contest between injured and injurer takes the semantic and performative form of *versus*. But unlike the consumer, whose injury "sticks" to her body, the corporation can never, in itself, suffer an equivalent corporal punishment since the product designers, marketers, engineers, and CEOs are consistently absorbed into the legal framing of the corporation, as are numerous others who work under the legal framing of the "corporate person." Thus the behaviors of an individual (smoker, overeater, bad driver) are ever pitted against a huge conglomerate of interests whose goal was ultimately, indeed, to have individuals buy more in order, in turn, to increase a company's stock value and, more generally, to increase the consumer spending index. While corporations do not want to injure per se, they *do* want people to smoke, overeat, and fantasize about driving fast. But the individuals that make up the conglomerate of the corporation have no accountability in the court; they cannot be "punished." Thus, a major contradiction exists between the legal mandate of the corporation, which is to maximize profit for its stockholders, and its supposed goal, which is to act in the consumers' interest of health and safety. In the legal semantic, this means not only that injury is built into the very structures of capitalism but that the injured person is literally separated out from the conditions of her injury.

Body as Culture's Repository

In thinking further about how culture resides in the materiality of human bodies, Elaine Scarry examines why it is that war requires the killing of enemy citizens. Could nations not agree that a chess game or a soccer match could settle the questions of a particular political disagreement? She asks, "What differentiates injury from any other activity on which a contest can be based in order to arrive at a winner and a loser?"[143] Her conclusion rests on the way that bodies and built environments both harbor and constitute culture: the promise of injury is that the victor can remake a destroyed culture. She writes, "The arms that had learned to gesture in a particular way are unmade; the hands that held within them not just blood and bone but the movements that made possible the play of the piano are unmade; the fingers and palms that knew in intricate detail the weight and feel of a particular tool are unmade; the legs that had within them by heart (that is, as a matter of deep bodily habit) the knowledge of how to peddle a bicycle are unmade. . . . All are deconstructed along with the tissue itself, the sentient source and sight of all learning."[144]

That the body is a repository for culture is in some sense intuitively true, reflected in aphorisms such as "you are what you eat." But to put consumer culture into terms of the physical making of Americans' bodies throws the assumptions of Scarry's analysis—that a nation will acculturate its citizens in terms of a set nationally determined values—into question; or, the United States provides an example of the handing over of the acculturation process in large part to private industrial interests. A super-sized portion of American capitalism is based precisely—and unapologetically—on convincing Americans to consume. Marion Nestle frames her recent book, *Food Politics*, on her conclusions that "many of the nutritional problems of Americans . . . can be traced to the food industry's imperative to encourage people to *eat more* in order to generate sales."[145] Billions of dollars are spent by the industry not on making hamburgers, fries, and salad dressing more healthy but on making them inexpensive and attractive through the use of cheap ingredients that have longer shelf lives; on lobbying governments to enact legislation in the industries' favor; and in finding ways such as advertising and packaging to make Americans consume more of it. Thus, American citizens are physically constituted through patterns of distribution and consumption.

Throughout the 1980s, the imperative of food consumption involved, as Greg Critser chronicles in his aptly titled book, *Fat Land*, the introduction of on the one hand vastly more unhealthy fats and sugars, such as palm oil and high-fructose corn syrup, in processed foods and without warnings or information and, on the other, "super-sizing" servings of all kinds. While many of the decisions to allow these new food products to be substituted without notice to consumers took place at the high echelons of government and corporate decision makers, the results of the decisions are clear in the bodies of Americans, 60 percent of whom are now overweight. In short, Americans are constantly barraged with a culture of "unhealth"—one in which regulatory agencies have conflicting roles. For example, the mandate of the Department of Agriculture (USDA) is to both advise the public on nutrition *and* to protect the interests of agriculture. As Nestle argues in detail, non-industry-supported studies consistently show that a large number of the conflicts of interest that arise from this contradictory mandate are resolved on the side of lobby dollars, from how budgets are allocated to how much meat is "recommended" in the food pyramid.

The targeting of kids that takes place through product placement, marketing, advertising, and vending machines in schools provides an

excellent example of this process, as it is widely acknowledged and embraced by market researchers who can identify real and imagined vulnerabilities of kids, "tweens," and teenagers and use them to market their products.[146] For example, in his chapter titled "Kids" in *Why We Buy,* Paco Underhill advises the potential marketer of the importance of product placement for kids: candy at the checkout aisle, dog treats on the bottom shelf, and cookies with the baby food.[147] This way, kids will see and reach for the desirable product, and certain aisles will be unavoidable even for wary parents. What has become known to marketers as the "nag factor" has become important in corporations' ability to enter many Americans' most intimate relationships[148]—through estimated expenditures of $2,190 per American household.[149] Advertisers, for example, now work to train children in methods of nagging depending on what category their parents (nearly always the mother) fall into: "indulgers," "bare necessities," "conflicted," or, the smallest group, "kids' pals."[150]

Corporate spokespeople use vulnerabilities, such as children's and teens' dependence on acceptance into small social spheres, to create markets.[151] When criticized by parents' groups, they will claim either that they did not know that kids would be particularly attracted to their sales strategies (cartoons, high sugar content) or that obviously kids would be attracted to certain products and therefore parents need to take this into account in deciding what to expose their kids to. One clear example of this was the marketing of Camel cigarettes. While claiming that it does not want kids to smoke, the tobacco industry has typically allied tobacco in its ubiquitous advertising—even in their anti-smoking campaigns—with being independent, cool, and adult.[152] RJR Nabisco used Joe Camel as a James Bond/Don Johnson "cool" character to advertise its cigarette, and the campaign was effective in garnering the attention of young kids.[153] One study concluded that nearly one-third of three-year-olds could match Joe Camel with cigarettes and that six-year-old children were as familiar with Joe as they were with the Mickey Mouse logo on the Disney Channel.[154]

While cigarettes may be understood to provide an extreme example of marketing and injury (since most long-term smokers become addicted before the age of twenty-one and because of the high probability that smoke will wound a human host), their strategy of targeting kids is not dissimilar to the one used by McDonald's Corporation for its "happy meals" with Ronald McDonald and special toys (McDonald's is high on nag factor), Nabisco's for Oreo cookies, and Kellogg's for Pop-tarts. Indeed, as Marion Nestle has shown, food advertising makes up about half the marketing directed toward kids, and the Centers for Disease Control have found that poor diet and physical inactivity

combined is only slightly behind tobacco as the leading cause of death in the United States.[155] Some studies have demonstrated that brand awareness can take place in children as young as six months and that brand loyalty can start as early as two years.[156] Advertising in this way is recursive: "kids" are now identified—and I identify them as a unique identity group—through their apparent affinity for their attraction to cartoon figures and to fried, high-fat, and sugary foods.[157]

But despite this sort of obviousness of marketing high-profit, low-health goods to vulnerable populations, the kinds of human wounding that results has been virtually untranslatable into proper "injuries." For example, in the 2003 *Pelman* case (in which two teenaged African Americans unsuccessfully sued McDonald's Restaurants for the injury of obesity), the complaint took on Rube Goldbergian extremes. Did McDonald's encourage "misuse" of its "product" (overconsumption of its foods)? Did McDonald's have a "duty to warn" since "their products have been so altered that their unhealthy attributes are now outside the ken of the ordinary consumer"? Have they "become completely different and more dangerous than the run-of-the-mill products they resemble"?[158] The wide coverage received by this case indicates precisely this ambivalence about the power of corporations to target consumers and bend their options and preferences, as well as widespread perceptions of the frivolous use of the law to compensate for individual frailties.

This disjuncture in what kinds of claims can be made in injury law, and the broad and seemingly inevitable production of unhealth in American capitalism, lies at the heart of what I am calling injury culture. That the body is at once the repository of culture and the main form of collateral against injury inevitably obfuscates the ways in which relations of inequality are encoded into commodities. Thus injuries and deaths may be unintended, but they can often be predictable in structural ways. The airbag example mentioned above further shows how both the creation of subject positions related to technology—such as "accident prone" drivers (or fat kids)—and the risk of physical injury is embedded in social inequity—an inequity that may find its roots in the misogyny that has interpreted drivers as tautologically male since the early days of automobiling. A woman seeking compensation for injuries caused by airbags may rightly be at a loss as to whether to blame the car manufacturer, NHTSA, or the masculinist education of designers. Furthermore, she may be at a loss as to who would be able to compensate her for such an injury—ultimately the injury of gender—and from which position to claim that injury. Thus the technology itself, with its promise to eradicate injury and its pre-

sentation of injury's new form, presents a key biopolitical issue through its distribution of risk and injury.

But the injury of the airbag can only be understood in the broader context of automobile culture. As Carol Sanger analyzes in her article "Girls and the Getaway," the car was one site through which gender was distinguished and naturalized, and then through which women were subordinated. She writes, "[T]he car has reinforced women's subordination and made it seem ordinary, even logical through two predictable, but subtle, mechanisms: by increasing women's domestic obligations and by sexualizing the relation between women and cars."[159] With the rise of the suburbs and the isolated stay-at-home mother, the car became the means by which women's time was taken through expectations that they would drive children to ever more far-flung lessons and sports events. It also provided a space in which rape consistently, in law, was invisible. This social construction of the car within women and men's work, and women and men's sexuality, was perhaps not an *inevitable* social use of the car, but it was a primary way that this commodity was taken up in American culture.[160]

If, as Sanger and other technology theorists such as Ruth Schwartz Cowan and Cynthia Cockburn argue, objects can materialize and naturalize certain identities, injury law demonstrates the recursive way in which design issues also materialize and naturalize sets of injuries as visible and compensable or invisible and non-compensable and how assumptions are made and articulated within discursive fields with arguments about choice, cost, and production. Thus, if American citizens are made through the practice of consumption as a nearly abstract ideal (as Lizabeth Cohen argues, and as I detail below), the actual items designed, advertised, and deployed as consumables can be understood as objects of governmentality, focusing differently distributed ideals and potential for action and possibility. Some of these possibilities depend on how products are taken up and used to shore up, supplement, and perform identities in familial and communal fields of power. Overwhelmingly, these opportunities for taking up objects are caught within dynamics of inequity that play out through unevenly distributed risk and injury. These dynamics become uniquely visible through critical readings of injury law; that is, legal contests provide a site at which such issues are struggled over. However, the form of the law overwhelmingly forecloses such discussion of risk and prior discrimination. Furthermore, the way in which injury law distinguishes persons and things makes it virtually impossible to understand how human wounding circulates as an economic and social fact.

What happens, then, when we see the law not as a neutral adjudicator but as constituting the terms of citizenship? How does injury culture instruct its subjects to understand wounding? Biopolitics is often talked about in terms of "normalizing," but it also differentiates, constituting difference within promises and fantasies of equality. Where the goals of the economy seem to oppose those of health, what kind of citizens are produced, enfranchised, and discarded?

Citizen Consumers

In her book *A Consumers' Republic*, Lizabeth Cohen has traced out in detail the ways in which American notions of citizenship became intertwined with consumerism during the twentieth century.[161] Particularly in the post—World War II period, the increasing consumption required for citizenship had to be performed in certain prescribed ways, and the common good was thought to emerge through the private and rational acts of consumption. However, as she notes, the state structuring of consumptive regimes also rendered certain forms of social engineering virtually invisible. She analyzes, for example, the GI bill and its consistent favoring of middle-class white men to the exclusion of women vets, widows of vets, and African American vets. "The fabled 'corporation man' of the 1950s . . . was as much a product of federal policy as corporate priorities, and was by no accident a man."[162] Furthermore, "The Consumers' Republic developed a structure of taxation that rewarded the traditional household of male breadwinner father and homemaker mother, thereby making women financially dependent on men at a time when the transformations of the depression and war might have encouraged alternatives."[163] The nuclear patriarchal family (re)emerged as the ideal consuming unit, and the commodities that were available for purchase served to entrench these roles and inequities.

This structuring of a consumers' republic and its private enterprise underpinnings came about not without struggle. A history of consumer movements charts against broader struggles of notions of patriotism in the twentieth century and the values of the consumer movements (who lobbied for fair trade, good design, and safety standards) pitted quite visibly against the private corporate interests in profit, obsolescence, and unregulated markets. Thus, the consumer movements of the 1930s were viciously uprooted after World War II when both private and governmental interests drove consumers to ally their personal interests with the good of the newly defined "economy" to such a degree that consumer groups of all stripes were targeted as communist. The alliance of consumption and freedom was most clearly presented in the infamous Nixon-Khrushchev kitchen debates, in which

Nixon defended obsolescence in the name of American choice, while Khrushchev held that a home should be a basic right. From here it was a short step to imagine that products could be used to distinguish and reflect on the value of the consumers themselves, and consumption became a primary way both to build communities (through Tupperware parties, for example) and to display and perform upward class mobility.[164] The rise of consumer interests in the 1960s and 1970s again receded with the gutting of most of these institutions (including OSHA, the FDA, and NHTSA) through the 1980s.[165]

Despite the viciousness with which they were attacked, consumers' movements never were a full critique of the consumers' republic.[166] They were merely attempts to gain fair prices, more voice in design issues, and more information on which to base decisions, and to have consumer interests voiced in regulatory arms of the government. They tended not to critique the broader fields of consumption and production to expose worker injury, pollution, or international trade inequities. They also did not critique such issues as nuclear families, gender, or, more generally, the centrality of consumption to American life. In other words, they did not concern themselves with the pivotal role that commodities play in governmentality.

To turn to the framing questions of this book, what kind of citizens are produced, enfranchised, and discarded in what I am describing as American injury culture? Obesity, the physiologist James O. Hill claims, "is a normal response to the American environment."[167] Yet it is perhaps the most feared and discriminatory body taboos and one of the fastest growing disabilities in the country. Plaintiffs in cases such as the McDonald's obesity case (*Pelman*) use law as a way to reassert a citizenship denied through the social and physical injuries of obesity. Along these lines, Adriana Petryna claims in her recent book on the Chernobyl nuclear disaster that "[a]cts of suffering can carry stakes beyond themselves, organize social behaviors, and inform policy actions regarding welfare and insurance, health care delivery, and courses of scientific investigation and its funding."[168] She calls the organization of these claims "biological citizenship." In the United States, I am arguing, biological citizenship is uniquely entwined with consumer citizenship, and as in the history of the use of consumer boycotts to instigate civil rights, consumption and its nemesis, litigation, entwine uniquely with health and with claims about suffering.

Claims about suffering are of course complicated. Pain is precisely that which cannot be fully communicated or fully known by another. The traces of this doubt infuse social understandings of injury law, from the repetitive strain injury sufferer who testified that "I never believed in RSI until I got it" to the need for plaintiffs' attorneys to have

good (read: bad) photographs for the jury. These slippages often converge in moralistic claims on both sides—precisely because in American injury culture subjects understand injury as a compensatory site, rather than integral to design, production, and consumption in a commodity culture.

In a short analysis of the way in which pain can become a moral touchstone, a "universal true feeling" on which political appeals can be made, Lauren Berlant outlines two ways of understanding citizenship. In the classic model, she argues, "each citizen's value is secured by an equation between abstractness and emancipation: a cell of national identity provides juridically protected personhood for citizens regardless of anything specific about them." This contrasts with a second version in which the "nation is peopled by suffering citizens and noncitizens whose structural exclusion from the utopian-American dreamscape exposes the state's claim of legitimacy and virtue to an acid wash of truth telling that makes hegemonic disavowal virtually impossible at certain moments of political intensity."[169] Citizenship, then, might be taken as a two-way street. On the one hand, as in Berlant's first definition, certain rights, privileges, and responsibilities are granted by virtue of the terms of belonging and, on the other, rights are claimed and asserted, as she describes in the second definition. We might term these "endowed" by the state and "asserted" by (potential) citizens. Laws, in the first model of citizenship, work to distribute goods and bads: rights can be either rules in themselves or reasons for rules based in humanist assumptions.[170] The endowed rights might instead base the distribution of goods on models of efficiency or an interest in the overall social benefit.[171] The various theories of torts scatter along a continuum of framing efficiency and various moral standings on how injury should matter and be made matter. Each judge in such cases will also come with her own view.

The second version of citizenship correlates roughly with "asserted" rights. This offers a more troubling prescription in rights claims as a route to a healthy civic culture. To come back to Berlant's own words, the use of pain as a measure of exclusion and legitimacy may "actually sustain the utopian image of a homogeneous national metaculture which can look like a healed or healthy body in contrast to the scarred and exhausted one."[172] Similar to this second model of rights, injury law suggests that consumptive regimes could take place either without injury or within the bounds of acceptably spread and compensated injury. Through these models, citizens are encouraged to understand injury as a compensatory state, identifying as universal subjects.

But as Wendy Brown has argued, appealing to the state to adjudicate injuries renders invisible the ways that the state is deeply invested in

injury production in the complex ways outlined above. The state makes injury visible only on its own terms, through its own mechanisms.[173] Asking the state to protect against injury deeply legitimizes the state as it disavows its role in injury production and distribution.[174] Suffering can carry a unique value—but only when it is registered in a meaningful way. So, bizarrely, suffering turns out to be uniquely meaningful even as it is easily dismissed in very narrow terms.[175] Furthermore, the ability to register suffering is highly contingent. Wealthier people have access to and use the tort system both more often and more successfully than less wealthy people.[176] Furthermore, wealthier people have more ability to override the usual limitations of law. The Air Transport Safety and System Stabilization Act of 2001 provides one potent example of this. This act, through the September 11th Victim Compensation Fund, offered the best of a workers' compensation system (guaranteed award) and the best of the tort system (very high awards) to a group of injured people who may not have had the evidence to bring a successful tort claim.[177] These cases illustrate Sheila Jasanoff's observation of a contemporary move toward the "transformation of the trial court's passionately personal gaze into the dispassionate processing routines of an administrative agency that puts efficiency and risk mitigation for all above the classic 'day in court' for each."[178] That these awards were paid from a taxpayer (rather than a corporate) purse also demonstrates the disparity in the ways that risks and injuries can be articulated: where some injuries are apparently issues of "national security," others lay buried as the side effects of business as usual.[179] Thus, sometimes injuries can link to a way to engage the structures that distributed those injuries, as they did with September 11, and sometimes not, as they do not with obesity.[180]

Conclusion

Design decisions ineluctably code danger and injury at the outset of the production process. Products anticipate the agents that will animate them temporally and statistically; products and humans simulate imagined relationships and worlds. In this sense, Pintos and cheeseburgers are not so dissimilar, as they both demonstrate how American injury culture injures as a matter of course.[181] Accidents and human wounding provide a boost to the economy that is astonishingly undertheorized in economic and social theory. Elucidating the issues in this way raises the question of how human wounding counts, who "owns" health, and how it is to count as a social good.

But within this ambivalence, an uneasy nostalgia for the human folds all too easily into rhetorics of social good and technological progress. This nostalgia makes legible sentiments such as: "Even if cars [substitute: pesticides, mercury amalgam fillings, nuclear power, ad infinitum] kill or sicken some of us, overall, they lead to a better quality of life for all of us Americans." The overlapping privileging of the human and the inclusive "us" presents the baseline for the imagined "utopian image of a homogeneous national metaculture" that Berlant writes about, and leads to the rhetorical power of injury law in its promise to right the wrongs of egregious corporate practices visited on specific persons (rather than statistical futures). The idealization of the ways that objects act in the world makes us into persons that can wield rights to ensure our place in that world.

The rights-bearing person who claims the right not to be hurt, however, is hurt with a wound that carries its own mode of circulation through the economy. As I pointed out, the existence of human wounding on the production and consumption side is integral to the economy for its infusion of billions of dollars. It has no "production" value in itself per se—only produced through compensation (otherwise calculated as a cost for its host). But as an economic force, as the wound circulates among lawyers, various kinds of doctors, accident investigators, insurance brokers and administrators, benefits officers, and wheelchair designers, it changes meaning as each practitioner turns it into a different sort of raw material for their services. If cancer were eradicated, a billion-dollar industry and millions of jobs would go with it. This point about the economic and social trade-offs of injury has been explicitly made by the Supreme Court in at least two opinions on cigarette litigation.

As it comes under rubrics of the discourses attached to each of these professions, the wound is reified as a distinct thing—always separate from the body it adheres to. Anthropologists Minnegal and Dwyer use an example of a pig to consider how value mutates in commodification:

> A pig is brought to an exchange not as a pig *per se*, but *as a particular* pig. Its particular constellation of attributes, and its history, make it not only appropriate but in a real sense, the only appropriate offering. Where pigs are sold, by contrast, attributes such as size, sex, and colour . . . no longer bear upon the appropriateness of the particular pig to the intended transaction. A pig is suitable for sale simply (i.e. universally) because it is a pig. *Thus, it seems that the idea of "pig" itself has become reified.*[182]

Marilyn Strathern draws attention, through this quote, to the way that the "'thing' created through commodification carries information about itself within it, and does not require contextualisation beyond

its evaluation in relation to similar entities."[183] Similarly, wounding is put on the marketplace: a doctor will charge a certain rate to repair a similarly broken leg, no matter how it was broken; an oncologist will "hope" against all odds that a standardized round of chemotherapy will shrink a cancer tumor.

Wounds, then, ambiguously circulate as owned, embodied, materially distinct (such as cancers, broken arms, illnesses of all kinds), and diffuse (such as generalized unhealth). For this reason of definitional haze, wounds have tended to be counted as externalities to the economy. Externalities are the costs, such as pollution or noise, that remain unaccounted for in economic calculations. Michel Callon puts the question of externalities in terms of the framing or bracketing of which series of exchanges will be rendered legible and be counted as an "economy." Callon recognizes that in the creation of an economy, the "framing process is necessarily incomplete: first because a wholly hermetic frame is a contradiction in terms, and second because flows are always bidirectional, overflows simply being the inevitable corollary of the requisite links with the surrounding environment."[184] In other words, any economy will have externalities, good and bad.

Bringing injury (or any externality) into the economy requires rendering it measurable. A damage award, a bill for the treatment of a broken leg, and a calculation inferring that traffic injuries or cancer deaths pose an economic "cost" or "benefit" to a society all put a measurement on wounding—they each bring the wound into the economy. But they do so in different ways, as one sees in the documents presented by tobacco companies that discussed money saved by governments as a result of the early deaths of its smoking citizens. And as the outrage spurred by those calculations demonstrated, setting these equations is a moral project replete with the full ambivalence of the costs of everyday life. In economic terms, Americans would ideally die, and quickly, between the morrow of their last social security tax payment and the eve of their first check.

These ambiguities begin to show how wounds can carry economic meaning in multifaceted and complicated ways. Wounding is simply not quantifiable: "the frame or border of the economy is not a line on a map, but a horizon that at every point opens up other territories."[185] How wounding will count and for whom is a political decision that has everything to do with the meaning of citizenship in a given social and political sphere. Bodies carry different kinds of materiality and wounds adhere differently to different people. Where injury is understood as a rights project, the complicated questions that attend human wounding, such as how they are integral to the economy, are simply foreclosed. Health and its political, economic, and social value become

rhetorical values rather than subjects of debate, and debate turns to terms of denunciation rather than analysis.

Law carries the full ambivalence of these promises. In its monetary valuation of the body, personal injury law merely echoes the broader logic of commodity culture. This logic renders invisible the inequities through which injuries are distributed. But institutions of injury law also strangely carry the potential to decommodify the wound—to make visible the "particular constellation of attributes, and . . . history" that belong to the wound that do, sometimes, matter. These trials present fascinating fields of play; someone's "day in court" is a powerful social moment. However, that day in court will ultimately disappoint. Unless better analytics are built for apprehending the meaning of human wounding as an economic and social force, with the full force of its ambivalent moralism and economics, a suit addressed to a personal injury will always tend to reiterate the same logic that led to the particular constellation of the injury.

Chapter 2

Sentience and Slavery

The Struggle over the Short-Handled Hoe

KNOWN AS *EL CORTITO* (the short one) or *el brazo del diablo* (the arm of the devil), the short-handled hoe, which measures 10–14 inches long and weighs 3–4 pounds, was regularly used by farm workers in California until it was outlawed in 1975.[186] In conjunction with hand weeding, it was useful in singling out lettuce, celery, and beet starts, which were planted in heavy rows to guarantee that sprouts would survive the ravages of birds, bugs, and the weather. Use of the hoe required the worker to fold over at the waist, constantly raising and lowering the hoe while walking sideways down the row of plants. The needs of agricultural mass production were such that workers were required to use the hoe for hours and days on end. Symptoms of short-handled hoe use included not only crippling injuries to the back but also nosebleeds, kidney malfunction, headaches, runny eyes from dirt, fever, acid urine, kidney pains, arthritis, exhaustion, wrist swelling, and poisoning from inhaling pesticides. One farm worker testified at a hearing in front of the Division of Industrial Safety that "I began using the short-handled hoe at the age of 11, [and] I have seen my body waste away."[187] A 1970 study found that the short-handled hoe caused health problems in 87 percent of respondents,[188] and of workers age thirty-one or older, 91 percent complained of back pain. Despite these figures, however, 50 percent of injured farm workers never saw a doctor due to intimidation, bureaucracy, inaccessibility of medical services, the language barrier, and possibly "macho" pride.[189]

To many workers, the short-handled hoe seemed to be a normal enough, self-evident tool. Indeed, one farm worker described how she initially thought the work would be easier with the short hoe. "I really thought it was cute," she said. "But then when I had started working about 2 or 3 hours I started feeling first of all the blood started coming to my eyes and my eyes started to hurt and then the next thing my legs started to hurt. After then it was my back and the pain was great."[190]

The short hoe is generally thought to have been introduced to California agriculture late in the nineteenth century as intensive crop farming took hold. When Japanese workers first came to California, they

FIGURE 4. A demonstration of racialized worker efficiency from the 1950 California Annual Farm Labor Report. Original photo caption reads: "Mexican workers are efficient at stoop labor tasks. Here Auburn Coe, Farm Placement Representative for Monterey County, notes worker's use of short handled hoe in thinning lettuce."

organized their own farms and thus had the freedom to use tools on a rotating basis and regularly change body position. A change in appellation from what was then known as "squat labor" to "stoop labor" reflects the change in farm work itself. If at one time workers could kneel or squat while intensely cultivating an area, a stooped position allowed a worker to make his or her way hurriedly down crop rows. This change in working postures was one indicator of the loss of control over working conditions more generally, as the economic and political persecution of the newly organized Chinese and Japanese immigrants was supervened by Mexican immigrants.

Unlike their predecessors, the new immigrants were typically not from farming backgrounds. However, "controllable labor was more attractive than skilled labor by this time, and so agricultural production underwent a reorganization."[191] The reorganization of labor established a labor contractor, or "crew pusher," who made sure that farm workers were working as productively as possible. An increasing division of labor established what the renowned journalist Carey McWilliams dubbed "factories in the field."[192] The short-handled hoe was an instrument of mass production in the sense that it was used for hours and

days without recess and it allowed crew pushers to watch over large fields to see "malingerers" who stood up to rest their backs. A steady stream of labor was available to compensate for workers who left the job due to injury or fatigue (daily turnover in short-handled hoe gangs was as much as 85 percent).[193] The short hoe remained a standard tool of agriculture in California through most of the twentieth century. The legal struggle that resulted in the abolition of the short-handled hoe started with a petition by the California Rural Legal Assistance (CRLA) in 1972. The case went through three hearings before the Department of Industrial Labor and was appealed twice before being accepted for hearing before the California Supreme Court. The case was heard twice more in front of the Department of Industrial Labor, and the hoe was banned in 1975.

Contemporary safety laws structure "fair" relations of production and injury. They encode what may be demanded of the worker's body in the process of work—on an everyday level and in terms of risks undergone for production and service. In a market economy where cheap production is the essence of profit, the well-being of the worker and the necessity of production are always put in balance. These contests are considered in different ways; for example, a cost-benefit analysis may be performed to decide what is reasonable risk. But these "tests" always leave room for questions such as, "reasonable risk" for whom? In what circumstances? Given how many unknown factors?

Safety laws also open a way for us to better understand how injuries and objects come to carry meaning. As this case demonstrates, safety codes are always open to contestation, and these contests are crucial events through which social relations are built into and performed through objects. Furthermore, these contestations force parties to articulate positions and assumptions about objects and people. The short hoe provides a particularly interesting place for this type of interrogation for several reasons. First, the political economy and the semiotics of race allow us to see blatant articulations of racist assumptions that are these days rare in such public fora. Second, the 1960s and early 1970s provide a unique period in California history where the face-offs between the "right" and the "left" were particularly clear-cut in the Berkeley free speech, anti-Vietnam, civil rights, and feminist movements. Within these movements, race in America took on a broad-based visibility and racism became unacceptable to a wider group of Americans. Taking its place within this set of domestic and international struggles, the short-handled hoe became the pivot point around which repetitive strain back injuries emerged *as injuries* in the context of racialized bodies that were contradictorily considered to be both ideal for stoop labor *and* "naturally" prone to back injury, and of the activism of a growing number of Californians who believed that the

racist underpinnings of agricultural production were wrong. Thus, *el cortito*—described by farm workers in the legal struggles variously as an instrument of torture, surveillance, indifference, and sheer pig-headedness, and described by the growers as simply a tool of the job—consolidated a unique showdown over political power, race and class, working conditions, and legal services for the poor. In so doing, it can illuminate how bodies and objects are co-constituted and made to "count" in different ways.

In pulling together the arguments that follow here, I have relied on the work of my historian colleagues who have created narratives about California's agricultural history. I have also worked from a series of interviews with community workers, doctors, attorneys who argued on both sides of the case and those who were more distantly involved in the case, and people who have been involved with farm working issues.[194] I have analyzed an archive of materials, most of which are on file at the CRLA's office in Salinas, that includes the legal briefs and petitions prepared by the attorneys, attorney correspondence, the transcripts of the hearings that took place before the Labor Relations Board, the studies used by the CRLA, press releases, newspaper reports, and other ephemera.[195] Without this archive, it would perhaps not be hyperbolic to say that there would be no short-handled hoe, no related back and other injuries, no poorly treated workers. Refracting the issue in this way, I pose that it is only through the archive created by this lawsuit that human bodies (that is, potentially injured bodies) were created and registered as something different than machinic cogs in the factory of the field.

"Archives assemble," says Michel-Rolph Trouillot. He argues that this assembly work is not the "passive act of collecting" but "an active act of production that prepares facts for historical intelligibility. Archives set up the substantive and formal elements of the narrative. They are the institutionalized sites of mediation between the sociohistorical process and the narrative about that process . . . they convey authority and set the rules for credibility and interdependence; they help select the stories that matter."[196] The short hoe, although barely mentioned in the literature on Californian agriculture, became a story that matters precisely for the ways that the suit both framed and forced articulations (articulations that are astonishingly frank in their racist underpinnings) about how sociohistoric events such as imported labor racialized bodies and how dangerous tools would be acted on and remembered. That the key CRLA lawyers pursued successful legal careers—one in the California court of appeals and the other in a large San Francisco law firm—while the doctor who testified on behalf of the growers and argued that Mexicans had congenitally disfigured backs wanted to forget the whole thing and refused an interview are remind-

ers that these narratives inscribe how right and wrong will affect configurations of memory, success, and shame.

The suit in itself was not the entire story; it came to matter because of a number of threads that came together to enable its existence and its success: poverty law, a new "leftist" state governor, the United Farm Workers (UFW) movement, and its charismatic leader, Cesar Chavez. Additionally, the short hoe came to symbolize the degradation of farm laborers. *El cortito* was taken up in various representational regimes, from Dorothea Lange's famous photograph of three heroically portrayed workers hurtling up the rows of the field to posters for the farm movement. But the short hoe as an object and a symbol became an archive in Trouillot's sense through this legal case: a case through which Mexican and Mexican American workers asserted their bodies as "human." Thus, on the one hand this chapter is about figuring out how the hoe, the injuries, and race as a category are mutually constitutive and crystallize in different ways for pernicious and progressive reasons. On the other hand, it is about examining the ways that the law, the archive, and history, as mutually constitutive, write the story of culture and its struggles over who gets to be human—and as human, who gets to be injured. The hoe, which clearly does not *in itself* demand a certain posture, came to be injurious at a specific geopolitical moment of Californian agribusiness. Thus, it became in the late 1960s and early 1970s a crucial actor in the ways that race and citizenship were consolidated and played out.

Relying on the archive in this way, in all its details and countervailing contradictory stories, also allows for a fuller accounting of the way the hoe circulated in everyday narratives about contemporary life—quite literally, of the social work done by the hoe in maintaining relations of inequality. A close examination of the transcripts of the hearings illuminates the way that the growers' claims to economics and efficiency underpinned premises about the bodies of Mexicans and Mexican Americans. These assumptions about what Mexican bodies were did more than infect agricultural production; they structured it. In this sense, *el cortito* was as important an actor as any worker in the story of California agriculture.

The popular story that has emerged in California since the 1970s has consolidated an encounter between the evil growers and the liberal lawyers who harnessed the law of the land for just ends. This story is a tempting one—how else to account for the truly vicious racism, the murderously anti-labor stance, the unabashed intervention into affairs of the state, and the pitiable greed of California growers in the nineteenth and twentieth centuries? How else to account for the brilliant use to which the law was put by dedicated CRLA lawyers and staff in

preventing the use of the short-handled hoe, or for the coalitions of activists, artists, and lawyers that arose during the struggle? This oppositional model, though, highlights the clumsy tools that law confers as a way of examining—let alone adjudicating—social struggles. After all, as Douglas Murray notes in the only published social analysis that focuses on the short-handled hoe, the structure of law insists that the arguments about the hoe were circumscribed within a narrow set of issues: "By identifying the problem as the hazardous use of a tool, the statutes deflected the attention away from the hazardous nature of production organized, directed and controlled by a corporation."[197] This model also tends to efface the workers themselves—they are deleted from both the account of *Growers v. the CRLA* and the continued conditions of their lives and labor.[198]

What follows here is divided into three sections. In the first I present an abbreviated history of California agriculture and its dependence on racial categories. The emergence of agribusiness in the state has been unique because of its concentrated ownership that was passed down from the Mexicans after 1848, the aridity and difficulty of irrigation, and the availability of waves of cheap alien workers who labored for barely subsistence wages. This will provide some context of the *bracero* labor policies, the establishment of the CRLA, and Governor Ronald Reagan's illegal attempts to cut social programming. In the second section I outline in some detail the testimony of the short hoe hearings, outlining the contours of the suit and the stories told about the short hoe. In the third section, I analyze the junctures of race, labor, injury, and the short hoe, examining how in the litigation, each party depended on racialized discourses through which to understand and articulate short hoe injuries and Mexican American bodies.

Race and Agribusiness: California

When Mexico surrendered California in 1848, the United States inherited large tracts of land from rancheros and passed these directly into the hands of corporate commercial agriculture.[199] The resulting concentration was further consolidated through railway land speculation.[200] Land remained uncultivated until toward the end of the century, when farmers sought to reap profits through bonanza wheat farming, which was popular because of the shortage of labor. Several successive droughts left this business in shambles, and with the development of the ice-making machine in 1851 and the refrigerated freight car in 1868, which made possible the transportation of fruit and vegetables, specialized crops were introduced[201]—oranges in 1873 and sugar beets in

1888.[202] This specialized farming and the highly technologized irrigation of the Imperial Valley further concentrated landholdings.

During this time of incipient landholding consolidation—between 1887 and 1893—Chinese immigrants formed the bulk of farm labor, and they virtually taught crop farming to the large farm owners.[203] With increasing Chinese immigration, exclusion became the foremost issue of California politics; white laborers saw the Chinese as stealing jobs and assisting large farm holders in monopolizing agriculture by helping them make the transition to crop farming. When the Chinese began to organize themselves by opening small businesses, employers' interests allied with labor and attempts to restrict immigration began.[204] Exclusion laws were passed in 1882, 1892, and 1902, in addition to the Nationality Act, which specified that only "free whites" and "African Aliens" could apply for naturalization in a country that was, by design, to be one of "Nordic fiber."[205] Thereafter, the Chinese—excluded from farm and public works labor, land ownership, access to business licenses, testifying in court for or against a white man, public education, citizenship, and naturalization—were confined to urban ghettos and faced vicious racism, violence, murder, and expulsion, as well as extra financial burdens in the form of taxation (shrimping and police taxes, among others) and specifically anti-Chinese laws and ordinances.[206]

I use the Chinese as an example here, but this cycle of using cheap labor and then maliciously dispossessing groups when they organized themselves was typical in California agriculture: South Asians, Japanese, Filipinos, and Armenians had similar experiences to those of the Chinese. Growers' strategies ensured ethnic factions and a chronic oversupply of labor in a market that was already only seasonal.[207] These tactics have been supported by the state government. One author notes that "confronted with an increasingly organized and militant agricultural work force, the state response typically has been to help promote the migration or immigration of a replacement supply."[208]

Unlike groups of Asians who came to work the fields, the Mexicans who arrived shortly after the turn of the century on the newly built railways had not been farmers.[209] Skill was no longer an important prerequisite for farm workers who labored increasingly in assembly-line agricultural production. Although the Mexicans were able to initiate some labor organization, the coming of white laborers who refused to organize with Mexicans stifled further organizing during the depression.[210] By 1935, three-quarters of all harvest labor was hired by one-tenth of growers who controlled over half of the production.[211] Growers began to further consolidate their power. In 1934 they organized the statewide Associated Farmers, whose explicit mandate was "to foster and encourage respect for and to maintain law and order, to promote

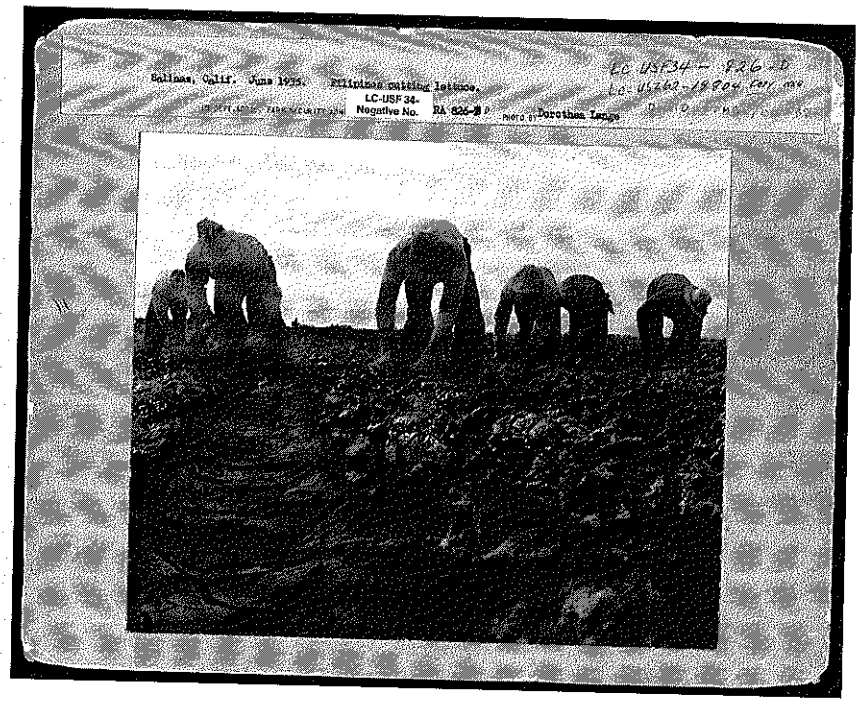

FIGURE 5. Filipinos cutting lettuce for Japanese owners, Salinas, California, Dorothea Lange, 1935. U.S. Farm Security Administration, Prints and Photographic Division, Library of Congress, LC-USF347–000826-D.

the prompt, orderly and efficient administration of justice."[212] Since agribusiness interests had been so successful in infiltrating government agencies, "justice" was also a term of art. Because they dealt in highly speculative markets with perishable commodities,[213] and because seasonal farm labor was almost the only cost that growers had control over, they argued that they were not responsible for working conditions and they protected this privilege savagely.[214] In 1947 one Professor Cleland wrote that "California's industrial agriculture can exhibit all the customary weapons . . . gas, goon squads, propaganda, bribery."[215]

Between 1942 and 1964, a bracero program recruited Mexicans to work in U.S. fields as a cheap labor supply. Public funds were used to initiate and maintain the program, and the terms of employment (most of which were never enforced) were negotiated by the United States and Mexico in 1942.[216] The goals of the program were succinctly encapsulated by the governor of California in 1947: "Mexican workers . . . should constitute a flexible group which can be readily moved from operation to operation and from place to place where local help falls short of the numbers needed to save the crops. These workers should

be in a sense 'shock troops' used only in real emergency as insurance against loss of valuable production."[217] A labor force that could be sent home was ideal for underpaid, difficult, and migratory farm labor, and labor shortages were always the reason given for importing labor (braceros and, later, illegal immigrants). However, braceros were used as strikebreakers and to maintain low wages—indeed, during the bracero era, agricultural wages declined drastically in comparison to those in manufacturing: from 65 percent in 1948 to 47 percent in 1959.[218] One employee of the U.S. Department dubbed the bracero program "legalized slavery."[219]

The attitude toward Mexican laborers during that period is reflected in this quote, taken from a book published in 1971: "To toil endless hours in stifling heat and under generally adverse conditions demanded more than mere physical attributes. [It] required a somewhat unique personality type: one accustomed to living, indeed thriving, in a virtual state of physical and mental peonage. The Mexican peasant was ideally suited for the task. . . . [T]he sociopsychological milieu in which the average Mexican peasant was reared, prepared him ideally for his role as the servile, hard-working, seldom complaining, perpetually polite, bracero."[220] By the 1950s, braceros constituted well over half the laborers in many crops,[221] and although growers again cried labor shortage, braceros were clearly used as cheap subsidized labor.[222] This point is corroborated by the fact that when the bracero program ended, the predicted disaster failed to materialize: crop production did not lessen and consumer prices did not increase.[223]

After a series of extensions to the program, the importation of bracero labor was officially halted in 1964. In 1965 United Farm Worker strikes began, and farm workers gained citizen support during the civil rights era.[224] The CRLA was one other result of this support. Initiated in 1966 as an element of President Lyndon Johnson's War on Poverty program, the CRLA included a core group of public service lawyers who cast about for broad-based issues with long-range consequences.[225] Among these, the short-handled hoe—much to the lawyers' surprise—staked a claim as a farm worker issue of major proportions.

The ten offices of the CRLA began with money ($1 million annually) from the Office of Economic Opportunity (OEO) and the dedication of young civil rights lawyers. The introduction of legal services to the poor of California was to fulfill Johnson's mandate of "equal justice under the law." A large percentage of the rural poor in California consisted of farm workers, who had no right to form unions, were in chronic oversupply, and earned less than minimum wage (one of the first CRLA suits was to enforce a newly instituted minimum wage of $1.65/hour).[226] Considering the odds—40 lawyers and 25 community

workers served 16 counties and a population in excess of 550,000 (at a time when the national average was one lawyer for 640 persons)—the CRLA was tremendously effective.[227] They won 90 percent of the class action suits brought between December 1966 and January 1970.[228] Two CRLA attorneys describe the paradoxical role of the CRLA as "a genuinely *conservative* force regarding the written laws and administration regulations of the State and Federal Governments. But it was a genuinely *revolutionary* force in relation to agribusiness's law and order."[229]

In order to not get bogged down with individual cases such as family or landlord disputes, the CRLA took on broader-based issues that would have a structural effect on poor people.[230] Its first major-impact cases in the late 1960s included three key suits. The first illegalized bracero labor;[231] the second contested Governor Ronald Reagan's 1967 $240 million cut to Medi-Cal as unconstitutional;[232] and in the third they halted the practice of having Mexican American children placed into "special classes" for the mentally handicapped by ensuring that the intelligence tests were administered in Spanish.[233] In addition, the CRLA brought a number of suits similar to the one brought against the Madera Unified School Board. The school board annually closed schools so that students could pick grapes in nearby fields, which were in violation of state health and sanitation laws—no toilets, drinking water, or hand-washing facilities. In addition, suit was brought against the state welfare department, which had terminated welfare to families who had refused to allow their children over ten years old to work in the fields.[234]

By 1970 Governor Reagan had had enough of equal justice under the law. At the height of the farm workers' activism, as the Delano grape strike boycott was gaining momentum, and the month after he was elected governor for the second time, he vetoed CRLA funding. In order to justify the removal of funding for a group that was renowned for its excellent track record, he had a report written with charges that "range[d] from the libelous ('CRLA attorneys tried to arrange a meeting between Angela Davis and the Soledad Brothers') to the ridiculous ('CRLA attorneys appear in court barefoot')."[235]

After a long battle, during which the author of the report, Lewis K. Uhler, refused to provide evidence to an OEO panel for any of the claims he had made, Reagan's veto was overridden.[236] The events of this proceeding have been well documented elsewhere. Suffice it to say here that by all accounts, including an independent report of the commission enlisted to examine Uhler's claims, the Reagan-Uhler report offered an account full of unfounded accusations. In the words of one former deputy attorney general of the state of California who had represented the state against the CRLA, "I am convinced . . . that this is a

report that the State officials issued containing charges that they know are not true. . . . I think this report is a very bad example of what happens when the philosophy against certain groups overcomes people's rationality."[237]

The Hearings

In 1969 Maurice Jourdane was a young graduate of Hastings College of Law and a newly appointed CRLA attorney. When farm workers approached him with the short-handled hoe, they tested him: if you really want to do something for us, you will get rid of this instrument. Like many of the farm workers had, he shook his head in disbelief—that is, until he went out and tried it himself. He spent the next six years on the case.[238] His first step was to spend a week at Stanford's law school library searching for a legal hook that might sidestep the powerful agribusiness interests that permeated most state institutions.[239] On September 20, 1972,[240] he and the CRLA posed the issue to the Industrial Safety Board (ISB) of the Division of Industrial Safety. This document mandates that workers in California have the right to "such freedom from danger to the life, safety, or health of employees as the nature of the employment reasonably permits."[241] Jourdane argued that the short-handled hoe contravened one of the health and safety standards in the California Administrative Code that prohibited the use of unsafe hand tools.[242]

While Jourdane had hoped that the issue would generate publicity and then legislation, the board took up the petition by setting up three hearings, one in San Francisco, another in Imperial (El Centro), and the final in Salinas, to hear testimony from farm workers, doctors, lawyers, and growers. The ISB, appointed by the governor, is legally bound to include representatives of labor, management, and the general public.[243] Reagan had named a "former FBI agent, a corporate director of an oil equipment manufacturing firm, the supervisor of employee relations for a major gas company, and the owner of a construction company," leaving the vice president of Operating Engineers Local 3 as the only labor representative.[244]

By all reports, the hearings were packed and raucous affairs, with growers' comments mixed in with those of farm workers and doctors in no clear order. Nevertheless, it is possible to gather the arguments generally under the categories of growers, the CRLA, and the farm workers.

The growers' statements are familiar in their resonance with contemporary U.S. tort reform laments. These complaints tend to express a

fairly typical array of concerns, mourning the costs of injuries to both businesses and the state; blaming the workers for the injuries; and casting injuries as an inevitable, if not regrettable, side effect of agricultural production (and as such, one they could not be held responsible for). The testimony included claims that there were no reasonable alternatives,[245] that workers chose to use the hoe,[246] that companies would go bankrupt if the hoe was banned,[247] that the state would suffer economic losses,[248] and that it would cost too much to replace the hoes.[249] Richard Hubbard, an owner and operator of Hubbard farms in El Centro, discussed the decisions made about farm technology in simple market terms. He talked about the technical difficulty of having to "dribble out 500,000 seeds to the acre, and then try[ing] to thin it down to 24,000 to 25,000 [seedlings] per acre."[250] Hubbard was clear on the question of technology, arguing that "[m]ost farmers are not altruistic, and if it is cheaper for them to go to a mechanical thinner, if they can obtain a better product by going to a long-handled hoe, we would have done so long ago."[251]

The growers also dismissed complaints of injury as misattributed, since the hoe is simply comparable to other tools such as wrenches and carpet layers' tools.[252] They further expressed fear that all stoop labor would be eliminated, thus, rendering much of farm labor problematic.[253] One grower raised the issue of fault: "We're not in the business to hurt someone's back. It's a necessity."[254] Finally, they resorted to barely veiled threats: "if you can't do the job we have braceros that can do it,"[255] or "if you take away the control that we have with the short-handled hoe, we . . . will have to mechanize."[256]

The real legal crux of the argument, which is to say the only argument that sufficiently narrowed the issue to the legal nugget of "unsafe" and whether or not the short hoe was, in fact, unsafe regardless of the many reasons that it may be desirable to keep it in the fields, was the suggestion that the problem was not the hoe but that people did not use it properly.[257] The other main argument along these lines was a simple denial that the short-handled hoe use caused back injury.[258]

Some farm workers testified that the hoe was fine, and their testimony fell into three categories.[259] They claimed that they would rather use a short-handled hoe than a long-handled hoe and that people who were injured were not using it properly, and they expressed fear about being replaced by technology in claims such as "if they take the short-handled hoe away. . . . [t]hey're going to put [in] machines."[260]

Legally, it was incumbent upon the CRLA to demonstrate two key points: first, that serious and irreversible back injuries were caused by the short-handled hoe, and second, that the long-handled hoe was as efficient as, if not more so, the short-handled hoe. To demonstrate these

points, they had the results of two studies. The first was a survey compiled from a questionnaire that the CRLA sent out nationally, finding that other states with similar crops (Washington, Idaho, Minnesota, Texas) did not use the short-handled hoe but the long-handled hoe.[261] The second study was a comparative one illustrating that agricultural workers who used the short-handled hoe had a drastically higher rate of back pain than those who did not. The rest of the testimony fell into roughly two categories—expert and experiential. Doctors and a workers' compensation attorney testified to the medical severity of the injury, the loss of productivity that resulted, the cost of compensation, and the reasons why injuries from the short-handled hoe did not appear in workers' compensation records.[262] Farm workers testified to the severity of the injury and the labor conditions of farm work.

Eleven doctors testified as to the severity of injury resulting from short-handled hoe use, explaining to the board in layman's terms yet in great detail the mechanisms of the spine, disks, muscles, and tendons; the mechanics of spinal injury resulting from short-handled hoe use; and the effects of lifting weight while bent over.[263] The doctors agreed that use of *el cortito* causes major degeneration and weakening such that the equivalent of a seventy-year-old back will be found on a person of thirty-five; that it causes arthritis, herniated or slipped disks, fracture, or spondilolosis that would not be caused by use of long-handled hoe; and that the injury is irreversible.

Even after surgery, 50 percent of patients with back injuries are never able to return to work. Dr. Robert Murphy testified that "[t]he worker loses a tremendous amount. He loses his livelihood. He never gets compensation that's equal to what he can make by working. He loses his family status. He loses his re-employability because these people do not get rehired. And from our studies at the University of California, I can tell you that the incidence of psychiatric disease in patients who have had chronic low back pains following injuries is tremendous."[264] While the growers tried to limit the scope of the injury, the doctors showed that the expense of injured workers is paid not only by the individuals but also by the state. When interrogated about the importance of the "productivity" of California agriculture, Dr. Murphy balanced productivity against the expense of back injuries. He said, "I'm sure you can buy a lot of beets for $100,000,000. I don't know what you mean by productivity, but it wouldn't even approach the cost of workmen's compensation for back injuries."[265]

A main obstacle to the CRLA's case was that very few workers' compensation cases had been filed that would demonstrate the direct link between hoe use and back injury.[266] There are two main reasons for this. First, agriculture was not covered under workers' compensation

until the late 1950s, so legal firms did not handle farm workers, and they did not know farm workers' needs or language.[267] Perhaps as a result of not having been covered, farm workers did not complain about their pain. Dr. Robert Thomson mentioned that "I have the feeling that they sort of expect [back pain,] that this is their way of life to have backaches, so they don't really come to the doctor complaining about it."[268] Second, because of the cumulative nature of the injury, a farm worker may be injured as a result of the hoe but while he or she was doing different work.[269] Another doctor stated that "the pattern of these injuries is not a sudden traumatic impact where the back goes out, but rather, because of this long period of weakening, finding then in the clinic later case after case after case of back problems in farm workers."[270] More crucially, even if the doctor could link the injury to the cumulative use of the hoe, workers' compensation claims require the doctor to report a specific incident that caused the injury.[271] As Dr. David Flanagan argued, injury using the short hoe is not "a reportable injury because there is no incident."[272] Thus, compensation records did not show the full story because other injuries happened only as a result of the already weakened back.[273] Furthermore, one doctor testified that he regularly sent injured workers to the welfare office rather than to workers' compensation because workers were so rarely compensated through this institution and when they were, the checks took months to go through the bureaucracy. Attorney Michael Rucka spoke for others when he argued that since they understood the injury as a result of the position, not the tool, they filed claims as "repetitive bending, stooping, and lifting."[274] Rucka also gave detailed testimony as to the difficulty and expense of representing repetitive trauma injuries, which were not generally worth it given the low wages (and thus predicted low settlements from which attorneys take payment as a percentage) of farm workers.[275] The added invisibility of these injuries relates to the fact that these tools are generally understood as ordinary products (like wrenches or carpet layers' tools), not as inherently dangerous.

Part of the CRLA's strategy to account for the low rates of reportage, the lack of workers' compensation records, and the difficulty of diagnosing the injury was the sheer number of doctors who testified, each from a different perspective. This attempt to stack the archive did not go unnoticed. Just prior to the statement of one of the doctors, the head of the commission, Edward White, deliberated on the necessity of yet another medical opinion, one that would likely repeat what had already been said, suggesting that they had heard enough medical evidence. CRLA attorney Martin Glick responded, "I think his testimony is quite different from some of the other doctors." White responded,

"We've already got nine doctors and we feel that perhaps we're adding icing to the cake."[276]

Farm worker testimony generally fell into four categories: the severity of the injury; the symbolic value of *el cortito*; the humiliation of the injury and of the stooped position; and the primitive state of technology. Many workers spoke eloquently of the sheer pain of using the hoe. Unlike other work that allowed the worker to switch tasks,[277] "after working with the short-handled hoe, one comes home without the desire to eat, to bathe, to communicate, to socialize. . . . I began using the short-handled hoe at the age of 11, [and] I have seen my body waste away."[278] Perhaps some of the most effective testimony was from a sixty-five-year-old man who had been an amateur and professional boxer in the 1920s before doing farm work. Mr. Hernandez said, "At the end of a week my body was pretty sore, especially the lower back. In the second week it was harder on me. I could hardly stand my lower back and my legs. On the third week it was just plain torture. . . . And I quit. . . . It was three weeks after that before I could . . . really straighten up without feeling pain in my back.[279] This man switched from stoop labor to lifting one-hundred-pound sacks over his head into boxcars. He did this for seventeen years and lifted as many as eight hundred bags a day. He said, "I have waited thirty-nine years for a hearing on this short hoe."[280]

Several reasons for the growers' preference for the short-handled hoe were suggested. Growers may have used the hoe to purposely degrade workers, to easily survey them across the fields, or to use them as a rite of passage. One worker testified that "the foreman will usually keep track in [his] own sort of tentative way of the number of times the person stands up to give his back a so-called rest. If a person stands up ten times or more, they'll keep an eye on this guy and he won't be there the next day. The sort of inherent relaxing mechanisms in harvesting other crops is built into it, but not the *cortito*. . . . It's very excruciating on the back."[281] This also explained, to the workers, the reasons why a few farm workers testified *for* the hoe at these hearings. "We know that the fieldworkers who are speaking up for the short-handled hoe are the ones who will be given the job of foreman because they are the ones who are always kissing up to the grower."[282]

It was not only the pain of the labor that the farm workers were protesting. According to one worker, "[There] is the terrific pain that the farm worker suffered while actually using the hoe during the end of the day. . . . And the second kind of pain they testified to is the pain that the farm workers had when they became thirty-five or forty and found themselves disabled, and having the problem of trying to get to sleep, trying to get up, having trouble walking and having to lie down again, and that kind of problem, I think as we all know, goes with back problems."[283] A few times, a farm worker would try to give a more general idea of the terms of labor and point out that the growers were giving an inaccurate account of labor conditions. Fred Reyes said, "The foreman brings some soda pop into the field and if the workers don't buy them, then [they're] fired. . . . They come in here and explain to you that everything is alright, and there's nothing wrong with the short hoe because they have tried to kill us with that hoe. They never paid the price rightfully for this kind of a job; now [in the hearings] they claim they pay $2.50 to $3.00 an hour." The board had no interest in the link between the short hoe and labor conditions. After this testimony the following dialogue ensued:

> WHITE: Mr. Glick, would you keep this on target now. We're not getting into working conditions.
>
> GLICK: I have nothing to do with this.
>
> WHITE: Oh, you don't. Well, would you tell him we are interested in the injury and the effect of the short hoe on the working, but not when it gets into other areas, working conditions, soda pop, this sort of thing.[284]

Larger claims about technology were also made. One worker argued, "I say that if they have the technology to [replace lettuce crews], if they have the technology to put a man on the moon, if they have the technology to create weapons that can cause unlimited destruction, then certainly they can find the technology to replace the short-handled hoe."[285] The farm worker testimony made clear that they realized that the short hoe issue was one of both labor conditions under agribusiness and the technological stagnation that comes with a cheap labor pool.

In their rebuttals to the farm workers and the CRLA, the growers introduced virtually no evidence for their sweeping economic claims or for their dismissal of health issues. They claimed that California has more intensive agriculture than other areas and therefore cannot be compared with the other regions.[286] They also resorted to other, extralegal methods of persuasion. For example, during the time of the hearings, they arranged a tour of a couple of the farms for the Division of Industrial Safety (the CRLA did not know about this until after the fact).[287] Unlike Jourdane, who took the case on after using the hoe himself, the committee claimed that none of the workers at these farms had seemed discontented or had had any complaints. The director wrote, "We were all watching carefully for any evidence of discomfiture or even low morale, such as expressions or actions or whatever. I observed literally none. Note that I had visited two fields and the same situation existed in both."[288] In future litigation Jourdane did not let this event go unnoticed, wondering aloud in briefs and petitions how

long the board members expected that a farm worker would keep her job after registering a complaint about working conditions.

On July 13, 1973, the board unanimously concluded that the CRLA "failed to prove the tool unsafe." Relying on statistics compiled by the Industrial Relations Board of work injuries in 1970 and on a few farm workers' testimonies in which they claimed that they did not suffer from back injury, the board ruled that not enough medical evidence had been presented by the CRLA. They wrote that "there are, in fact, many work operations that hasten aging of various body parts at varying rates according to individual resistance . . . [and] very few of these conditions are logically controllable by safety orders, because such orders have few ways of adjusting to the fact that some people are quite resistant to the related aging processes."[289] Thus, the board concluded that "the unsafe tool" clause was not intended to encompass tools that caused injury as a matter of everyday use, arguing that the prohibition on unsafe hand tools applies only to tools that are inherently dangerous and not to tools that cause danger from the manner of their use.[290]

Martin Glick expressed his disappointment in the commissioners, who, in the face of overwhelming testimony, were "surrounded by peer pressure, and engaged in secret processes."[291] The CRLA then appealed the case to the California Supreme Court, which only accepted *Carmona* after it was refused by the court of appeals. As chief justice of a notoriously pro-plaintiff court, Justice Tobriner wrote that "a defectively designed tool which causes injury as a result of the manner in which it must regularly be used can be just as harmful to employees as a defectively manufactured tool or a tool in poor condition." As he pointed out, "almost all tools are only unsafe when used and would not constitute an inherent danger if not in use."[292] The Supreme Court directed the division to reconsider its opinion in accordance with a wider standard of defective design.

By the time the second set of hearings (San Diego [March 24, 1975] and Salinas [March 27, 1975]) began, Jerry Brown had replaced Ronald Reagan as governor and had in turn replaced some of the key political figures in the state; California politics had swung to the left.[293] The short-handled hoe had received wide newspaper and television coverage and popular support.[294] Finally, in 1975, the short-handled hoe was legally banned, although enforcement of the ban has been lax.[295] The CRLA victory was sweetened several months later when Bud Antle, a corporation that had staunchly defended the short-handled hoe, publicly acknowledged that workers wielding the long-handled hoe were more productive than they had been with the short hoe.[296]

Embodied Technology: Race

In the context of production, when injuries suffered by workers are recognized as injuries (that is, they are not blamed on the worker's incompetence or preconditions and they are not entirely overlooked), they are often perceived as a side effect of production, and/or as a necessary by-product of production, and/or as an unintentional consequence of production. Put another way, the power of the growers was not only in the power to injure but in the ability to erase the traces of that injury *as injury* (traces that would otherwise be apparent in workers' compensation records, for example) as well as to describe farm worker claims as banal, unviable, or out of hand and thus to cede the conditions for continued injury. While the short-handled hoe might be understood as an instrument of surveillance such that a foreman looking across the fields would be able to spot a worker resting her back, it was also an instrument whereby the power of agribusiness was inscribed into that very body.

Thus, the success of the farm workers and the CRLA depended on their convincing the court and the Industrial Relations Board of two key points. First, they had to show that farm workers' bodies were worth something—that they could not and should not be merely discarded as by-products to the labor process and that as owners of worthy bodies, they should not be systematically injured in the course of work. Second, they had to prove that the short hoe has a systematic relationship to injury, even though it was clear from the testimony of the growers that all agricultural work hurts. What came to be at stake, then, was what the relationship between the racialized body and the short hoe would be. Whereas for growers, racial stereotypes were used to assert their entitlement over workers' bodies and "naturalize" the workers' relationship to the short hoe, strategic reconstructions of technologies and bodies were used by the CRLA to decouple this relationship.

It is not surprising that the physical characteristics of race took on a key importance in these hearings, given the way in which race has structured agricultural production in California.[297] In the set of hearings that took place after the California Supreme Court ruling, the growers reiterated their anecdotal evidence and introduced the new testimony of Dr. Oakley Hewitt, an orthopedic surgeon from the Palo Alto Medical Clinic. Dr. Hewitt reported in an affidavit that "certain groups of people, . . . because of racial characteristics, diet or lifestyle are more prone to symptomatic low back disease. . . . The Stewart study of the Eskimo . . . reported that approximately 60 percent of the

Eskimo tribe studied have a [back] condition called Spondylosis."[298] He then argued that "Mexicans" have a similar congenital weakness that can account for the high rates of injury. (I use scare quotes because Hewitt does not describe what he means by the term Mexican.)

But we have also seen how the growers argued that Mexican laborers were ideally *suited* for stoop labor. For example, Farmer Mervyn Baily testified, "I cannot remember one single case . . . where we had a back injury attributed to the short-handled hoe. My father ran a crew of Hindus in 1911. . . . Then Japanese. Then we followed with the Filipinos. And then the Mexicans. The stoop laborers, most of them are smaller or more agile than the ordinary Anglo due to their build and the fact that they seem to have a stronger body for the job."[299] If the racial marker of flexibility (echoed in the contemporary rhetoric of Asian women factory workers' "nimble fingers") christens racialized groups as consummate workers through the idealization of their bodies, in the claim that Mexicans have a congenital predisposition (similar to that of the colonially inscribed "Eskimo") to back injury the doctor inscribes Mexican laborers as radically embodied in a markedly different way. These people who neither had nor deserve toilet facilities, who were housed in old prisoner-of-war camps, who did not have access to fresh water or bathing facilities—the people who are always already physically inscribed with the stigmatic and semiotic mark of the "wetback"—are reinscribed as additionally always already injured by virtue of their genetic traits.

If having control over pain was one element of the power of the growers, the ability to bestow civilization and then eschew human rights on the basis of the lack of civilization was another crucial factor that describes the way in which growers maintained power.[300] The story told by Dr. Hewitt locates the fault of the short-handled hoe wounds with the body of the Mexican worker but then uses the observation to argue in defense of the continued use of the hoe. The trope of the radically embodied worker devalues the farm worker in a specific way by racializing him *as devalued*. The very marker of what it is to be Mexican is to have an injured back.

The fact that certain societies and cultures have constructed racialized Others for the purpose of doing semiotic or material work for themselves through that very construction is by now well accepted in cultural and anthropological theory. It is with this in mind that we recognize the plausibility of how representations deeply affect the ways in which groups of people enter political and economic life. Thus, Camille Guerin-Gonzales's conclusion to her carefully argued study rings true: "representations of the work force as temporary and male [both before, during, and after bracero labor] influenced both

government policies and growers' practices, which severely limited the economic participation of Mexican immigrants."[301] I am arguing here that as well as being temporary and male, the representation was of a workforce that was uncivilized and preinjured—and consequently not susceptible to tangible or compensable injury. To put this another way, if the fundamental claim that Elaine Scarry makes in her book *The Body in Pain* about pain and injury is that the unmaking of the human being—the injury of tissue—is precisely the "unmaking of the civilization as it resides in each body," then it would be reasonable to assume that the uncivilized body cannot be unmade. The uncivilized body is the precisely the *pre*injured body discursively incapable of feeling pain.[302]

Trauma theorist Robert Jay Lifton makes a pivotal point about the particular enabling capacity of the racist epithet. He argues that the dehumanization of the Vietnamese people in the 1960s, embodied in the term "gook," provided the key means for the ruination of their way of life and ultimately for their torture and murder. Lifton discusses the way in which peasants became "psychologically functional victims," explaining that the "process is self-perpetuating: once seen as symbolically death-tainted, the victims can be more easily killed, which makes them still more death-tainted. They are cast out of history, denied the status of a people with cultural continuity. Since they are historically and psychologically already dead, one may kill them arbitrarily, without the feeling one is taking a life."[303] Once victimized, the imagined and real "gooks" entered the scapegoating cycle of victimization: "because he is an inferior outcast, he must do the polluted and defiled work of society; because he does that work he is death-tainted and contemptible; because he is contemptible, he must be forced to accept his degraded condition and may be brutalized and murdered at will."[304] The role of the physical body figures centrally in this cycle; the Mexican American body can be simultaneously all that is detestable: brown, good at stoop labor, *and* pre-injured and congenitally deformed. Though not a question of death and survival in the same way as was Vietnam during the war, race and the strategic positioning of victimization were certainly about economic superiority—in Californian terms, inferior lives were blatantly used and injured to create the wealth of agribusiness and the luxury of culture enjoying lettuce and strawberries.

In addition to this mode of racialization, a clear strategy of the defenders of *el cortito* was the despecification of the injuries rendered by the short hoe. Contrary to the testimony of many doctors who described in detail the effects of lifting the weight of the hoe while bent at the waist, Dr. Hewitt argued that "it may well be that all forms of

stooped labor, which could include planting, harvesting, picking or cultivating in specific crops, would predispose a worker to an increased incidence of degenerative conditions of the lower back . . . and whether the short hoe, per se, is any worse than handpicking and harvesting lettuce is very difficult to say."[305] The defense attorney corroborated this point, saying that workers do not actually hoe very much, and "other work, such as cutting lettuce, is as bad."[306] Grower Paul W. Englund noted that the short-handled hoe accounted only for 20 to 25 percent of all stoop labor in agricultural work, and he asked the pivotal question: "Is the short-handled hoe worse than cutting lettuce, or packing lettuce, or picking strawberries, or picking onions, or all the crops that are grown on the ground? That's a question I don't know, but I can see what the result [of banning stoop labor] would be."[307] By broadening the issue to encompass all farm work, Hewitt and Englund dissipate concern for the specific work and injury while holding the question at the level of the ridiculous (who would outlaw *all* farm work?), thus aborting the question of how farm work might be more varied or technologically enhanced to limit injury.

In another example of this tactic, growers divulged and appealed to their own health problems. Grower Lloyd Heger said that when he injured his back, his "doctor told him to lose fifteen pounds and get more sleep." He said, "I know of several other growers that have back injuries . . . [that are] not caused by the short-handled hoe."[308] Another grower said, "[I]f I didn't have to work, I'd live longer. I have an implanted pacemaker."[309] These comments can be taken as a stab at attorneys who may not understand the everyday injuries of agricultural work and a testimony to all kinds of injuries that become ephemeral in industrial culture. On the other hand, the claims dilute the seriousness and systemic nature of short hoe injuries. Thus, growers made their case based in a combination of blatant social devaluation based on racial categories, the generalized injuries attributable to all kinds of work, and the threat of an end to agricultural production.

The very wording of the safe hand tool law compelled the CRLA and farm workers to prove the direct linkage between hoe use and injury. Yet their victory clearly depended on building a larger social movement publicizing the role of *el cortito* in farm workers' lives. The enforced use of the hoe was understood by the farm workers to be a blatant use of power for the purpose of reiterating the message of farm worker subordination.

Q. If you had a preference for using the long-handled hoe, would you use it?
A. I would rather use the long hoe.

Q. Why don't you use the long-handled hoe right now?
A. The company will not permit us to use the long-handled hoe because they want to take all the juice that they can out of us.[310]

Thus, the symbolic power of the hoe, which appeared in UFW posters of the period, was harnessed by the farm workers to change the meaning of the tool and invest it with the resonance of the power dynamics of agribusiness more generally. But this symbolic power, even as it was appropriated by farm workers, was a key aspect of worker degradation.[311]

In the introduction to *The Body in Pain*, Scarry discusses the ways in which pain entails the feeling of being acted upon. Even in cases where pain is purely internal, it is described with the metaphors of other instruments such as "hammering" pain or "knife-like" pain.[312] It is through this "expressive potential of the sign of the weapon" that she explains the communicative success of Amnesty International publications that prominently display the symbols of torture.[313] At the same time the expressive potential of the short hoe might be a reflection of the overt and abused power of the growers. This is reflected both in the UFW posters that featured the hoe as symbolic of the farm workers' struggles and in farm worker testimony such as "it was torture, it was torture."[314] The significance of the hoe itself lies in part in the work that was required by the CRLA, UFW, and farm workers in creating it as a tool of torture or a weapon in some sense. In this light, the particular choice of appellation for the hoe by the workers, *el brazo del diablo*, cannot be overlooked.[315] Conversely, the use of images such as Dorothea Lange's photographs of farm workers in the 1930s hinge on a slightly different strategy: humanizing and even heroizing the workers.

Mexican American arms had already played a pivotal role in Californian agriculture, as reflected in the bracero program—literally the "one who uses his arm" program. But the "arm of the devil" is additive—it connotes the appendage that, while *used* by the farm worker, is *of* the (perceived) devil-grower and situates the farm worker's body as an intermediary. The devil's arm was a tool but also the direct arm of the capitalist, the arm of the government, the arm that controlled the conditions of labor, as well as the arm that entered the workers' bodies through its ability to injure, maim, and disable. The devil's arm was indeed not the prosthesis of the worker but of the corporation. Just as in product liability suits in which the plaintiff's claim relies on her ability to denaturalize the taken-for-granted relations between bodies and technologies, the farm workers' claim to ban the hoe depended on their insistence on the material difference between the hoes and their bodies. After all, the worker's body, for the grower, is part of his own prosthetic assemblage—the technology of agricultural production of which

the worker was one part and the hoe was another and the boundaries between the two were insignificant. On the other hand, for the farm worker the very appellation of the "devil's arm" connotes a sequence of moveable parts, in which the worker's body is distinct from the rest of the aggregate—the hoe is the distinct object with which he produces for the grower. Given the circulation of bodies within the system of agricultural production, the farm workers' bodies physically depended on their ability to convince the growers that their bodies were materially distinct from the rest of the productive prosthetic.

Conclusion

Before the short hoe's implication in injurious relations, workers were simply required as mechanical parts of the production process. These relations of production between workers and machines have been noted by authors as diverse as Karl Marx and Henry Ford. Ford wrote quite literally about how his workers were mere appendages to his machines, and thus how he could employ disabled men and even women in accordance with the exact requirements for production. Ultimately, one way to differentiate bodies and machines is in the designation of injury and the ways in which injury both becomes thinkable and carries meaning when it does. Ownership of a human body allows certain actors in the production process (that is, the human actors) to come to the table as legal actors and claim their bodies as basic, nondisposable collateral in capitalist production. This process was precisely at stake in defining the short hoe as "inherently" dangerous. Thus, the archive of the short hoe presents two key insights into the ways that difference, race, and subordination, as regimes of social injury, circulate and become naturalized within and between humans and tools and the physical injuries they produce.

First, the short hoe provides a place to examine how farm worker injuries gradually became legible as injuries. The law itself could not do the work of enabling this shift, but it offered access to institutional networks that became instrumental because of wider political shifts. If anything, this makes clear the extent to which justice is a political rather than legal issue. For the inequalities that stemmed from short hoe use, claims were made in terms of advocacy: inequality was intertwined with a concept of "injury." Thus, the CRLA attorneys argued that "my client is human—and has been harmed, as any other human would have been, by this product." Pain was used as the universal human touchstone. One of the first things one CRLA lawyer did was go to the field and use the short hoe himself. Furthermore, the ultimate

victory for the farm workers was influenced by the way the case was picked up by white liberals of the era who joined the struggle to have the hoe banned and by a political era in which both consumer rights—and, not unrelated, civil rights—were being fought for and, in an incipient way, taken seriously. Universal civil rights was a necessary argument for plaintiffs in arguing to outlaw the short-handled hoe; since Mexican American "humanness" was at stake, lawyers argued that the work tool dehumanizes in the process of injuring. All of the CRLA attorneys to whom I spoke agreed that without Jerry Brown's election and his replacement of key political figures, the short hoe would still be in use. Additionally, by the time of the short hoe victory, Cesar Chavez and the UFW had developed a broad-based, continent-wide social movement for farm workers' rights, and this victory was one of a number of victories that reflected the growing visibility of and social support for farm workers' rights. Thus, as the short hoe became *the* symbol of farm workers' struggles, it gained additional power in the minds of radical and liberal activists.

Furthermore, the ways in which the hoe brought the injury into the story of agricultural labor after it had been ignored for so long entailed a collaboration between medical and legal discourses.[316] Although the concept of cumulative trauma was not a new concept at the turn of the decade—the California Labor Code had long contained the statutory bases for the concept of micro-trauma or cumulative injury[317]—the application of these laws to farm workers, who were not perceived as entitled to benefits, was radical. In the years just prior to the CRLA case, the labor code law had been incipiently used as a basis for finding liability for spinal disability. Thus, the physicians who were willing to testify in the short hoe case were the more "liberal and risk taking and for the most part not from academic medicine."[318] Michael Rucka explains that "the logical extension and application of what was known in medicine to what was known in the law was what brought about success."[319] Furthermore, once it became clear that the hoe was going to go, doctors were much more willing to diagnose the hoe-related injuries; repetitive strain injuries in general had more success in workers' compensation claims in the late 1970s and 1980s.

Second, the hoe made racial subordination seem natural, and the narratives that circulated in the hearings illuminate how this was so. In some key sense, Mexican American farm workers were produced as racialized beings through their relation to the hoe and through their bad backs. Thus, registers of physical and social injury (back pain, racial subordination) are produced, labeled, and crystallized for their utility on the one hand in dehumanizing and reifying labor, and, on the other, in recuperating the humanity of the workers.

In part we can see this through the different arguments that were made by the growers. One strategy disengaged injury from power relations (we, too, get injured). Another approach simply claimed the necessity of the work tool (like a wrench, it is simply a requirement to get the job done—we cannot halt all agricultural production). These two implicitly play out competing notions of economic and social goods (such as safety and production) and which costs are acceptable and by whom. In so doing, they ignored the problem of stuctural injuries and shifted them to unimportant side-effect status.

Another tactic attributed fault to the workers themselves. Unlike (and like) the flexible Filipinos and Hindus, but like the congenitally injured Eskimos, the Mexican American laborer was the one who was injured by his racial designation as always already injured. Furthermore, the Mexican American expected to be injured—he or she did not go to the doctor because of a bad back but lived with it, either because a bad back is a normal occurrence or because she did not expect that physicians could help her. Registers of injury circulate here; as the constitutive feature the social injury of racial designation is the physical injury suffered from farm labor. Social and physical injury are inextricable.

On the other side, the law was used to allow a disenfranchised group to literally have their stories entered into the historical archive. If the short hoe could be shown to be *inherently* injurious, issues such as fault, race, or economic consequence had nothing to do with its legality in the fields. Trouillot reminds us that the "constitution [of] subjects goes hand in hand with the continuous creation of the past. As such, they do not succeed such a past, they are its contemporaries."[320] In this sense, the constitution of farm worker subjects was contingent on the recognition of the injurious experiences of the short hoe; even the worker who switched work after three weeks had "waited thirty-nine years for this hearing" precisely because it brought recognition and a means to rejoin the racial category, albeit in its own problematic terms. Law, the historiographic archive, and citizenship are mutually constitutive. Simultaneously, the short hoe, injuries, and race were mutually constitutive.

The object of the hoe brought the disability into legal discourse—and then that discourse brought Mexican laborers into history, even as the hoe had not yet been acknowledged in workers' compensation or other medical records. The very form of safety laws is based on negotiating just how much injury an employer might ask of its employees—after all, as the growers testify, all work can result in injury. Ultimately then it was through the object and through the unsafe tool clause that the farm workers and the CRLA were able to argue—for the first time—that this injury *did* exist. But even as the clause allowed Tobriner

radically to blame the tool rather than the user and thus to redefine the hoe as injurious and the bodies as meaningful, the short hoe and its legal hook of the unsafe hand tool clause necessarily circumscribed workers' ills within a narrow set of legal issues and away from the conditions of agricultural labor more generally. Thus, variations of the short hoe struggle continue with hand weeding, strawberry picking, and the use of curved knives, practices that continue to define racialized immigrant labor in California.