Notes

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1. The cartoon refers to a well-publicized lawsuit brought against McDonald's fast food restaurants by a group of overweight African American teenagers in late 2003 that was dismissed without a hearing in 2004. The plaintiffs claimed, in *Pelman*, that they had been misled as to the nutritional value of McDonald's food and had suffered the injury of obesity. In that sense the suit gave voice to the frustrations experienced by subjects of an economy that gains strength through tempting its citizens with unhealthy, cheap, and ubiquitous foods. *Pelman v. McDonald's Corporation*, 237 F. Supp. 2d 512; 2003 U.S. Dist. LEXIS 707, pp. 534–537. See also Roger Parloff, "Is Fat the Next Tobacco?" *Fortune*, Feb. 3, 2003, pp. 51–70. I discuss this issue further in chapter 1.

2. This representation of the litigious African American refers to *Pelman*. However, as legal anthropologists have well noted, communities in the United States have vastly different views of and engagement with American law.

3. Jeffrey Meikle, for example, writes of the domestication of plastic bags though massive advertising drives in the 1950s. When plastic dry cleaning bags were introduced in 1956, they were touted by Du Pont as being reusable. By 1959, after nearly one hundred children had died of suffocation and nearly twenty adults had adopted them for suicide, the industry blamed ignorant parents for keeping plastic bags (which they now claimed were disposable) within reach of children. Meikle reports that the contemporary press "aimed a barely contained fury at the plastic bags themselves as entities of near demonic malevolence." Meikle suggests that this simple new technology became the rhetorical outlet for more general anxieties about nuclear and industrial culture. Once the bags were rendered fully knowable—through a massive educational campaign by the plastics industry, redesign and standardization of the bag, and printed warnings that still appear—nationwide calls to "ban the bag" were appeased. Meikle, *American Plastic: A Cultural History* (New Brunswick, NJ: Rutgers University Press, 1995), 250–52.)

4. Richard Abel and Laura Nader argue that since studies show that nine out of ten people who become injured do not sue, the law cannot properly function in its role to publicize defective products and more adequately spread costs. They thus advocate more use of these laws. Laura Nader, *The Life of the Law: Anthropological Projects* (Berkeley: University of California Press, 2002), 203; Richard Abel, "The Real Tort Crisis—Too Few Claims," *Ohio State Law Journal* 48 (1997): 443, 447.

5. Peter A. Bell and Jeffrey O'Connell, *Accidental Justice: The Dilemmas of Tort Law* (New Haven: Yale University Press, 1997). See also Marshall S. Shapo, *Tort Law and Culture* (Durham, NC: Carolina Academic Press, 2003).

6. A variety of legal venues negotiate the drama of human wounding, and in the chapters that follow I examine several of them. I generally note these as the legal institutions addressed to the law of personal injury, or "injury law" for shorthand. Chapter by chapter I discuss each institution's relation to the more specific venues of tort and personal injury law; they overlap but do not fully encompass each other.

7. Donna Haraway writes in her chapter titled "A Cyborg Manifesto," "Our best machines are made of sunshine; they are all light and clean because they are nothing but signals, electromagnetic waves, a section of the spectrum, and these machines are eminently portable, mobile—a matter of immense human pain in Detroit and Singapore. People are nowhere near so fluid, being both material and opaque." Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991), 149–82, quote on p. 153.

8. The popular discourse that injury law has engendered tends to fracture along inherited rhetorics of politically powerful groups, particularly of business interests and of trial lawyers. In a nearly rote formula, corporate interests, generally under a header of "tort reform," employ a rhetoric of "frivolous cases" and "runaway juries" against U.S. individuals and their trial lawyers who believe they "truly have a good case." These sides correspond remarkably well to the two sides of the American political hegemony: the Republicans tend to support and collect lobby funds from the tort reform movement, while the trial lawyers ally themselves with Democrats. The tendency to ridicule the popular conception of lawsuits seems to be too much for anyone to resist. A recent parody published in *Utne* mimicked a company memorandum urging the use of more warnings. These warnings include, for example, "If the product uses an electric cord [*sic*], do not wrap the cord around your neck. Do not chew on the electrical cord." Douglas Jones, "Company Memorandum," *Utne*, Mar.–Apr. 2004, 93.

9. Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002), 10.

10. The basic facts of the case are as follows: Stella Leibeck, an eighty-two-year-old woman, was severely burned when she opened a cup of coffee a few minutes after purchasing it at a drive-through, while the car was parked, and coffee spilled on her groin area. She suffered third-degree burns, was hospitalized for seven days, and underwent several painful skin grafts. While initially not wanting to launch a lawsuit, she also, as she wrote in a letter to McDonald's Restaurants, thought that "no person would find it reasonable to have been given coffee so hot that it would do the severe damage it did to my skin." (Quote from letter cited in Michael McCann, William Halton, and Anne Bloom, "Java Jive: Genealogy of a Juridical Icon," *Miami Law Review* 56 (2001): 120.) McDonald's offered $800 compensation, and Leibeck hired an attorney. During the trial, evidence was submitted that McDonald's had received about 700 complaints about the temperature of the coffee and resulting burns, and had settled at least one case for severe coffee burns. A spokeswoman said that in accordance with company policy, coffee is served at 180–190 degrees—substantially hotter than that of home coffeemakers. Agreeing that the coffee was defectively designed and breached the Uniform Commercial Code's warranty of fitness for intended purpose, initially skeptical jurors decided on an award of $2.7 million in punitive damages. Recalling that the intent of a punitive damage award is to "punish" the wrongdoer, they used two days' worth of McDonald's coffee profits ($1.35 million daily) as a basis for setting the award. The judge later reduced this award, which was understood by him as being "excessive, as a matter of law," to $480,000. His rationale was based not in the punitive function of the law but rather as a "trebling of the $160,000 award of compensatory damages."Despite the reduction of the award, this suit was widely reported on and ultimately became the subject of a major tort reform campaign in the mid-1990s. In general, as scholars have detailed, "news coverage of civil tort disputes routinely parallel[ed] in form and substance the simplistic tort takes circulated by tort reformers to assail the explosion of frivolous lawsuits." (McCann, Halton, and Bloom, "Java Jive," 132. The authors make this claim based on a study of the media coverage of tort cases over the last twenty years.) This is not necessarily the result of a conspiracy but because of the manner in which the press tends to simplify narratives in ways that conflate complex problems to simple epithets such as "individual responsibility"; find large awards more spectacular than awards reduced on appeal (and so misrepresent the outcome of cases); misrepresent facts (many papers reported that Leibeck was in a moving vehicle); and simplify complicated legal structures. In this particular case, the misrepresentation in the press became the basis for the (mis)representation of the case in numerous comedy shows and corporate-funded advertising, both for products and as a basis for advertising tort reform. A widely aired radio ad featured this narration: "A jury awarded a woman $2.9 million in a lawsuit against McDonald's Corporation. She spilled coffee on her lap and claimed it was too hot. . . . Every day there is another outrageous lawsuit. Who pays? You do." (Jean Stefanic and Richard Delgado, *No Mercy: How Conservative Think Tanks Changed America's Social Agenda* [Philadelphia: Temple University Press, 1996], 105–6.) The reduction of the award was not mentioned. This typical radio ad gives neither the facts of the case, the truth about the ultimate award, or the details about how and why "we pay." See *Leibeck v. McDonald's Restaurants*, No. CV-93-02419, Sept. 16, 1994. Nevertheless, it is highly effective. Referring to that case, another plaintiff whose baby was killed in a cradle with a simple design flaw claimed, "I'd hate to call the shots on the McDonald's lawsuit. I personally believe there needs to be tort reform out there. But I don't believe [mine] is a frivolous case." (Jeanne Browkaw, "The Hand That Rocks the Cradle," *Mother Jones*, Sept./Oct. 1996, http://www.motherjones.com/news/special_reports/1996/09/chenowith.html.)

11. For an ethnography of the problems and paradoxes Americans face when they take issues to the courts, see Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990). Counter to the stereotypes about litigious Americans, Merry found that "[p]eople hesitate to turn to court unless they

feel that important principles are at stake. The plaintiffs in this book endured problems for a long time before resorting to the court" (172). For a short ethnography of personal injury suits in a community in Illinois, see David M. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," *Law and Society Review* 18, no. 4 (1984): 551–82. For an overview of the main players in the discipline of legal anthropology, see Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999," *Journal of the Royal Anthropological Institute* 7 (2001): 95–116. See also Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998); David Engel, Carol Greenhouse, and Barbara Yngvesson, *Law and Community in Three American Towns* (Ithaca: Cornell University Press, 1994); and Susan Bilber Coutin, "Smugglers or Samaritans in Tucson, Arizona: Producing and Contesting Legal Truth," *American Ethnologist* 22, no. 3: 549–71.

12. Richard Abel has stated that in a lifetime, 60 percent of Americans will have an injury for which they could rightly sue (cited in Abel, "The Real Tort Crisis"). While statistics such as these certainly hint at the depth of the injury problem in the United States, they also mislead with their solidity. Are we to include pesticide injuries, which cause serious injuries but for which no clear legal strategy for litigation has emerged? What about cancer caused by increased use of plastics—certainly an injury, but again, how would we begin to locate a proximate cause? Whom would one sue? What does it mean to define injury as that which could "rightly" be litigated?

13. While I do want to argue with this book that legal trials tend to reproduce hegemonic cultural assumptions, I also think that the various actors, human and nonhuman, perform their roles in trials in ways that cannot be completely explained. They exceed the conditions of their production, and in this excess much of the interest of lawsuits is derived. To take a clear example, legal opinions will often harbor unexpected logics, and dissents can act as "placeholders" to set the intelligibility for future majority decisions. For an outline of some of the key questions about how "law uses the resources of the larger culture precisely in order to establish its own particular kind of discourse," see Robert Post, "Introduction: The Relatively Autonomous Discourse of Law," in *Law and the Order of Culture*, ed. Robert Post (Berkeley: University of California Press, 1991), quote on p. viii. For a brief sociolegal studies treatment of injury in law, which compares three cases of injury at three different historical moments in three different cultures, see David M. Engel, "Injury and Identity: The Damaged Self in Three Cultures," in *Between Law and Culture: Relocating Legal Studies*, ed. David Theo Goldberg, Michael Musheno, and Lisa C. Bower (Minneapolis: University of Minnesota Press, 2001), 3–21. Engel argues that "differing perspectives on injury [have] significant implications for the role and meaning of law" (3).

14. Dick Pels, Kevin Hetherington, and Frederic Vandenberghe, "The Status of the Object: Performances, Mediations, and Techniques," *Theory, Culture, and Society* 19, no. 5/6 (2002): 1–21, quote on p. 9.

15. Sarah Jain, "Dangerous Instrumentality (Bystander as Subject in Automobility)," *Cultural Anthropology* 19, no. 1 (Feb. 2004): 61–94.

16. Cited in Webb Keane, "Semiotics and the Social Analysis of Material Things," *Language and Communication* 23, no. 3–4 (July–Oct. 2003): 409–25. Haraway's "Cyborg Manifesto" was the landmark text in cultural studies to push an examination of humans and nonhumans using analytic terms that remain constantly in motion. She writes, "Why should our bodies end at the skin, or include at best other beings encapsulated by the skin? From the seventeenth century til now, machines could be animated—given ghostly souls to make them speak or move or to account for their orderly development and mental capacities. Or organisms could be mechanized—reduced to body understood as resource of mind. These machine/organism relationships are obsolete, unnecessary. . . . We don't need organic holism to give impermeable wholeness" (178). See also Sarah Jain, "Prosthetic Pathology: Enabling and Disabling the Prosthesis Trope," *Science, Technology, and Human Values* 24, no. 1 (winter 1998): 31–54.

17. *Words and Phrases*, permanent edition, vol. 21A, *Industrial—Innkeepers* (St. Paul, MN: West Publishing, 2003), 238–39. In the legal literature, care is also taken to distinguish injury from accident. See, for example, *Judicial and Statutory Definition of Words and Phrases*, coll., ed., and comp. members of the editorial staff of the *National Reporter System*, vol. 4, *Freeze—Kept* (St. Paul: West Publishing, 1904), 3616. An earlier citation takes care to distinguish injury from damage, the latter in which "no manner of *right* is concerned." See Alexander M. Burrell, *Law Dictionary and Glossary: Terms of the Common and Civil Law*, 2nd ed., vol 2 (New York: John Voorhies, 1859). The slippage among wounding, intent, incidental, accidental, negligent, and unavoidable is exactly the stuff of the debates in legal literature.

18. In the vernacular use of the term, bodies—as themselves material objects—are subject to injury as a matter of course. Arguably, time itself is a prolonged injury process. Consider the aging woman's disfigured, painful, and swollen feet that are dismissed by doctors as the effects of aging. Are they less important than the young basketball player's fallen arch? How is the "importance" of these signs of pain to be objectified or measured? Furthermore, an application of the term "injury" to describe subjective phenomena is both inexact to begin with and vastly open to rhetorical manipulation. High stakes can make it easy to appeal for fiduciary gain or time off from an unsatisfying job: certain claims of whiplash may not be exactly feigned but may remain painful until the application of what doctors call the "green poultice." Like "need," injury is a term open to interpretation and not easy to objectively measure. Injury, when put in the terms that the law requires, must also have a certain resting place. An act of god, such as a heat wave that causes several hundred deaths, does not injure in a compensable form—even when those injuries may be traced to government regulations on energy supply and air conditioners—but a medical device with a poorly designed wick may translate directly into proximate cause. For a book-length study of the decisions that culminated in several deaths in the Chicago heat wave of 1995, see Eric Klinenberg, *Heat Wave: A Social Autopsy of Disaster in Chicago* (Chicago: University of Chicago Press, 2002).

19. Even as Bill Maurer pointed out to me, consumer capitalism also attempts to absorb parts of the subject—particularly labor—into its logic. Still,

on the consumer side, even in instances of body parts, cell lines, and so on, a subject-consumer is required, by definition.

20. "Governmentality," in *Michel Foucault: Power*, ed. James D. Faubion, *Essential Works of Foucault, 1954–1984* (New York: The New Press, 1994), 201–22, quote on pp. 208–9.

21. Bruno Latour, "The Berlin Key or How to Do Words with Things," in *Matter, Materiality and Modern Culture*, ed. P.M. Graves-Brown (New York: Routledge, 2000), 10–21, quote on p. 18.

22. Latour, "Berlin Key," 18. Latour seems to shy away from analysis of either the stakes or the consequences of the distinctions he explains so lucidly.

23. This theorization of the animation of matter can be traced back through anthropological theory to Evans-Pritchard, who discussed the way in which the spear was an animate aspect of the Nuer male, extending his strength, vitality, and virtue. Similarly, Gregory Bateson wrote that the blind man's "stick is a pathway along which differences are transmitted under transformation, so that to draw a delimiting line across this pathway is to cut off a part of the systematic circuit which determines the blind man's locomotion" (Bateson, "The Cybernetics of "Self". A Theory of Alcoholism," *Psychiatry* 34 [1971]: 1–18, quote on p. 7). For more on his related work on prostheses, see Jain, "Prosthetic Pathology."

24. His research question is rather different from those I broach here. He asks, "What is the concept of history embedded in the accident investigation that begins while crushed aluminum is still smoldering?" Peter Galison, "An Accident of History," in *Atmospheric Flight in the Twentieth Century*, ed. P. Galison and A. Roland (Dordrecht: Kluwer, 2000), 3–43, quote on p. 3; quote in text on pp. 38–39 (emphasis original).

25. Elaine Scarry writes perhaps more thoughtfully and more complexly of the implications of "object awareness." She writes that a door with its "design is a material registration of the awareness that human beings both need the protection of solid walls and need to walk through solid walls at will. The door not only seems capable of transforming itself back and forth between the two states of wallness and nonwallness but, more remarkably, seems capable of understanding which of the two states the man wants it to be at any given moment." Scarry, *Bodies in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), especially 296–304, quote on p. 296. For a demonstration of a variety of science and technology studies (STS) approaches to these questions, see Nelly Oudshoorn and Trevor Pinch, eds., *How Users Matter: The Co-Construction of Users and Technologies* (Cambridge, MA: MIT Press, 2003). See also Karin Knorr Cetina, "The Market as an Object of Attachment: Exploring Postsocial Relations in Financial Markets," *Canadian Journal of Sociology/Cahiers canadiens de sociologies* 25, no. 2 (2000): 141–68.

26. Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'," *Cardozo Law Review* 11 (1990): 919–1045, quote on p. 949.

27. This market research in a way is self-fulfilling as markets and marketing become more homogeneous. One example of this is in the difficulty that game designers have had in building computer games that are more appealing to girls. Making the games pink and based less in violence and more in communication serves only to fold into the same forces that do the girling in the first place. In other words, people identified as girls are taught from birth to identify with pink and not with computer games—these identifications are what make this subset of people girls.

28. A number of scholars concerned with the social roles of technology have launched deep critiques of mid-twentieth-century design theory that contended that design should be interpreted in light of its combination of craftsmanship, utility, and intuition. Langdon Winner lay the groundwork for understanding how artifacts invariably have politics of all kinds built into them, from underpasses that do not allow public buses to pass through them to nuclear programs that demand centralized control and decision-making centers. (Winner, "Do Artifacts Have Politics?" in *The Whale and the Reactor: A Search for Limits in an Age of High Technology* [Chicago: University of Chicago Press, 1986], 19–39.) Scholars such as Adrian Forty have demonstrated that design is simply not just an aesthetic exercise but highly contingent on political economics. (Forty, *Objects of Desire: Design and Society since 1750* [New York: Thames and Hudson, 1992].) Ellen Lupton has illustrated that technologies such as telephones have delighted in their cultural suffusion with gender stereotypes—and that we ignore these object semiotics at our peril. (Lupton, *Mechanical Brides: Women and Machines from Home to Office* [New York: Cooper-Hewitt, National Museum of Design, Smithsonian Institution; Princeton: Princeton Architectural Press, 1993].) Furthermore, historians such as Joy Parr, Edward Tenner, and Ruth Schwartz Cowan have vividly examined the ways that technology can too easily "bite back" in the form of "more work for mother" and other unintended consequences. (Parr, *Domestic Goods: The Material, the Moral, and the Economic in the Postwar Years* [Toronto: University of Toronto Press, 1999]; Tenner, *Why Things Bite Back: Technology and the Revenge of Unintended Consequences* [New York: Knopf, 1996]; Schwartz Cowan, *More Work for Mother: The Ironies of Household Technology from the Open Hearth to the Microwave* [New York: Basic Books, 1983].) All of these commentators have worked to embed a notion now well accepted in STS that objects and communities are co-constituted; designed "things" unleashed in the world thereafter produce and shape future possible worlds and ways of imagining them. This observation leaves open the perennial question of unintended consequences: unintended by whom? Who notices structural inequalities such as gender or size, and who gets to materially encode these? How does this process work, and how can it be challenged?

29. The purpose of an "award of damages to a person injured by the negligence of another is to compensate the victim. . . . The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred." *McDougald v. Garber*, 73 N.Y. 2d 246, 253–54, 538 N.Y.S. 2d 937, 536 N.E. 2d 372, 374 (1989).

30. Mary Douglas has noted that the social comprehension and reaction to risk is based in "a fixed repertoire of possible causes among which a plausible explanation is chosen," rather than any truly objective risk calculus. (Douglas, *Risk and Blame: Essays in Cultural Theory* [New York: Routledge 1992], 5.) Douglas critiques the notion of objective risks and the search for them by experts in risk analysis, noting that "the risk perception analysts say practically nothing

about intersubjectivity, consensus making, or social influences on decisions" (12). Furthermore, she writes, "Resort to the law in itself engenders mistrust. We have to get used to these anxieties, this mathematics of probability intruding into our intimate concerns, this bogus objectivity, this coding of risks in our present culture. If anyone ever thought that the complex coding of taboos was more restrictive, the work of the modern safety officer should give them pause" (16).

31. The Canadian government, however, has recently legislated far more stringent warnings, which take up half of the packages with graphic images and information that are at once instructional and admonitory. The Canadian warning labels appeal to the rational consumer-chooser in a radically different way, assuming in fact that no rational chooser would decide to smoke and asserting a much greater stake in ensuring that people do not smoke. The government's warnings seem to meet the potential addictive behavior with the irrational elements of disgust and fear of the consequences. The Canadian government has had both a greater stake and a greater legitimacy in its involvement in debates about seatbelt and helmet use, product warnings, and informational campaigns because of its role in providing public health care. As lawyers are very aware, the decision to add warnings can be a very dicey thing, as they can also imply retroactive liability. This was the debate in the late 1960s with the issue of cigarette warnings. David Rempel, who advised on the warning that Compaq added to computer keyboards in the mid-1990s, said that for manufacturers this concern with retroactive liability was also at issue. Rempel, phone interview, May 6, 2004.

32. Or a social network will notice a social structure—law—that may enable him to benefit from this "injury."

33. Friends of mine recall that in the 1960s deaths resulting from drunk driving were perceived simply as accidental and no charges were filed.

34. This circulation and bundling of an object's meaning is a condition required for the biography of things approach of material culture studies. See, for example, Arjun Appadurai, "Introduction: Commodities and the Politics of Value," in *The Social Life of Things: Commodities in Cultural Perspective* (New York: Cambridge University Press, 1986), 3–63.

35. But furthermore, it is one through which so many of the actors are backboxed, or removed from the equation. What about the engineers and business administrators who made certain decisions? Their public accountability is made manifest only through the corporate stock prices, not through the consumers of their products with only few notable exceptions such as the civil rights boycotts of the 1960s or the boycott of Nestle products in the 1970s. How these interests play out is not at all self-evident.

36. For a direction toward a more subtle analysis of how object intentions might be said to translate linguistically, see Keane, "Semiotics and the Social Analysis of Material Things."

37. Francois Ewald, "Insurance and Risk," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 197–210, quote on p. 205.

38. Scarry, *The Body in Pain*, 301.

39. Eve Kosofsky Sedgwick, "Epidemics of the Will," in *Incorporations*, ed. J. Crary and S. Kwinter (New York: Zone Books, 1992) 582–95, quote on p. 594.

40. Another example through which behaviors and design came directly into conflict was in the 1960s when the notion of the negligent motor vehicle driver took on a very different valence. Until 1966, courts reasoned that since automobiles were not "intended" to crash, injuries that occurred as a result of the "second collision," the collision of occupants with interior knobs or other hard surfaces, were not the responsibility of manufacturers. Courts sided with the manufacturers in deciding that they were under no obligation to make cars "crashworthy." This changed radically with *Larsen v. General Motors*, when the court found that cars crash regularly and as a matter of course and therefore should be expected to be reasonably crashworthy. Though certainly *Larsen* has to be contextualized within a broader cultural shift that, at the highest political echelons, started to treat car deaths and injuries as a political issue, the case marks a key moment in the social model for a complete revision of how crash injuries would be understood by engineers, lawyers, and politicians who worked to have NHTSA instituted on the premise that automobiles were murderously unsafe. (*Larsen v. General Motors Corporation*, 391 F.2d 495; 1968 U.S. App. LEXIS 7766 Mar. 11, 1968.) The opinion stated:

> Automobiles are made for use on the roads and highways. . . . This intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts. . . . The manufacturer . . . can easily foresee . . . that [a car] will be involved in some type of injury-producing accident. Jeffrey O'Connell in his article "Taming the Automobile," *58 Nw.U.L.Rev. 299, 348 (1963)* cites that between one-fourth to two-thirds of all automobiles during their use at some time are involved in an accident producing injury or death. . . . We think the "intended use" construction urged by General Motors is much too narrow and unrealistic.

Compare this case to one decided only two years earlier: *Evans v. General Motors Corporation*, in which the "court held that a manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle "more" safe where the danger to be avoided is obvious to all. Defendant had a duty to test its frame only to ensure that it was reasonably fit for its intended purpose" (359 F.2d 822 [7th Cir. 1966]).

41. Quoted in Susan Buck-Morss, "Envisioning Capital: Political Economy on Display," *Critical Inquiry* 21, no. 2 (1995): 434–76, quote on p. 448. The division of labor in pin manufacture had already been well established by 1772, and the manual process was illustrated in Denis Diderot's *L'Encyclopedie*. See Henry Petroski, *The Evolution of Useful Things* (New York: Vintage Books, 1992), 53.

42. "With the wave of a hand, the victim of the division of labor becomes its beneficiary." Buck-Morss, "Envisioning Capital," 448–50.

43. Scarry, *The Body in Pain*, 263.

44. Thomas O. McGarity and Sidney A. Shapiro, *Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration* (Westport, CT: Praeger, 1993), 3. Current rates are between 4,650 and 12,000 per year, and nonfatal injuries are between two and eleven million per year, far above other in-

dustrialized nations. Underreportage rates are extremely high, ranging from 30 to 40 percent (4–6).

45. McGarity and Shapiro, *Workers at Risk*, 17.

46. Anthony F. Bale, "Compensation Crisis: The Value and Meaning of Work-Related Injuries and Illnesses in The United States, 1842–1932" (Ph.D. diss., Brandeis University, 1987), 103.

47. Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Philadelphia: Temple University Press, 1986), 43.

48. Bale, "Compensation Crisis." See also John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004).

49. About 87 percent of employees are currently covered by workers' compensation. Only railroad workers and seamen—whose unions have consistently preferred the higher damage awards (paid when negligence can be proven) available through tort law to the lower payments of workers' compensation—are universally excluded. Agricultural workers are covered by workers' compensation in twenty states. As poorer laborers and often as immigrants, they have less access to the tort law system and typically work with high-risk pesticides. Injuries caused by these pesticides are difficult to prove and often are not evident immediately.

50. In order to qualify for workers' compensation an employee "must have received (1) a personal injury (2) as the result of an accident (3) which arose out of and (4) in the course of employment." (Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials*, 5th ed. [Westbury, NY: Foundation Press, 1996], 723.) The "accident" requirement has been difficult for people with repetitive strain injuries to meet.

51. McGarity and Shapiro, *Workers at Risk*, 24. Workers' compensation systems do not have a built-in incentive, as safe employers are not given reduced rates on payments, which are standardized across vocation categories according to risk, ranging from 0.1 to 25 percent of payroll.

52. Benefits are paid according to established schedules and will cover medical expenses and some combination of temporary, partial, or permanent disability. Benefits are calculated from combinations of financial loss and physical impairment and amount to a capped percentage of wages. Franklin and Rabin, *Tort Law and Alternatives*, 726.

53. Robert L. Rabin, "The Quest for Fairness in Compensating Victims of September 11," *Cleveland State Law Review* 49 (2001): 573–89, quote on p. 580.

54. State-level work regulations began with the 1867 Department of Factory Inspection in Massachusetts, followed by the first workers' safety law in 1877. Since then, state regulatory programs have been notoriously inadequate. Charles Noble's research indicates that before 1970, state regulation programs were starved for resources, spending an average of 48 cents per nonagricultural worker on occupational health and safety regulation. Restricted by legal and administrative problems, agencies had little power to enforce regulations. In addition, there were vast differences among states, and even states with sound programs depended on voluntary compliance. Twenty-one states did not allow inspectors to shut down machinery in imminent danger situations; sixteen states had no criminal sanctions against deliberate violations of the law; and five states did not give inspectors the legal right to enter the premises without the permission of the employer. Most states relied on outdated standards. Noble, *Liberalism at Work*, 56–57.

55. Even the most conservative commentators recognize this. See Cass R. Sunstein, Reid Hastie, John W. Payne, David Schakade, and W. Kip Viscusi, *Punitive Damages: How Juries Decide* (Chicago: University of Chicago Press, 2002). For a full study, see Michael Rustad, "In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data," *Iowa Law Review* 78 (1992): 1.

56. G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1985), xx.

57. Thanks to Janet Halley for pointing out her theory of the "sandwich maker."

58. *MacPherson v. Buick Motor Co.*, Court of Appeals of New York, 217 N.Y. 382, 111 N.E. 1050 (1916).

59. *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

60. *Escola*, 24 Cal. 2d 453, 150 P2d 436.

61. *Escola*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440.

62. Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 27. C. Edward White argues that torts emerged from a diverse series of writs to answer for society's need for a generalized standard of care toward strangers. He argues, "Negligence provided that unity; it also provided a workable standard—a limiting principle—for the numerous inadvertent injuries involving strangers that had come to be a characteristic late 19th-century tort action." White, "The Intellectual Origins of Torts in America," *Yale Law Journal* 86, no. 671 (1977): 593.

63. Levi, *An Introduction to Legal Reasoning*, 10–27.

64. Ibid., 15, citing *Loop v. Litchfield*, 42 N.Y. 351, 359 (1870).

65. Jain, " 'Dangerous Instrumentality,' " xx.

66. Andrew L. Kaufman, *Cardozo* (Cambridge, MA: Harvard University Press, 1998), 279–80.

67. Ibid.

68. Susan Stewart, *Crimes of Writing* (New York: Oxford University Press, 1991), 21.

69. Jamie Cassels, "(In)equality and the Law of Tort: Gender, Race and the Assessment of Damages," *Advocates' Quarterly* 17 (1995): 158–98. See also Barbara Welke's painstaking and insightful analysis of the gender implications of streetcar alighting injuries in the early twentieth century in *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York: Cambridge University Press, 2001), and Leslie Bender, "Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities," *Duke Law Journal* (1990) 848–912.

70. White, *Tort Law in America*, 41.

71. Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997), 4.

72. Ewald, "Insurance and Risk," 202. See also Durkheim's discussion of suicide and statistics in *Suicide: A Study in Sociology*, trans. John A. Spaulding and George Simpson (New York: Free Press, 1997). See Jonathan Simon, "The Ideological Effects of Actuarial Practices," *Law and Society Review* 22, no. 4 (1988): 771–800.

73. Indeed, Elaine Scarry argues that the jury's role is to "take back" the injury.

74. For a legal realist take on types of jurisprudential logic, see, for example, John Dewey, "Logical Method and Law," *Cornell Law Quarterly*, 10 (1925): 17–27. Dewey also discusses the incongruity between logic and good sense.

75. Many of these cases are masterful at isolating causative events as well as simply disregarding certain facts that are irrelevant to the actual injury suffered: for example, where a trespasser dives into a pool and is injured by the rubber bottom, or a drunk person crashes and the seatbelt is faulty; trespassing and drunkenness are extra-legal matters in cases of strict liability.

76. Risk-benefit standards offer a definition of "defective" that is considerably different from that of strict liability (which serves more of an insurance role) or of consumer expectation (which bases built-in safety as a measure of what a reasonable consumer ought to be able to expect). In risk-benefit, the jury is asked to consider "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978).

77. See Scott S. Sagan, *The Limits of Safety: Organizations, Accidents and Nuclear Weapons* (Princeton: Princeton University Press, 1992).

78. Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970), 24. This book provides an overview and analysis of the key theories of accident law and their strengths and weaknesses rather than strongly arguing for any particular model. It is not my intention here to outline or discuss in any detail the pros and cons of the many theories and possible goals of the law.

79. Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (New York: Basic Books, 1993), 22.

80. Other commentators have addressed the "junk science" issue with more finesse and rigor. See particularly Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, MA: Harvard University Press, 1995).

81. I say "by its very structure" while acknowledging the theorists, such as Calabresi, who believe that accidents are inevitable because I think the structure and the Calabresian theory of cost-sharing are at odds. I am proposing with this book that the structure of the law, its case-by-case method, its way of training and selecting judges, and the power of the medical and other cultural institutions overshadow the cost-sharing possibilities.

82. The Bronco II case won an appeal to the California Court of Appeals. "The evidence supports the jury's conclusion that Ford willfully and consciously ignored the dangers to human life inherent in the 1978 Bronco as designed," appellate Judge Steven Vartabedian said. Punitive damages were calculated as "1.2 percent of Ford's net worth or nine days of profits at the time of trial." (Eric Freedman, "Punitive Damages Upheld in Rollover Suit," *Automotive News*, Sept. 9, 2002. See *Juan Ramon Romo v. Ford Motor Company*, 113 Cal. App. 4th 738; 6 Cal. Rptr. 3d 793; 2003 Cal. App. LEXIS 1736; 2003 Cal. Daily Op. Service 10150; 2003 Daily Journal DAR 12739.) The U.S. Supreme Court subsequently sent the case back to the California court claiming that the punitive damages should be of a single-digit multiple of the compensatory damages. (See *Ford Motor Company v. Juan Ramon Romo*, 538 U.S. 1028; 123 S. Ct. 2072; 155 L. Ed. 2d 1056; 2003 U.S. LEXIS 3680; 71 U.S.L.W. 3721; 2003 Daily Journal DAR 5278.) Vartabedian did reduce the punitive damage awards, but not before some recalcitrant working through of the philosophy and purpose of punitive damages. The opinions in this series of trials make for fascinating reading.

83. This factoring was the primary bone of contention in the Ford Pinto case when evidence was presented showing that Ford neglected to make simple design changes on the basis that the lives saved would not be worth it. The Pinto story "broke" in *Mother Jones* with a Pulitzer Prize–winning article in August 1977 by Mark Dowie titled "Pinto Madness." Dowie's prose is incendiary, but no more so than Ford's: "If we can't meet the standards when they are published, we will have to close down. And if we have to close down some production because we don't meet standards we're in for real trouble in this country" (31). The Pinto fires were also covered by *60 Minutes* and extensive newspaper reportage. See Francis T. Cullen, William J. Maakestad, and Gray Cavender, *Corporate Crime under Attack: The Ford Pinto Case and Beyond* (Cincinnati: Anderson, 1987).

84. *State Farm Mutual Automobile Insurance Company v. Inez Preece Campbell and Matthew C. Barneck*, 538 U.S. 408; 123 S. Ct. 1513, Dec. 11, 2002, Argued, Apr. 7, 2003, Decided. It would be difficult to fathom what "malice" might mean in terms of corporate behavior. *Cammack v. Ford Motor Co. and Max Mahaffy Ford Inc.*, June 1995, Harris, Texas, provides one example of an Explorer rollover in which jury damages were decreased because of lack of malice on Ford's part. The press widely covered the initial jury award (punitive) of $22.5 million, even though it was reduced immediately by the judge to four times the compensatory award of $2.5 million and eventually settled for under $4 million (how much under is proprietary knowledge) when Ford countersued, claiming that the parents of the deceased had no legal standing on which to sue. These and more details or rollover suits are accounted in Adam L. Penenberg, *Tragic Indifference: One Man's Battle with the Auto Industry over the Dangers of SUVs* (New York: HarperBusiness, 2003), 41–48.

85. If, as Robert Proctor argues, Americans are going to accept, first, that chemicals dumped into the environment (either as part of the production process or as a disposed of consumable) and, second, that food and consumer items are safe until proven otherwise, they also trade in futures. The company making money as a side effect of the chemical use will have more resources to "prove" that a chemical was and remains safe. Johns-Manville and RJR proved that asbestos and tobacco were safe for decades. (Proctor, *Cancer Wars: How Politics Shapes What We Know and Don't Know about Cancer* [New York: Basic

Books, 1995].) In a similar vein, Ulrich Beck examines in detail the multiple ways that risks in industrial economies have been consistently legitimized and unequally distributed as a latent side effect of other activities such that *everyone* can claim that no one either "saw or wanted their consequences." (Beck, *Risk Society: Towards a New Modernity*, trans. Mark Ritter [Newbury Park, CA: Sage, 1992].)

86. Steven Lee Myers, "Russians Become Litigious: Survivors of Theater Siege Sue," *New York Times*, Dec. 6, 2002.

87. Frank Bardacke, personal communication with the author, Mar. 3, 1999.

88. See the work of Robert C. Post, who writes on looks and discrimination. Robert C. Post, with K. Anthony Appiah, Judith Butler, Thomas C. Grey, and Reva Siegel, *Prejudicial Appearances: The Logic of American Antidiscrimination Law* (Durham: Duke University Press, 2001).

89. Cassels, "(In)equality and the Law of Tort."

90. While some theorists posit an insurance system or "cost-spreading" notion of the function of law, these ideals ultimately cannot connect with the structures of law that require plaintiffs to recoup their losses.

91. 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, and they use a variety of theories that vary from cost-benefit "tests" to theories based in insurance models. Reallocation, when these equations have caused "unjust" losses, 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 law requires the physical body to come to the table as a preceding artifact being reclaimed after having been unjustly altered. This reclamation presents 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.

92. Jonathan Parry writes that it was the "Christian world which developed the theory of pure utility, and that—as Mauss indicated—is perhaps no accident. Since the things of this world are seen as antithetical to the person's true self, his soul, an ethicised salvation relation is I think likely to encourage that separation of persons from things which is an ideological precondition of market exchange." Parry, "The Gift, the Indian Gift, and the 'Indian Gift,' " *Man* 21 (Sept. 1986): 453–73, quote on p. 468.

93. Ivan Illich, *Energy and Equity* (New York, Harper and Row, 1974).

94. One standard anecdote is that as a nation gets richer, its population gets fatter. However, it is certainly worth noting that highly educated populations have only "half the level of obesity of those with a lower education." (Craig Lambert, "The Way We Eat Now," *Harvard Magazine* [May/June 2004]: 49–58 [quote on p. 51].) Furthermore, while about 60 percent of the general population is overweight, low-income African American groups have a rate closer to 80 percent.

95. Celeste Langan "Mobility Disability," *Public Culture* 13, no. 3 (2001): 459–83, quote on p. 468.

96. Airbags provide an excellent way to see how bodies are built into both social and technological systems. The airbag poses the classic example of a product that was calculated to fit men of average height and weight without seatbelts on. Airbags are designed to "deploy in front of an average adult male's chest." They are designed not to save the largest percentage of drivers but the largest percentage of male drivers. (Associated Press, "Small Women Vulnerable to Air Bags, Data Show," *Star Tribune* [Minneapolis- St. Paul], Oct. 26, 1996, 11A.) Though overall credited with saving lives, inflating at 200 miles per hour from a little cubbyhole in the steering wheel, airbags also cause a number of injuries, including severe cuts caused by the plastic cover flying off the steering wheel, the amputation of hands and arms caught in the way of the inflating bag, broken bones, tearing of heart and internal organs, and fatal head injuries. (Keith Harper, "Car Air Bag Design Could Be Fatal to Children, Tests Show," *The Guardian*, Feb. 17, 1997, 5.) Consequently, as a correlate of height, 42 percent of women compared to 24 percent of men received facial injury from the airbags. While 50 percent of drivers under 5'5" received facial injury, only 18 percent of drivers 5'11" and over did. (Associated Press, "Two-thirds in Air Bag Study Suffered Injury," *Buffalo News*, Apr. 1, 1997, A5.) The "shortness-bias" is also built into seatbelt designs. Because of body size differences that tend to fall along gendered lines and the one-size-fits all attitude of the Big Three manufacturers, airbags were, post-market, found to be excessively dangerous to smaller women. (For an explanation of attempts and failures to set regulations that would locate automotive controls within reach of smaller people, see Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* [Cambridge, MA: Harvard University Press, 1990], 75–76.) This disconnect between mass production of the same design and mass consumption of consumers with different kinds of bodies is not atypical; indeed, it is absolutely predictable. How are we to describe these injuries? (See Andrew M. Pope and Alvin R. Tarlov, *Disability in America: Toward a National Agenda for Prevention* [Washington, DC: National Academy Press, 1991] for an overview of the scope of disability in the United States, and Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* [New York: Routledge, 1996], for a thoughtful discussion on setting disability "standards," and of definitional problems in general.)

97. Thomas Koenig and Michael Rustad, "His and Her Tort Reform: Gender Injustice in Disguise," *Washington Law Review* 70 (1995): 1–89. This article reports that in early tort law, injured women did not receive compensation for harms they suffered; compensation was awarded for "damaged goods" to the man who was perceived to own the woman. Eleanor D. Kinney et al., "Indiana's Medical Malpractice Act: Results of a Three-Year Study," *Indiana Law Review* 24 (1991): 1275–1428. demonstrates that women are less likely to be able to show that their bodies are as valuable as men's bodies.

98. As I argue in detail elsewhere, the automobile comes with a complex semiotic organization of social difference, space, and community. I here call it

double-injury to vastly oversimplify. See my *Commodity Violence* (Durham: Duke University Press, forthcoming).

99. "More than 60% of citizen-respondents in our surveys and experiments exhibited a zero-risk mentality by endorsing the statement 'If everyone tries as hard as they can, the risk of environmental damage from industrial accidents like train derailments, oil spills, and toxic waste problems can be reduced to zero.' " Sunstein et al., *Punitive Damages*, 230.

100. Grey had had returned the car to the dealer a number of times since the vehicle's purchase. It's problems included "excessive gas and oil consumption, down shifting of the automatic transmission, lack of power, and occasional stalling." *Grimshaw v. Ford Motor Co.* App., 174 Cal.Rptr. 348, 359, May 29, 1981.

101. *Grimshaw*, 174 Cal.Rptr. at 358.

102. Ford did not issue a "voluntary" recall until May 1978 under threat of NHTSA action.

103. Schwartz, "The Myth of the Ford Pinto Case," 1020.

104. The plaintiff presented the expert evidence of a former engineering executive who had been terminated from Ford on the basis of his interest in safety, as well as the cost of an alternative design ($4–8/car). He testified that Ford had "decided to defer corrective measures to save money and enhance profits" (*Grimshaw*, 174 Cal.Rptr. at 351). The plaintiff also produced a motion picture and a report of crash tests showing the faulty design of the fuel tank. Dowie notes that even this document underestimated the likely number of burn injuries, which were listed as equal in number to burn deaths. This has no statistical value, as burn injuries are much more prevalent that burn deaths. In addition, Dowie reports that one of the delay tactics Ford used on NHTSA was to try to diminish the importance of burn deaths in autos. In its further research, NHTSA found, on the contrary, that "40,000 cars were burning up every year, burning more than 3,000 people to death. . . . Forty per cent of all fire department calls in the 1960s were to vehicle fires—a public cost of $350 million a year, a figure that, incidentally, never shows up in cost-benefit analyses" ("Pinto Madness," 30). Not until 1977 did NHTSA impose a rear-end collision standard on fuel leakage.

105. Gary T. Schwartz, "The Myth of the Ford Pinto Case," *Rutgers Law Review* 43 (Summer 1991), 1033.

106. Ibid., 1025.

107. Ibid., 1040.

108. Ibid., 1060.

109. Marcia Angell expresses some outrage at the way that the FDA handled the breast implant recall, claiming that it behaved as a political rather than a regulatory agency. (Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case* [New York: W.W. Norton, 1996], especially 50–68.) However, regulation (and its lack) in the United States has always been a highly political issue. For one example, whose title can only be seen as tongue-in-cheek, see Philip J. Hilts, *Protecting America's Health: The FDA, Business, and One Hundred Years of Regulation* (New York: Knopf, 2003). He traces the history of the FDA, precisely as a political body.

110. Mashaw and Harfst, *The Struggle for Auto Safety*, 233.

111. Studies have consistently shown that improved energy efficiency will have major benefits in terms of thousands of dollars saved in fuel over the life of the car. This seems like a straightforward cost-benefit calculation but again, whose costs? Whose benefit?

112. The court found that the fact "that defendant manufacturer fired [a] high ranking engineering executive for advocating automotive safety was indicative of the industrial management's attitude towards safety in automobile production and was thus relevant to the issue of malice in this products liability suit since it has tendency . . . to prove that manufacturer's failure to correct automobile's fuel system design defects, despite knowledge of their existence, was deliberate and calculated." The finding of malice was key in the issuance of punitive damages. (*Grimshaw v. Ford Motor Co.*, App., 174 Cal.Rptr. 348, at 350, May 29, 1981.)

113. After six months of offering seatbelts, Ford caved to pressure by General Motors and stopped offering them for fear that they would focus attention on design and that cars would have to meet federal safety standards "as trains, ships and aircraft have been required to do for decades." (Ralph Nader, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* [New York: Pocket Books, 1966], 88.) Consumers Union recommended seatbelts, but found that of 39 brands tested, 26 failed. (Norman Isaac Silber, *Test and Protest: The Influence of the Consumers Union* [New York: Holmes and Meier, 1983], 91.) The National Safety Council's attitude toward seatbelts was noted in an article by its president. (Howard Pyle, "Automobile Seat Belts: What They Can Mean for Safety," *State Government* 35 (winter 1962): 24–29.) Advocating lap belts, Pyle notes that 80 percent of Swedish drivers use a lap and shoulder belt: "We encourage motorists to choose what is best for themselves, and emphasize always that the seat belt is no substitute for good driving" (26), and "We at the National Safety Council believe that everyone working toward the same end will achieve the same results as accomplished in Sweden through more voluntary actions" (28). While some manufacturers added anchors so that buyers could purchase and install belts, the fact was that they were extremely difficult to install and, furthermore, associated with dangerous driving. The CBS documentary *The Great Holiday Massacre* (aired Dec. 26, 1960) shows the difficulty of installation and societal perspective on the belts. One gentleman I interviewed told me that in the early 1960s his girlfriend's parents treated him with suspicion when they found out he had installed seatbelts, which indicates the level to which people believed in behaviors over design at that time. For an excellent overview of auto safety debates, see Joel W. Eastman, *Styling vs. Safety: The American Automobile Industry and the Development of Automotive Safety, 1900–1966* (Lanham, NY: University Press of America, 1984).

114. *Food and Drug Administration, et al. v. Brown and Williamson Tobacco Corporation, et al.*, No. 98–1152 Supreme Court of the United States, 529 U.S. 120; 120 S. Ct. 1291; 146 L. Ed. 2d 121; 2000 U.S. LEXIS 2195; 68 U.S.L.W. 4194; 2000 Cal. Daily Op. Service 2215; 2000 Daily Journal DAR 2987; 2000 Colo. J. C.A.R. 1435; 13 Fla. L. Weekly Fed. S 161 Dec. 1, 1999, Argued, March 21, 2000, Decided.

115. The majority wrote: "[T]he court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy

decision of such economic and political magnitude to an administrative agency." On cigarettes being too dangerous to be regulated, the majority wrote: "Various provisions in the [Food, Drug, and Cosmetic] Act require the agency to determine that, at least for some consumers, the product's therapeutic benefits outweigh the risks of illness and serious injury. This the FDA cannot do, because tobacco products are unsafe for obtaining any therapeutic benefit." Thus, the agency would have to ban cigarettes, which the majority found inconceivable. On the other hand, the dissent argues that regulation, rather than an outright ban, would be possible. See Richard Klugar, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* (New York: Vintage, 1993), for an account of the ways in which the industry has lobbied to exclude itself from all regulatory agencies.

116. A provision in the United States Code put it this way: "[T]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying interests which directly affect interstate and foreign commerce at every point, and stable conditions are necessary, therefore, to the general welfare." *FDA et al.*, US LEXIS 2195 (2002).

117. For more on the FDA's collection of information to build their case, see David Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (New York: Public Affairs, 2000).

118. Significantly, states only moved into litigation after tobacco injury had become a legible issue. Shifts in government interests resulted in a similar issue with the Firestone/Ford debacle. Plaintiffs' lawyers did not file reports of injury with NHTSA, since the agency had been so lax in setting regulations in their past analysis of Blazer rollovers. Thus, attorneys feared that if an investigation was launched and closed without regulatory action, preemption would not allow their plaintiffs to make claims successfully. Keith Bradsher, *High and mighty: SUVs—The World's Most Dangerous Vehicles and How They Got That Way* (New York: Public Affairs, 2002). See also *Geier v. Honda Motor Company*, 529 U.S. 861; 120 S.Ct. 1913; 146 L.Ed 2d 914, 2000 LEXIS 3425, where the U.S. Supreme Court ruled that federal regulations on airbags preempt civil recovery.

119. Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (Berkeley: University of California Press, 2002), 79.

120. Structurally, the paradox I am outlining here has tended to resolve on the side of economic health for several key reasons. In brief: (1) the privatization of health care that marks its success not by public health but by profit; (2) the way that accidents churn money into the economy; (3) the ability of corporations to lobby government officials; (4) the contradictory mandates of several key governmental organizations, which are supposed to encourage both public health and private industrial development; (5) laws about corporations that understand them to be "persons," rather than complex organizations; (6) a separation of moral and economic logics; and, as I suggested above, (7) the very rudimentary understandings of how injury costs work and are spread.

121. U.S. General Accounting Office, 1998, cited in Eric French and Kirti Kamboj, "Analyzing the Relationship between Health Insurance, Health Costs, and Heath Care Utilization" (Chicago: Federal Reserve Bank, Third Quarter, 2002, Economic Perspectives), *http://www.chicagofed.org/publications/economicperspectives/2002/3qepart4.pdf*, 60. Another study found that "In 2003, premiums for job-based health benefits rose by 13.9%. This is the third consecutive year of double-digit premium increases, and a higher rate of growth than any year since 1990. Premium increases in 2003 exceeded the overall rate of inflation by nearly 12 percentage points." Kaiser Family Foundation, *Employer Health Benefits 2003 Annual Survey*, The Kaiser Family Foundation and Health Research and Educational Trust, information provided by the *Health Care Marketplace Program*, publication number 3369 (Menlo Park, CA: Kaiser Family Foundation, 2003), 1–152, quote on p. 18.

122. "National Health Expenditures, 2003, "Virginia Centers for Medicare and Medicaids Services (CMS)," *http://www.cms.hhs.gov/statistics/nhe/historical/highlights.asp*. This marks an increase of 9.3 percent from 2001–5.7 percent faster than the overall economy "as measured by growth of the gross domestic product." The article further reports that the "healthcare share of the GDP increased from 14.1% in 2001 to 14.9% in 2002." This includes private insurance, out-of-pocket, Medicaid, and government health spending (workers, veterans, public health, schoolchildren). Health care expenditures have nearly doubled since 1992, as reported in the Kaiser Family Foundation, *Trends and Indicators in the Changing Health Care Marketplace, 2004*, update, Health Care Marketplace Project, publication number 7031 (Menlo Park, CA: Kaiser Family Foundation, 2004).

Medicare costs are not dissimilar, having reached $5,400 per beneficiary in 1996. David Cutler, "What Does Medicare Spending Buy Us?" in *Medicare Reform: Issues and Answers*, ed. Andrew J. Rettenmaier and Thomas R. Saving (Chicago: University of Chicago Press, 1999), 131–52, quote on p. 135.

123. Uwe E. Reinhardt, Peter S. Hussy, and Gerard F. Anderson, "U.S. Health Care Spending in an International Context: Why Is U.S. Spending So High, and Can We Afford It?" *Health Affairs* 23, no. 3 (2004): 10–25, quote on p. 14.

124. Robert J. Mills and Shailesh Bhandari, "Health Insurance Coverage in the United States: 2002," U.S. Census Bureau, September 2003, 1, *http://www.census.gov/prod/2003pubs/p60–223.pdf*. Reinhardt, Hussy, and Anderson, "U.S. Health Care," give the following comparison for total health spending per capita for 2001: United States, $4,887; Canada, $2,792; Switzerland $3,322; Germany $2,808; Australia, $2,513.

125. This difference in medical systems is reflected in national behaviors. Wendy Waters has found that Canadians were much more likely to wear seatbelts than Americans were, largely because they understood health and safety as communal concerns. Wendy Waters, Michael Macnabb, and Betty Brown, "A Half Century of Attempts to Re-Solve Vehicle Occupant Safety: Understanding Seatbelt and Airbag Technology," Insurance Corporation of British Columbia, Canada, Paper No. 98–56-W-24, Jan. 2003, *http://www.nhtsa.dot.gov/esv/16/98S6W24.pdf*.

126. To give an example, the current premiums for the Alberta Health Care Insurance Plan (public) are $44 per month for single coverage and $88 per month ($1,056/year) for family coverage. Subsidized rates are charged to qualifying low-income earners. For more on the debates in Canada over public and

private health care, see Kevin Taft and Gillian Steward, *Clear Answers: The Economics and Politics of For-Profit Medicine* (Edmonton: Duval House, 2000).

127. In the United States, studies have demonstrated that for-profit hospitals are more expensive than not-for-profit ones in every category of service, echoing on a local level this comparison between the American and Canadian health care systems. Elaine M. Silverman, M.D., M.P.H., Jonathan S. Skinner, Ph.D., and Elliott S. Fisher, M.D., M.P.H., "The Association between For-Profit Hospital Ownership and Increased Medicare Spending," *New England Journal of Medicine* 341, no. 6 (Aug. 5, 1999): 420–26.

128. In the United States, administration costs $1,059 per person, compared to $307 per capita in Canada, which translates in the United States to 31 percent of health care expenditures compared to 16.7 percent in Canada. Steffie Woolhandler, M.D., M.P.H., Terry Campbell, M.H.A., and David U. Himmelstein, M.D., "Costs of Health Care Administration in the United States and Canada," *New England Journal of Medicine* 349, no. 8 (Aug. 21, 2003): 768–75, *http://content.nejm.org/cgi/content/full/349/8/768*: "In 1999 U.S. private insurers retained $46.9 billion of the $401.2 billion they collected in premiums. Their average overhead (11.7 percent) exceeded that of Medicare (3.6 percent) and Medicaid (6.8 percent). Overall, public and private insurance overhead totaled $72.0 billion—5.9 percent of the total health care expenditures in the United States, or $259 per capita. The overhead costs of Canada's provincial insurance plans totaled $311 million (1.3 percent) of the $23.5 billion they spent for physicians and hospital services. An additional $17 million was spent to administer federal government health plans. The overhead of Canadian private insurers averaged 13.2 percent of the $8.4 billion spent for private coverage. Overall, insurance overhead accounted for 1.9 percent of Canadian health care spending, or $47 per capita."

129. "A recent price comparison of a U.S. Internet pharmacy with a Canadian Internet pharmacy, for example, found that the price of 60 capsules of 100-mg celecoxib is $92 in the United States and $54 in Canada; the price of fluticasone propionate nasal spray is $60 versus $40; 90 tablets of 20-mg atorvastatin is about $276 versus $205, and 180 tablets of 10-mg generic tamoxifen is about $140 versus $45 (in U.S. dollars based on an exchange rate of $1.34)." (Jennifer Fisher Wilson, "Cheaper Drugs in Foreign Markets Increase the Focus on Domestic Drug Prices," *Annals of Internal Medicine* 140, no. 8 [Apr. 20, 2004]: 677–80, quote on p. 677.) Furthermore, "In a recent report comparing prices in 8 countries relative to the United States, Danzon determined that Japan paid more for prescription drugs than U.S. consumers, while the other countries—Canada, Chile, France, Germany, Italy, Mexico, and the United Kingdom—paid 6% to 33% less." This is corroborated in study after study. For example, "a 30-day supply of clozapine (Clozaril, Novartis), costs $51.94 in Spain, $294.93 in the UK, $271.08 in Canada, and $317.03 in the USA. The newest antipsychotic, olanzapine (Zyprexa, Eli Lilly), costs $76.87 in Spain and $324.08 in the USA. If prices for clozapine and Lilly's fluoxetine (Prozac) were reduced to the average European price, US purchasers would save $1.1 billion, said HRG." (Alicia Ault, "Call for Tightening of U.S. Drug Price Controls," *Lancet* 352, no. 9124 [July 25, 1998], 299).

130. Bureau of Labor Statistics, Current Employment Statistics Survey, 2002.

131. Jonathan Oberlander, *The Political Life of Medicare* (Chicago: University of Chicago Press, 2003).

132. When my child was in the hospital for four months and I watched my paychecks evaporate, I checked the Stanford Web site for ways to "lower my medical expenses." The benefits page suggested exercising more, eating better, and some other unfathomably ridiculous things. Around that time Stanford faculty and staff also received an email from the dean explaining the rising costs of medical care as a result of the increase in technological progress. These rhetorics about personal responsibility (exercise) and technology (progress) completely miss the way in which expenses grow in corporate-based medical insurance.

133. For the latter estimate, see Elizabeth Warren, Teresa A. Sullivan, and Melissa B. Jacoby, "Medical Problems and Bankruptcy Filings" (April 2000), *Norton's Bankruptcy Adviser*, May 2000, *http://ssrn.com/abstract=224581*. See also Elizabeth Warren, Teresa A. Sullivan, and Melissa B. Jacoby, Harvard Law School Public Law working paper, No. 8, and University of Texas Law, Public Law Research Paper No. 9. This article furthermore notes that "households without a male present were nearly twice as likely to file for bankruptcy giving a medical reason or identifying a substantial medical debt as households with a male present." And, "[o]f debtors 65 or older, 47.6% listed a medical reason, as compared with 7.5% of debtors under 25."

134. National Economic Accounts, Bureau of Economic Analysis, Department of Commerce, *http://www.bea.doc.gov/bea/dn2/gpoc.htm#1994–2001*. Reflecting consumer spending in 2003, "Medical Care" is the largest category of services.

135. National Highway Traffic Safety Administration, "The Economic Impact of Motor Vehicle Crashes 2000" (U.S. Department of Transportation, DOT HS 809 446, May 2002), also reported in "Cost of Crashes Has Increased Dramatically, NHTSA Reports," *Insurance Institute for Highway Safety Status Report* 37, no. 7 (Aug. 17, 2002): 6. It is not clear in the article how far these statistics go in including costs.

136. In 1999, pharmaceutical companies spent $1.8 billion on direct-to-consumer advertising. Andrew Ellner, "Rethinking Prescribing in the United States,"*http://bmj.bmjjournals.com/cgi/content/full/327/7428/1397?eaf*.

137. Marcia Angell, "The Pharmaceutical Industry—To Whom Is It Accountable?" *New England Journal of Medicine* 342 (2000): 1902–4. Indeed, it is very difficult to ascertain spending patterns on advertising and research. Kurt Brekke and Michael Kuhn write that "the pharmaceutical industry is one of the most advertising-intensive industries" (1). They cite Schweitzer, saying "the marketing expenses for three of the largest US pharmaceutical companies—Merck, Pfizer, and Eli Lilly—ranged from 21 to 40% of annual sales, while the R&D expenses varied between 11 and 15%. Similar figures are reported from Novartis and Aventis, the largest pharmaceutical companies in Europe" (1). (Brekke and Kuhn, "Direct-to-Consumer Advertising in Pharmaceutical Markets," working paper 9, 2003 [Program in Health Economics, Department of Economics, University of Bergen], 1–23. See also S. O. Schweitzer, *Pharmaceuti-*

cal Economics and Policy [New York: Oxford University Press, 1997].) On the other hand, the Pharmaceutical Research and Manufacturers Association (PhRMA) states in their 2004 annual report that member companies spent $2.5 billion on research and development in fiscal year 2003, while $13.9 billion was spent on promotion of pharmaceuticals to doctors and consumers during the same period. (PhRMA, May 23, 2001; *http://www.phrma.org/mediaroom/press/releases/23.05.2001.225.cfm.*) PhRMA member institutions include among them such "big pharma" companies as AstraZeneca, Bayer, Biogen Idec, Bristol-Myers Squibb, GlaxoSmithKline, Hoffman LaRoche, Johnson & Johnson, Ortho, Eli Lilly, Merck & Co., Novartis, Pfizer, Schering-Plough, and Wyeth Pharmaceuticals.

PhRMA's reports on industry spending have been roundly criticized. A report by the American Medical Student Association ("Issue Forum on the Pharmaceutical Industry") sums up these critiques as follows:

> In 2000, an analysis of 11 Fortune 500 pharmaceutical companies showed that 30% of their revenues went to marketing while only 12% went to research and development. Promotional spending on prescription drugs rose from $9 billion in 1996 to $15.7 billion in 2000 . Of that $15.7 billion, 26% or $4 billion was spent on detailing to doctors. Promotion to health care professionals accounts for 80% of pharmaceutical marketing expenses. It increased from $8.4 billion to $13.2 billion between 1996 and 2000. (*http://www.amsa.org/hp/COCForum_Pharm.doc*)

138. Nader, *Unsafe at Any Speed*, vi. See also William Haddon Jr., Edward A. Suchman, David Klein, *Accident Research: Methods and Approaches* (New York: Harper and Row, 1964), who note that medical research is funded at 300 times the amount of accident prevention (4). They trace this to a folklore of accidents that says they just happen, and also that prevention is a threat to industry since it implies responsibility. Furthermore, they write that "health and safety has become one of the basic needs in modern life."

139. Proctor, *Cancer Wars*, 266–67.

140. Peter S. Green, "Czechs Debate Benefits of Smokers' Dying Prematurely," *New York Times*, July 21, 2001, Sect. C, p. 2.

141. For an insightful analysis of the historical purification of economic passions, see Sylvia Junko Yanagisako, *Producing Culture and Capital: Family Firms in Italy* (Princeton: Princeton University Press, 2002).

142. See Bell and O'Connell, *Accidental Justice*, for an outline of how quickly even a wealthy family can become destitute after the serious injury of a breadwinner—and how this desperation leads even initially disinclined people to find a deep pocket and sue.

143. Scarry, *Bodies in Pain*, 20.

144. Ibid., 122–23.

145. Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (Berkeley: University of California Press, 2002), 4.

146. The endless desire on the part of producers to create new niche markets has recently introduced the market of girl "tweens." I recently attended a talk by a corporate anthropologist (Intel, Feb. 2002) in which the vulnerabilities of this group were carefully analyzed to understand how they might more efficaciously be targeted as a market. One notes here first the injurious intent of using people's vulnerabilities for the sole purpose of making money (using a potential vulnerability to advertise in such a way as to capitalize on that vulnerability such that the person will purchase products that make her think she is assuaging that vulnerability), and in doing so, in this case, invariably leading to further injury in a sort of prosthetic circularity. But second, what it is about the culture of U.S. capitalism that makes good—or at least normal, social beings—people do this kind of work, and that makes this kind of work so highly remunerative? Like the cigarette industry representative I sat beside on a flight from San Francisco to Toronto who simultaneously claimed that he did not want his teenage daughter to smoke and obsessively talked about the massive sushi bill that he and his colleagues had racked up the previous evening. Corporate branding has somehow been able to interpellate white-collar workers into aligning their identities with the corporation, even as citizens hold conflicting demands of parent and worker. Part of the way this can happen is through the remuneration gained through this kind of work: the anthropologist and the tobacco executive knowingly promote injurious products that they do not want for their own "tweens," but in doing the work they are able to provide private educations, health care, and other goods to their families.

147. Paco Underhill, *Why We Buy: The Science of Shopping* (New York: Touchstone Books, 2000).

148. Ralph Nader analyzes the nag factor as one facet of the "corporatization" of kids that is intended to prepare them for a life of brand consumption. Ralph Nader, Alternative Radio, "Corporate Power: Profits before People," lecture and interview, September 1, 1994, #RNAD3b.

149. In 2001 corporations spent over $230 billion in advertising. (McCann-Erickson U.S. Advertising Volume Reports and Bob Coen's Insider's Report for December 2001 [*web.archive.org/web/20011202101952/http://www.mccann.com/insight/bobcoen.html*].) The 2000 census reported 105 million households in the United States. (U.S. Census Report, Sept. 2001, Households and Families: 2000.)

150. Cheryl Idell, Lucy Hughes, and Dick Huston, "MarketResearch C'mon, Mom! Kids Nag Parents to Chuck E. Cheese's, Selling to Kids," May 12, 1999 (c) Phillips Publishing International, Inc., *http://www.findarticles.com/p/articles/mi_m0FVE/is_9_4/ai_54631243.*

151. For $3,325, reduced from $3,500, one can have instant online delivery of *The U.S. Kids Market*, 6th ed. (2004), which analyzes the consumer behavior of kids aged 3–12 and their parents. Available at *http://www.packagedfacts.com/pub/928713.html.*

152. J. DiFranza and T. McAfee, "The Tobacco Institute: Helping Youth Say 'Yes' to Tobacco," *Journal of Family Practice* 34, no. 6 (1992), *http://www.findarticles.com/p/articles/mi_m0689/is_n6_v34/ai_12348520.*

153. L. Bird, "Joe Smooth for President," *Adweek's Marketing Week*, May 20, 1991.

154. Paul M. Fischer, Meyer P. Schwartz, John W. Richards Jr., Adam O. Goldstein, and Tina H. Rojas, "Brand Logo Recognition by Children Aged Three to Six Years," *Journal of the American Medical Association* 266, no. 22 (1991): 3145–48. At the beginning of the campaign, the brand had less than 1 percent of the under age eighteen market. Within three years, it had a one-third share of the youth market—and nearly one-half billion dollars in annual sales. Joseph R DiFranza, John W. Richards, Paul M. Paulman, Nancy Wolf-Gillespie, Christopher Fletcher, Robert D. Jaffe, and David Murray, "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children," *Journal of the American Medical Association* 266 (1991): 3154–58; Karen Lewis, "Addicting the Young: Tobacco Pushers and Kids," *Multinational Monitor* 44, no. 1–2, Jan./Feb. 1992, *http://www.multinationalmoniter.org/hyper/issues/1992/01/mm0192_07.html*.

155. "In 2000, the most common actual causes of death in the United States were tobacco (435,000) and poor diet and physical inactivity (400,000)." Alcohol consumption came in third, with an estimated 85,000 deaths. Center for Disease Control, "Fact Sheet: Actual Causes of Death in the United States, 2000," *http://www.cdc.gov/nccdphp/publications/actual_causes.htm*.

156. James McNeal and Chyon-Hwa Yeh, "Born to Shop," *American Demographics*, June 1993, pp. 34–39.

157. For older children, one might mention toy guns, violent computer games, sexualized girls' underwear, and Barbie dolls—all products that arguably contain violent and injurious underbellies in the ways that they create and normalize gender identities.

158. *Pelman*, 237 F. Supp. 2d at 534–37.

159. Carol Sanger, "Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space," *University of Pennsylvania Law Review* 144, no. 2 (Dec. 1995): 705–56, quote on p. 712.

160. For a more detailed analysis of automobility and identity, see Sarah Jain, "Violent Submission," in *Cultural Critique*, forthcoming.

161. Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003).

162. Ibid., 141.

163. Ibid., 146.

164. Social activist groups such as anti-fur organizations have at times successfully repartnered violent means of production to the act of consumption. In other ways, violence may become part of the "fetish" quality products. I analyze this in *Commodity Violence*.

165. Cohen has a fascinating discussion of recent notions of citizenship and identity politics—notions that both Democrats and Republicans have been able to use in their advertising, whereas in the 2000 election Nader depended on a notion of citizenship represented by his flagship organization Public Citizen. (See Cohen, *Consumers' Republic*, chapter 8, pp. 345–98.)

166. Excellent reviews of the history of the consumer's movement are provided by Cohen, *A Consumer's Republic*, and Silber, *Test and Protest*.

167. Cited in Greg Critser, *Fat Land: How Americans Became the Fattest People in the World* (Boston: Houghton Mifflin, 2003), 3.

168. Adriana Petryna, *Life Exposed: Biological Citizens after Chernobyl* (Princeton: Princeton University Press, 2002), 14–15. See also Jake Kosek, *Understories: The Political Life of Forests in Northern New Mexico* (Durham: Duke University Press, 2006).

169. Lauren Berlant, "The Subject of True Feeling: Pain, Privacy, and Politics," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 105–33, quote on pp. 107–8.

170. Duncan Kennedy argues this point in "The Critique of Rights in Critical Legal Studies," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 178–228.

171. Anthropologist Aiwa Ong has rewritten the notion of citizenship from a completely different angle to mean, rather than a particular identification with a nation-state, "the cultural logics of capitalist accumulation, travel, and displacement that induce subjects to respond fluidly and opportunistically to changing political-economic conditions." Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham: Duke University Press, 1999), 6.

172. Berlant, "The Subject of True Feeling," 108.

173. Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995). Brown, *States of Injury*, 27.

174. See James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

175. Therefore we might valuably think about injury as a boundary object, how it carries stakes for various parties reflected through the ways that it is represented. Adele Clarke and Theresa Montini use this approach in their study of RU486; see "The Many Faces of RU486: Tales of Situated Knowledges and Technological Contestations," *Science, Technology, & Human Values* 18, no. 1 (winter 1993): 42–78.

176. Koenig and Rustad, "His and Her Tort Reform."

177. "The Fund provides an alternative to the significant risk, expense, and delay inherent in civil litigation by offering victims and their families an opportunity to receive swift, inexpensive, and predictable resolution of claims. The Fund provides an unprecedented level of federal financial assistance for surviving victims and the families of deceased victims." September 11th Victim Compensation Fund of 2001, Lexsee 67 FR 11233, Federal Register, vol. 67, no. 49, Rules and Regulations, Department of Justice, Office of the Attorney General, 28 CFR Part 104 (CIV 104F; AG Order No. 2564–2002), RIN 1105-AA79. See also Elizabeth Kolbert, "The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives," *The New Yorker*, Nov. 25, 2002.

178. Sheila Jasanoff has traced the changes in court systems in dealing with these new mass class action suits in "Science and the Statistical Victim: Modernizing Knowledge in Breast Implant Litigation," *Social Studies of Science* 32, no. 1 (Feb. 2002): 37–69, quote on p. 42.

179. What if the *New York Times* published car accident deaths on its back page each day, as it did with the deaths resulting from the attacks on the World Trade Center? We would see, as we did then, images of good people (over 100 each day) and the testimony of those who loved them. The contradictory

mandates among state interests in consumption, injury, and protection are a total social fact in the state and corporate management of injury.

180. And in each of these cases, the moral judgments on injury seem to differ. Consider Wendy Brown's observations of neo-liberalism in this light:

> In making the individual fully responsible for her/himself, neo-liberalism equates moral responsibility with rational action; it relieves the discrepancy between economic and moral behaviors by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences. In so doing, it also carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action, e.g., lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits. . . . The model neo-liberal citizen is one who strategizes for her/himself among various social, political and economic options, not one who strives with others to alter or organize these options."

(Brown, "Neo-liberalism and the End of Liberal Democracy," *theory and event* 7, no. 1 [2003], article available at *http://muse.jhu.edu/journals/theory_and_event/*.

181. The Personal Responsibility in Food Consumption Act is referred to in the vernacular as the "cheeseburger bill." It is described as a "bill to prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements." Lexsee 108 H.R. 339: "To prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity." At the time of this writing the bill had passed the House but not the Senate.

182. Marilyn Strathern, "Losing (out on) Intellectual Resources," in *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy (New York: Cambridge University Press, 2004), 201–33, quote on p. 221, citing M. Minnegal and P. Dwyer, "Women, Pigs, God, and Evolution: Social and Economic Change among Kubo People of Papua New Guinea," *Oceania* 68, no. 47 (1997): 47–60 (emphasis original).

183. Strathern, "Losing (out on) Intellectual Resources," 201–33, quote on pp. 221–22.

184. Michel Callon, "An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology," in *The Laws of Markets*, ed. Michel Callon (New York: Blackwell, 1999), 255.

185. Mitchell, *Rule of Experts*, 292.

186. The file on the short-handled hoe at the CRLA in Salinas includes all of the transcriptions of the Division of Industrial Safety's hearings on the hoe, newspaper clippings, the studies and correspondence related to the studies done on the use of the hoe across the United States, letters that were written to the CRLA in support of its work, petitions and briefs written by the CRLA attorneys, and the notes of attorneys who worked on the case. When specific documents are not directly cited, future notes will cite this file. See also Maurice Jourdane, *The Struggle for the Health and Legal Protection of Farm Workers El Cortito* (Houston: Arte Publico Press, 2004).

187. Transcript of the Salinas hearing, Mar. 27, 1975, 29.

188. Bart Goldie, "Study of Soledad and Orange Cove," senior thesis, Community Studies, UCSC, May 31, 1971, 10.

189. Ibid., 13.

190. Alma Rose, Transcript of the Salinas hearing, Mar. 27, 1975, 37. Another worker testified, "I came to the U.S. five years ago, and that is the first time I saw the short-handled hoe. I looked at it and not listening to what others said, I said that instrument cannot hurt me. But after using the short hoe for a few months it sure did change my mind, because it hurt so much I have decided never to use the short hoe again. I don't care if I am ridiculed by my friends that I was not a man and afraid to use the short hoe." (Jose Marks, eighteen years old, Transcript of the Salinas hearing, Mar. 27, 1975, 35.) The quality of the transcription varies for each hearing. Many of the farm workers testified in their second language. I have made minor editorial changes in the cases where there has been an obvious translation or transcription error.

191. Douglas Murray, "The Abolition of El Cortito, The Short-Handled Hoe: A Case Study in Social Conflict and State Policy in California Agriculture," *Social Problems* 30, no. 1 (Oct., 1982): 28.

192. Carey McWilliams, *Factories in the Field: The Story of Migratory Farm Labor in California* (Boston: Little, Brown, 1939). This book appeared the same year as *The Grapes of Wrath*, and both created an uproar among growers of California.

193. Transcript of the Salinas hearing, May 3, 1973.

194. Most of the doctors who worked on the case are deceased or no longer practicing. Dr. Oakley Hewitt, the one doctor who testified for the defenders of the short hoe and is still in practice at this writing at the Palo Alto Medical Clinic, refused to talk to me. His nurse reported that he "doesn't want anything to do with it."

195. Much of this was found in the file of the Salinas branch of the CRLA. I asked both of the attorneys working on the side of the growers for their records (Richard Maltzman and Asher Rubin). Although they seemed willing to giving them to me, they were unable to locate their files.

196. Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press, 1995), 52.

197. Murray, "The Abolition of El Cortito," 37. The goal of Murray's paper is to explore an example of "how social problems are solved within the state arena and how state policy affects the sources of social conflict" (27).

198. Although the victory "belonged" to the CRLA, a strategic decision was made to attribute the work on the short-handled hoe to Chavez and the United Farm Workers. Martin Glick, interview by the author, San Francisco, June 1, 1998; Maurice Jourdane, interview by the author, San Diego, Dec. 10, 1998.

199. For a highly readable account of California farming and land ownership history and irrigation, see John Opie, *The Law of the Land: Two-Hundred Years of American Farmland Policy* (Lincoln: University of Nebraska Press, 1987), especially chapter 9, "The California Difference," 133–49. For a far more de-

tailed account, see Robert C. Fellmeth, *Politics of Land: Ralph Nader's Study Group Report on Land Use in California* (New York: Grossman, 1973).

200. In 1870, 1/500 of the population owned one half or more of all agricultural land in the state. McWilliams, *Factories in the Field*, 23.

201. Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (Santa Barbara: McNally and Loftin, West, 1978), 25.

202. Lawrence J. Jelinek, *Harvest Empire: A History of California Agriculture*, 2nd ed. (San Francisco: Boyd and Fraser, 1982), 52.

203. They were also hired to reclaim five million acres of swamp in San Francisco Bay and the Sacramento-San Joaquin River delta and produced $60–90 million in wealth annually, according to a congressional committee estimate. Theo J. Majka and Linda C. Majka, *Farm Workers, Agribusiness, and the State* (Philadelphia: Temple University Press, 1982), 20.

204. Organized opposition to Chinese immigration began as early as 1859. Majka and Majka, *Farm Workers*, 22. See also Jelinek, *Harvest Empire*, 53.

205. Maxine Hong Kingston, *China Men* (New York: Vintage Books, 1977), 153, quoting a congressman. Her chapter "The Laws" (153–59) outlines the laws relating to Chinese immigration and exclusion from the 1868 Burlingame Treaty to 1978 immigration quotas. The California referendum on Chinese exclusion turned up a vote of 154,638 for and 833 against (Majka and Majka, *Farm Workers*, 24).

206. Majka and Majka, *Farm Workers*, 24–25. For an account of how the Chinese were reinscribed as "friendly" during World War II, see Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* (Boston: Little, Brown, 1989), 370–79.

207. Majka and Majka, *Farm Workers*, 5.

208. Ibid., 12.

209. Between 1880 and 1910, 15,000 miles of railways were built through uninhabited land to export gold, silver, and copper from Mexico to the United States (Galarza, *Merchants of Labor*, 27.) The Mexican Civil War of 1911 caused a wave of immigration and provided a new set of agricultural laborers.

210. For more on Mexican American deportation during the depression, see Camille Guerin-Gonzales, *Mexican Workers and American Dreams: Immigration, Repatriation and California Farm Labor, 1900–1939* (New Brunswick, NJ: Rutgers University Press, 1996). She argues that the "failure of the federal government to protect farm workers during the 1930s had tremendous consequences for the entrenchment of Mexican immigrants as a reserve labor force constructed as foreign and temporary" (134). Another author who focuses on migrant workers in the early century is Don Mitchell, *The Lie of the Land: Migrant Workers and the California Landscape* (Minneapolis: University of Minnesota Press, 1996).

211. Jelinek, *Harvest Empire*, 67.

212. Galarza, *Merchants of Labor*, 39.

213. The price of California's lettuce, for example, can range from $2.50 to $15.00 a carton. William H. Friedland, Amy E. Barton, and Robert J. Thomas, *Manufacturing Green Gold: Capital, Labor, and Technology in the Lettuce Industry* (New York: Cambridge University Press, 1981), 44.

214. Jelinek, *Harvest Empire*, 68.

215. Quoted in Galarza, *Merchants of Labor*, 39.

216. Ibid., 42–44. The program was first run through the Farm Security Administration (a department of the New Deal), but after industry complaints it was switched to the War Manpower Commission in 1943. Galarza, *Merchants of Labor*, 51.

217. Quoted in Galarza, *Merchants of Labor*, 55.

218. Patrick H. Mooney and Theo J. Majka, *Farmers' and Farm Workers' Movements: Social Protest in American Agriculture* (New York: Twayne, 1995), 152.

219. Lee G. Williams, quoted in ibid., 152.

220. Richard B. Craig, *Bracero Program: Interest Groups and Foreign Policy* (Austin: University of Texas Press, 1971), 14–15.

221. Jelinek, *Harvest Empire*, 84.

222. Guerin-Gonzales writes that "the Bracero Program resuscitated and helped to perpetuate the perception of Mexicans as foreign, temporary, male workers, although renewed immigration from Mexico was anything but temporary" (*Mexican Workers*, 135).

223. Jelinek, *Harvest Empire*, 84–85.

224. Mooney and Majka, *Farmers' and Farm Workers' Movements*, 154.

225. Glick interview.

226. Fred J. Heistand, "The Politics of Poverty Law," in *With Justice for Some: An Indictment of the Law by Young Advocates*, ed. Bruce Wasserstein and Mark J. Green (Boston: Beacon Press, 1972), 160–89, quote on p. 163. Because of the seasonal nature of farm work, the average Mexican American family income in 1970 was $4,000. Mexicans were excluded from unemployment insurance and virtually excluded from public assistance (only 7 percent of Mexican American families received public assistance in 1965).

227. Heistand, "The Politics of Poverty Law," 180.

228. Ibid.

229. Michael Bennett and Cruz Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," *Chicano Law Review* 1, no. 1 (1972): 78–79.

> For years and years Chicano and other farm workers had no representation while their large corporate employers had plenty—in the State Legislature and Congress, the Governor's mansion, and before the courts. And these facts shaped the laws of agricultural employment: Agribusiness became accustomed to legal *rights* called the bracero program (subsidized labor supply), federal and state water projects (subsidized irrigation), and the Agricultural Extension Service (subsidized research and technical assistance . . .), and the national Soil Bank (subsidized non-use of land). Each cost the tax payer billions, and each cost the farm workers jobs, wages, and dignity. On the other hand, farm workers were the only Americans that Congress specifically *excluded* from the statutory right to a minimum wage, collective bargaining, and unemployment insurance. . . . [When worker housing, wage, and labor conditions codes were legislated,] enactments were rarely enforced and violators never punished. (78)

230. Heistand, "The Politics of Poverty Law," 184.

231. Despite the official end to bracero labor importation at the end of 1964, the practice continued until 1967 through a loophole in the law. The CRLA lawsuit challenged the fact that growers' claims of labor shortages (if they demonstrated this they could import labor through a clause in the ban) were never verified by the Department of Labor. As a result, 1968 was the first year that bracero labor was not imported (although by 1970, 50,000 commuter aliens were admitted into the state and over 180,000 illegal immigrants entered). Heistand, "The Politics of Poverty Law," 164–66; Bennett and Reynoso, "California Rural Legal Assistance," 8–10.

232. Heistand, "The Politics of Poverty Law," 182.

233. *America's War on Poverty*, film series; Hector de la Rosa, interview by the author, Salinas, CA, May 11, 1998; Jerome B. Falk and Stuart R. Pollak, "Political Interference with Publicly Funded Lawyers: The CRLA Controversy and The Future of Legal Services," *Hastings Law Journal* 24 (1973): 607; "Diana File" at CRLA office in Salinas.

234. For a description of the ways in which the welfare department's attorney's depositions were used to press criminal fraud charges against welfare recipients, see Heistand, "The Politics of Poverty Law," 169.

235. Heistand, "The Politics of Poverty Law," 183. See Bennett and Reynoso, "California Rural Legal Assistance," for an account of the biased ways in which information on the CRLA was collected by Lewis K. Uhler. The practice of hiring illegal immigrants "cost northern California farm workers approximately $2.7 million in lost wages in 1969 and costs to the public increased annual welfare expenditures of not less than $1.4 million for the support of domestic farm workers and their families" (166). With state expenditures so high, it is no wonder that Reagan wanted to cut welfare and medical care and, rather than ensuring decently paid work for farm workers, try to have them disappear from statistics and other information by erasing them from any state registration.

236.

> The origin of certain measures designed to cripple or kill legal services belied their purported purpose. Thus, when [Republican senator] George Murphy moved to give a line item veto to state governors over legal services, it was less likely intended, as claimed, to decentralize legal service than, as he acknowledged on the floor of the Senate, to permit governors to stop litigation against the growers hiring illegal entrants. When the Justice Department resorts to collecting dossiers on legal service attorneys—a clandestine activity, so there is no rationale provided by the department as yet—it is logical to infer that they are resentful of defending, and losing, numerous cases in which the federal government is sued by legal service attorneys. (Heistand, "The Politics of Poverty Law," 175–76)

237. Quoted in Falk and Pollak, "Political Interference," 641. "The California Farmer estimated that growers' newspaper and magazine ads, radio and TV spots, billboards, and other organizational efforts netted Reagan 800,000 votes." *California Farmer*, June 17, 1967, 14, quoted in Bennett and Reynoso, "California Rural Legal Assistance," 10n. 38.

238. De la Rosa interview; Jourdane, interview.

239. Jourdane interview.

240. Murray reports the year as 1973, although the petition I found in the CRLA archives is dated Sept. 20, 1972. Murray, "The Abolition of El Cortito."

241. California Labor Code, Section 6306 (a).

242. Jourdane and the other main attorney on the case, Martin Glick, realized that when this clause had been challenged it was for tools that had been individually faulty or broken but believed it to be their only option. (Jourdane interview.) Jourdane's petition included affidavits from eight injured and disabled farm workers; the statements of five physicians; the results of a study comparing back injuries of workers using the short-handled hoe to farm workers not using the short-handled hoe in Orange Cove (Bart Goldie); the results of a nationwide study examining different states' crops and how they were thinned (finding that all other states used the long-handled hoe for the same and similar crops corroborated by farm worker statements on working in other states); a declaration by a labor contractor who claimed that he started using the long-handled hoe and it was better all around; and a list of a number of sections in the California Labor Code that he argued should be applied to create a safe working space for farm workers, including the abolition of the short-handled hoe. He also noted that section 142 imposes "the duty to enforce its safety orders" on the Division of Industrial Safety.

243. Murray, "The Abolition of El Cortito," 33.

244. Ibid.

245. Transcript of the San Diego hearing, Mar. 24, 1975, 15.

246. Ibid., 32.

247. De la Rosa interview.

248. Jourdane interview.

249. The short-handled hoe was manufactured in Virginia and Sacramento, and cost between $2.50 and $2.85 and was heavier than the long hoe (CRLA files).

250. Transcript of the Imperial (El Centro) hearing, May 1, 1973, 53.

251. Ibid., 55–56.

252. Transcript of the Salinas hearing, Mar. 27, 1975, 27.

253. Ibid., 16.

254. Robert Granger, quoted in "Two Views on Short Handled Hoe," editorial, *Salinas Californian*, May 3, 1973. Also in Granger, transcript of the Salinas hearing, May 3, 1973, 14.

255. Transcript of the Salinas hearing, Mar. 27, 1975, 22.

256. Paul Englund, transcript of the Salinas hearing, May 3, 1973, 44.

257. George Betz from Bruce Church, quoted in "Two Views on Short Handled Hoe," editorial, *Salinas Californian*, May 3, 1973.

258. Mervyn Baily, transcript of the Salinas hearing, May 3, 1973, 33.

259. Hector de la Rosa, a community worker for the CRLA, claims that labor contractors would pay them for the afternoon of work if they testified that short hoe was not injurious while telling them that without hoes there would be no jobs. De la Rosa, interview.

260. Transcript of the Salinas hearing, May 3, 1973, 9.

261. CRLA file; de la Rosa interview.

262. For more on the gender presumptions of the wording of "workmen's compensation," see Penny Kome, *Working Wounded* (Toronto: University of Toronto Press, 1998). Although in the 1970s workmens' compensation was still the term in use, I use the current, more gender representative workers' compensation.

263. Transcript of the Imperial (El Centro) hearing, May 1, 1973, 12–22, testimony of Dr. Robert W. Murphy (discussed by other doctors as well).

264. Dr. Murphy, transcript of the Imperial (El Centro) hearing, May 1, 1973, 20.

265. Ibid., 22.

266. Transcript of the Salinas hearing, Mar. 27, 1975, 28.

267. Michael Rucka, interview by the author, Salinas, CA, June 4, 1998.

268. Dr. Robert Thomson, transcript of the Imperial (El Centro) hearing, May 1, 1973, 29.

269. Ibid., 31. Thomson argued that farm workers did not know about workers' compensation.

> But also I fill out workmen's compensation forms, and there are a couple of reasons for this. One is that the patient I typically see is a man who comes in complaining of an acute onset of back pain which occurred while he was lifting an irrigation ditch, or jumping over the edge, or lifting a piece of pipe. . . . And I know the man has worked off and on for a number of years using the short-handled hoe in a bent position. What I fill out on this form that we get from Pan American Underwriters is that he has acutely injured his back, for example, while lifting an irrigation ditch [*sic*]. Now, if he doesn't tell me that, if I don't have something specific I can tie that to, I don't bother to fill out the workmen's compensation form. What I do is fill out a State disability insurance form, and frequently send the man down to the welfare department.

270. Transcript of the Imperial (El Centro) hearing, May 1, 1973.

271. Rucka interview.

272. David Flanagan, transcript of the Salinas hearing, May 3, 1973, 62.

273. Ibid.

274. Michael Rucka, transcript of the Salinas hearing, May 3, 1973, 23.

275. Ibid., 25. Rucka told me that once it became clear that the hoe was going to go, doctors were much more willing to diagnose the hoe-related injuries. Rucka interview.

276. Transcript of the Salinas hearing, May 3, 1973, 8.

277. Jose Cavazos argues this in relation to lettuce cutting. Transcript of the Salinas hearing, Mar. 27, 1975.

278. Transcript of the Salinas hearing, Mar. 27, 1975, 29.

279. Transcript of the Imperial (El Centro) hearing, May 1, 1973, 47.

280. Ibid.

281. Hisaura Garza, sociology Ph.D. student, ex-farm worker testifying in Salinas, May 3, 1973, 61. Another worker suggests that "primarily it's a question of riders. They're the guys that are pushing the crew, and if the people are standing you can't tell whether they're really working at a steady pace or not. When they're bending over you know they're working. It's not a question of having a better productivity or a better quality of work, it's just a matter of having all the people down at the same time so you know they're working." Manuel Olvidas, transcript of the San Francisco hearing, Mar. 6, 1973, 31.

282. Transcript of the Salinas hearing, Mar. 27, 1975, 25.

283. Transcript of the Imperial (El Centro) hearing, May 1, 1973, 4.

284. Ibid., 39.

285. Transcript of the Salinas hearing, Mar. 27, 1975, 31.

286. Otis Glendenning, transcript of the Imperial (El Centro) hearing, May 1, 1973, 24.

287. Glick interview.

288. Edward White, memo, May 3, 1975, CRLA file.

289. Press release, "Industrial Safety Board Denies Petition against Short Hoe," July 13, 1973, CRLA file.

290. The CRLA filed a petition for rehearing in August 1973 that primarily addressed the medical proof issue. Jourdane claims that a rehearing was denied, and they then took the issue to the California Supreme Court (CRLA file).

291. Glick interview.

292. *Sebastian Carmona et al. v. Division of Industrial Safety*, Jan. 13, 1975. The California Supreme Court in general, and Justice Tobriner specifically, were known to be extremely pro-plaintiff in cases of product liability law. Whether or not the court was swayed by the crowd of farm workers in the audience, who, Asher Rubin claims, were planted to garner sympathy for the cause, remains a question. (Asher Rubin, telephone conversation with the author, June 4, 1998.)

293. Glick was appointed as head of the State Employment Department and Rose Bird became agricultural secretary. A number of anti-hoe advocates were now "insiders." (Glick interview.) Administrative edict, Administrative Interpretation No. 62, Division of Industrial Safety, Apr. 7, 1975.

294. The popular folk singer Malvina Reynolds sent a copy of her song "El Cortito" to Jourdane. The chorus reads, "Bend down Ronnie Handsome / And manicure the land / Bend down / Mister Governor / How I'd love to see you bend / Moving along the endless rows with the short hoe in your hand." (c) 1973, Schroder Music Co. (ASCAP) Berkeley, 94704 (CRLA file).

295. Several authors have pointed out that growers were only spurred to embrace new technologies when they could no longer exploit labor. The mechanical tomato harvester provides one such example. While it had been developed by the mid-1950s, it was adopted for use only after the end of the bracero program. (Carroll Pursell, *The Machine in America: A Social History of Technology* [Baltimore: Johns Hopkins University Press], 293–94; R. Douglas Hurt, *Agricultural Technology in the Twentieth Century* [Manhattan, KS: Sunflower University Press, 1991], 88–98; and Langdon Winner, "Do Artifacts Have Politics?" *Daedalus* 109, no. 1 [winter 1980]: 121–36.) After the short-handled hoe was abolished, massive state funding was given to the University of California–Davis in 1975 to develop new methods of seeding and new seeds, which were at first wrapped in strips of plastic to protect them from pests. As stronger seeds were developed, hoe work on the starts became altogether unnecessary. (De la Rosa interview.) A strip of the plastic-enclosed seeds is on file at the Salinas office of the CRLA.

296. "Praise for Long Hoes," *San Francisco Chronicle*, Apr. 15, 1975, 20.

297. For example, California growers groups, including the Grower-Shipper Vegetable Association, the Western Growers Protective Association, and the

California Farm Bureau Federation, were particularly vocal about interning the Japanese. The Grower-Shipper Vegetable Association claimed in the *Saturday Evening Post* in May 1942: "We've been charged with wanting to get rid of the Japs for selfish reasons, we might as well be honest. We do. It's a question of whether the white man live on the Pacific Coast or the brown man. They came into this valley to work, and they stayed to take over. . . . If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows." Takaki, *Strangers from a Different Shore*, 389.

298. Transcript of the San Diego hearing, Mar. 24, 1975, 8–9. Dr. Hewitt still works at the Palo Alto Medical Clinic, but he chose not to speak to me about his involvement in this case.

299. Transcript of the Salinas hearing, May 3, 1973, 33.

300. For more on the control of pain as a crucial aspect of power, see Scarry, *Bodies in Pain*.

301. Guerin-Gonzales, *Mexican Workers*, 135.

302. Scarry, *Bodies in Pain*, 122. See also Hortense J. Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book," *Diacritics* 17, no. 2 (summer 1987): 65–81, for a related argument on slaves, in which she distinguishes "flesh" from "body" as central to the difference between captive and liberated subject positions.

303. Robert Jay Lifton, *Home from the War: Learning from Vietnam Veterans* (New York: Beacon Press, 1992), 198. It may seems anachronistic to compare the Vietnam War to capitalist mass production in this way. There are clear and present differences, such as the fact that American soldiers were constantly under the threat of death themselves. A key point Lifton makes is that the Americans, "themselves under constant threat of grotesque death," needed to find, "in a real sense create, a group more death tainted than themselves, against whom they [could] reassert their own continuity of life" (197) However, one of my primary goals in this book is to examine the ways in which everyday technologies imbricate with lives to create the everyday conditions of trauma, while the broader literature that has recently coalesced under the rubric of "trauma studies" has focused more distinctly on discretely violent events of war.

304. Lifton, *Home from the War*, 199. For a different but related reading of the ways in which racial slurs cite histories of trauma and thus reiterate trauma "through the linguistic substitution for the traumatic event," see Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997), 36.

305. Transcript of the San Diego hearing, Mar. 24, 1975. Affidavit of Dr. Berkeley Huett (Oakley Hewitt) read into the record by Richard Maltzman, 8–9.

306. Maltzman, transcript of the San Diego hearing, Mar. 24, 1975, 12.

307. Transcript of the Salinas hearing, May 3, 1973, 42–43.

308. Lloyd Heger, transcript of the Imperial (El Centro) hearing, May 1, 1973, 8.

309. Otis Glendenning, transcript of the Imperial (El Centro) hearing, May 1, 1973, 25.

310. Transcript of the San Diego hearing, Mar. 24, 1975, 35.

311. In his analysis of the relationship between reason and violence in the state, Michael Taussig distills the key facets of Max Weber's account of the way in which political domination legitimates itself into two points: first, through the "monopoly on the legitimate use of violence within a given territory," and second, through the "State's embodiment of Reason, as in bureaucratic forms." Taussig adds, however, that "[w]hat we are missing here . . . are the intrinsically mysterious, mystifying, convoluting, plain scary and arcane cultural properties and power of violence to the point where violence is very much an end in itself—a sign . . . of the existence of the Gods." Taussig, "*Maleficium*: State Fetishism," in *Fetishism as Cultural Discourse*, ed. Emily Apter and William Pietz (Ithaca: Cornell University Press, 1993), 223.

312. Scarry, *Bodies in Pain*, 14.

313. Ibid., 17.

314. De la Rosa interview.

315. Michael Taussig examines the social significance of the devil in the folklore of plantation workers and miners in South America in *The Devil and Commodity Fetishism in South America* (Chapel Hill: University of North Carolina Press, 1980).

316. This account is based on personal communication with Michael Rucka, workers' compensation attorney, Feb. 10–19, 1999.

317. California Labor Code, section 5412.

318. Rucka, Personal communication.

319. Ibid.

320. Trouillot, *Silencing the Past*, 16.

321. Mark Twain, "The First Writing Machines," in *The $30,00 Bequest and Other Stories*" (New York: Harper and Brothers, 1906), available at *wysiwyg://291/http://www.boondocksnet.com/twintexts/writing_machines.html*.

322. For more on Australia, see Andrew Hopkins, "The Social Recognition of Repetition Strain Injuries: An Australian/American Comparison," *Social Science and Medicine* 30, no. 3 (1990): 365–72.

323. In the United States alone there are an estimated 230,000 carpal tunnel surgeries a year, each with a 54–56 percent success rate and a minimum of two to six months loss of hand use. By the mid-1990s RSI accounted for 56 percent of the illnesses reported to OSHA (double the amount reported in 1984). The American Academy of Orthopedic Surgeons estimated that RSI costs $27 billion annually in medical treatment and lost income. In 1989, 3.2 million cases of RSI were serious enough to take time away from jobs, adding up to 57 million lost workdays. These statistics do not, of course, include writers and students who are not considered laborers, nor do they include people who, due to the nature of the injury and labor relations, do not report it. See Kate Montgomery, "The Body Is Not a Robot," *Massage* 57 (Sept./Oct. 1995): 58.

The difficulties of collecting injury data are reported in A. Olenick J.D., M.D. et al., "Current Methods of Estimating Severity for Occupational Injuries and Illnesses: Data for the 1986 Michigan Comprehensive Compensable Injury and Illness Database," *American Journal of Industrial Medicine* 23 (1993): 231–2. The authors argue that the present federal and state systems for estimating occupational injury underestimate the problem by as much as a factor of eight. See