

COPYRIGHT NOTICE:

**Sarah S. Lochlann Jain: Injury**

is published by Princeton University Press and copyrighted, © 2006, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: [permissions@pupress.princeton.edu](mailto:permissions@pupress.princeton.edu)

## *Introduction*

---

### Injury in U.S. Risk Culture

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### The Book

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

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

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

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

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

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



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

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

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

### Terminating Accounts

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

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

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

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

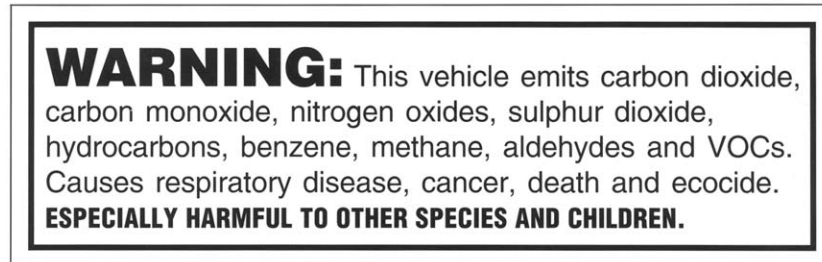


FIGURE 2. Produced by World Carfree Network, <http://www.worldcarfree.net>

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

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

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

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

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

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

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

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

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

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

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



FIGURE 3. Canadian cigarette package warnings.

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

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

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

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

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

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

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



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

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

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

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

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

### Recursive Objects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



lower court denied recovery on the basis that he was a trespasser. On appeal, Judge Cardozo “simply redefined the boy’s status from that of a trespasser to that of a bather in public waters, thus enabling him to apply the protections accorded to such persons.”<sup>67</sup>

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

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

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

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

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

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

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

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

It is not my aim here to play very differently oriented commentators against each other, or to examine in any detail the strengths and weaknesses of the diverse pro and con positions on the law. The key point is that tort law, by its very structure, assigns injuries to the status of acci-

dental entailment, inevitable by-product, or statistical cost of the benign activity of capitalist market exchange, production, and consumption.<sup>81</sup>

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

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

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

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

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

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

### Structure of the Book

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

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

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

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

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

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

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

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

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



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

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