

Two Roads Diverge for Civil Recourse Theory

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INTRODUCTION

John Goldberg and Ben Zipursky's civil recourse theory purports to be descriptive and unitary. It cannot be both. According to this theory, as a positive matter, tort law is unified by wrongs and is not designed to be used as an instrument for purposes such as compensation and deterrence. In this Article, I argue that civil recourse theory does not offer a complete description of twenty-first-century tort law. Tort law is not just about civil recourse; at least part of tort law's purpose is instrumental. The extent of routinization in tort law, particularly in automobile accident claims, demonstrates a gap between civil recourse theory and the tort law it is supposed to describe. In the trenches, insurers and plaintiffs' lawyers are concerned about the profitability of their portfolio of cases as a whole. Insurers and many plaintiffs' lawyers, therefore, routinize the claims system, increasing its administrability and the compensation of claimants, but reducing or eliminating the importance of wrongs in a large portion of cases. Civil recourse theory fails as a descriptive unitary theory of tort law because it does not accurately

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describe automobile accident claims, constituting a majority of tort claims and three-quarters of tort payments.¹

Goldberg and Zipursky acknowledge that instrumentalism shapes the nature of tort law's wrongs.² Moreover, they concede that the practice of routinizing claims is a "potential red flag[]"³ and that "tort law is in some ways out of synch with this trend."⁴ Goldberg and Zipursky's admissions are necessary for a descriptive theory of torts, but they reveal civil recourse's implicit pluralism. If civil recourse is to remain unitary, it must be articulated as a normative, rather than descriptive, theory.

I. CIVIL RECOURSE THEORY

A. Core Claims

As currently espoused by Goldberg and Zipursky, civil recourse is descriptive.⁵ It attempts to describe tort law as it is, not as it should be. Distilled to its essence, civil recourse theory asserts that tort law's purpose is "providing victims with an avenue of civil recourse against those who have wrongfully injured them."⁶ In his presentation at the 2012 Association of American Law Schools (AALS) annual meeting, Goldberg stated that civil recourse theory was composed of three core "levels" or "components:" (1) rights of action, (2) wrongs, and (3) remedies.⁷ The first component, rights of action, arms people with a legal power; this is victim

1. JAMES M. ANDERSON, PAUL HEATON & STEPHEN J. CARROLL, *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE 1* (2010), available at http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf; see also ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND, CHANTAL G. BROMAGE, SARAH A. GIBSON & ASHLEY N. MASON, NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 28* (2010), available at http://www.courtstatistics.org/Other-Pages/~/_media/Microsites/Files/CSP/EWSC-2008-Online.ashx.

2. *Goldberg & Zipursky Respond to the Quandaries Facing Civil Recourse Theory*, TORTSPROF BLOG (Jan. 12, 2012), <http://lawprofessors.typepad.com/tortspof/2012/01/goldberg-zipursky-respond-to-the-quandaries-facing-civil-recourse-theory.html>.

3. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 396 (2010).

4. *Id.* at 394.

5. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 403 (2005) ("Our point here is not that [the principle of civil recourse] is demanded by principles of justice, or even morally sound, but that it is the animating idea behind our system of tort law.").

6. John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1252 (2008).

7. John C.P. Goldberg, *Address at the Association of American Law Schools Annual Meeting, Twenty-First Century Tort Theories: A New Audit of Civil Recourse Theory* (Jan. 5, 2012) [hereinafter Goldberg Podcast], available at <http://lawprofessors.typepad.com/tortspof/2012/07/podcast-of-2012-aals-panel-on-civil-recourse-theory.html>. Cf. Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 TENN. L. REV. 431, 433-40 (2011); Jane Stapleton, *Evaluating Goldberg & Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1529-32 (2006).

empowerment.⁸ People are empowered through tort law when they experience a wrong, the second component of civil recourse theory. Goldberg and Zipursky also refer to civil recourse theory as “torts as wrongs,”⁹ and wrongs are clearly the crux of civil recourse. As Goldberg and Zipursky assert: “[W]e believe that tort liability is predicated on the commission of a wrong—a failure to act in accordance with a relational norm of right conduct—that in turn generates in a victim of the wrong a power to respond to the wrongdoer.”¹⁰ Finally, if the victim proves the wrong, he or she is entitled to the third level of civil recourse theory, a remedy. According to civil recourse theory, remedies are not about a duty to repair, but a right of redress.¹¹ As Goldberg notes, “[t]he animating ideas here are relational and retaliatory, involving notions of empowerment, response, and satisfaction.”¹²

B. Instrumentalism

The origin of civil recourse theory lies in its rejection of an instrumentalist tort law. Goldberg and Zipursky specifically contrast their view with the Holmes-Prosser understanding¹³ that “[t]ort law is about shifting losses to achieve policy objectives, not wrongs and recourse.”¹⁴ Pursuant to this instrumentalist view, the most common policy objectives allegedly served by tort law are compensation (or loss-spreading) and deterrence,¹⁵ but sometimes scholars include constraints such as administrability to the mix.¹⁶ Instrumentalism, considered by Goldberg and Zipursky to be the dominant view in the modern torts academy, has been their target from the beginning.

According to Goldberg and Zipursky, as a descriptive matter, tort law is not an instrument to achieve policy objectives; it is about wrongs, and only about wrongs. As such it is “unitary.”¹⁷ A plaintiff has a cause of action “only because the defendant has committed a legal wrong against the plaintiff”;¹⁸ thus, the role of tort law “is not to deliver deterrence [or] compensation.”¹⁹

8. Goldberg Podcast, *supra* note 7.

9. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

10. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1150 (2007).

11. *See id.*

12. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 436 (2006).

13. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1752–77 (1998).

14. Goldberg & Zipursky, *supra* note 9, at 924.

15. *Id.* at 927. *But see infra* note 19 and accompanying text. Goldberg & Zipursky identify influential scholars in the instrumentalist tradition as including panel participant Guido Calabresi and Richard Posner, who received the 2012 Prosser Award during the panel presentation. *See* Goldberg & Zipursky, *supra* note 9, at 924, 926–27.

16. Goldberg, *supra* note 6, at 1251.

17. *Id.* at 1251–52.

18. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643 (2002).

19. John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of*

C. Instrumentalism as a Source of the Wrongs

Tort law is certainly unified by wrongs if all that means is that torts consists only of the causes of action, or “wrongs,” created by courts or legislatures. That, however, is the “vacuous” understanding of legal wrongs that Goldberg and Zipursky reject.²⁰ Thus, the source of the content of the wrongs is critical.

Goldberg and Zipursky generally describe the wrongs that comprise tort law as violations of context-specific social norms that have been elevated, usually by judges, to the status of law.²¹ Social norms are “obligations already recognized in familiar forms of social interaction.”²² With regard to torts, these norms are “social norms of safe conduct” or “safety norms.”²³ Goldberg and Zipursky elaborate and emphasize the norms depend on context: “In different settings and situations, with respect to different sorts of interactions, individuals conceive of themselves as occupying different sorts of normative space governed by different norms of responsibility that impose different sorts of demands or expectations of them.”²⁴ Tort law “carves up the social world into ‘loci of responsibility’—i.e., particular contexts governed by norms of appropriate conduct that actors must observe for the benefit of identifiable classes of potential victims.”²⁵

Of course, not all social norms become law, nor should they. Which social norms are selected for elevation to legal status? Goldberg and Zipursky are relatively silent on this process thus far. In a prior article, I briefly suggested that Goldberg and Zipursky implicitly rely on Benjamin Cardozo’s theory of law and judging in framing civil recourse theory.²⁶ Cardozo’s view of law, according to Goldberg, is that “the proper function of the law is to articulate and enforce at least some of the obligations recognized in and by the community.”²⁷ Judges (and, occasionally, legislatures) have the task of determining which social norms to elevate to legal wrongs.²⁸ Furthermore, some legal wrongs have no correlation to

Reliance in Fraud, 48 ARIZ. L. REV. 1001, 1014 (2006).

20. Goldberg & Zipursky, *supra* note 9, at 948 (defining “vacuous” as “a legal wrong being anything the law defines as a legal wrong”).

21. Robinette, *supra* note 7, at 436–37.

22. Goldberg & Zipursky, *supra* note 5, at 392.

23. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 608 (2005).

24. Goldberg & Zipursky, *supra* note 5, at 392.

25. Goldberg, *supra* note 23, at 608 (citing Goldberg & Zipursky, *supra* note 5, at 403–04).

26. Robinette, *supra* note 7, at 437 n.34.

27. John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1335 (1990) (footnote omitted).

28. On this point, Goldberg & Zipursky elaborate:

Nevertheless, because law comes with consequences that morality does not (most obviously state-enforced sanctions), and because there are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges, there will be times at which it is appropriate for legislatures and judges and jurors to decline to elevate certain moral norms to legal norms. Similarly, there are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.

morality, and judges (or, less often, legislatures) must decide when to create legal wrongs with no moral counterpart.

What role, if any, does instrumentalism play in this process? Recently, Goldberg and Zipursky acknowledged “instrumental considerations actively shap[e] the nature of what the courts or legislatures are willing to count as ‘wrongs,’” even labeling this an “important phenomenon.”²⁹ Moreover, they describe the process of creating a new legal wrong in the context of strict liability for products in the 1960s and 1970s: “judges, on the basis of a variety of considerations, decided to cobble together a new legal wrong out of a mix of existing doctrinal materials and policy considerations, one that commercial sellers are directed not to commit and that confers a right on consumers.”³⁰ The policy considerations involved were compensation and deterrence,³¹ and Goldberg and Zipursky seemingly acknowledge that “these goals are being served by products liability law and that they have played an important motivational role in courts’ decisions to adopt the doctrine.”³²

The assertion that tort law is unitary and its purpose is not to deliver compensation and deterrence is hard to square with this account. If an important reason courts created the legal wrong of strict products liability was to compensate and to deter,³³ and strict products liability does, in fact, serve the goals of compensation and deterrence, it seems to me that at least a purpose of the law is to compensate and deter. This is true even if products liability is described as a “norm that products are to be sold in a condition that is safe for ordinary use.”³⁴ The wrong is being created, at least in part, as an instrument to compensate the injured and deter similar injuries. There is still a wrong in the sense defined by civil recourse theory. It is a relational wrong (a wrong by the producer to the consumer), that is a legal wrong (it was elevated to that status by judges or by the legislature),

John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1586 (2006).

29. Goldberg & Zipursky Respond to the *Quandaries Facing Civil Recourse Theory*, *supra* note 2.

30. GOLDBERG & ZIPURSKY, *supra* note 3, at 303.

31. *Id.* at 302.

32. *Id.* at 303.

33. Goldberg and Zipursky are forced to concede this. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). As George Priest noted, “The power of the *Greenman* opinion is through its reference to Traynor’s concurring opinion in *Escola*.” George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. LEGAL STUD.* 461, 507 n.296 (1985). Traynor’s *Escola* concurrence laid out an explicitly instrumentalist rationale for products liability. Traynor started with deterrence: “[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.” *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944). However, because not all injuries can be prevented, strict liability would also help spread the losses caused by those injuries: “The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” *Id.* at 441.

34. GOLDBERG & ZIPURSKY, *supra* note 3, at 286.

and injurious (based on the consumer being hurt). However, the wrong is at least partially being used to affect the world beyond the parties involved in the injury; law is being used as an instrument. Goldberg and Zipursky's descriptive account fits pluralism better than the unitary vision of civil recourse.

The cautious and conditional language Goldberg and Zipursky select emphasizes this point. They state:

To say that these goals [compensation and deterrence] are being served by products liability law and that they have played an important motivational role in courts' decisions to adopt the doctrine is *not* to say that products liability law (much less tort law in general) is nothing more than a means for achieving these goals. A body of law has a content and a life that stands at least somewhat independently of the reasons that may have justified its adoption.³⁵

There is a significant middle ground between the idea that tort law is unified by wrongs and the idea that it is "nothing more" than a means for achieving compensation and deterrence. Similarly, the assertion that tort law stands "at least somewhat independently" from the reasons justifying its adoption does not mean those reasons are not *a* purpose of torts.

II. THE CONCESSIONS

Goldberg and Zipursky have conceded that some parts of tort law do not fully correspond to civil recourse's explanatory power.³⁶ Most of the concessions cover relatively uncommon areas of tort law—wrongful death and survival actions,³⁷ some applications of transferred intent,³⁸ strict liability for abnormally dangerous activities,³⁹ and aspects of punitive damages.⁴⁰ Two of their concessions, however,

35. *Id.* at 302–03 (emphasis in original).

36. *See* Robinette, *supra* note 7, at 445–47.

37. John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1341 n.71 (2003) ("Legislatures have occasionally relaxed the wronging requirement, as by enacting survival and wrongful death actions that permit certain beneficiaries to sue those who have wronged their decedent."). This was done for compensatory purposes. *See* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 53–54 (2004).

38. Goldberg, *supra* note 37, at 1341 n.71. Goldberg concedes, "It is possible, moreover, that the common law also recognizes limited exceptions to the wronging requirement. This may be the case, for example, with respect to certain applications of 'transferred intent.'" *Id.* He notes that this would "depend on whether the tortfeasor's intentional [actions] toward one person [would] also constitute[]" wrongful actions toward the person actually injured. *Id.*

39. Goldberg & Zipursky, *supra* note 9, at 951; *see also* Goldberg & Zipursky, *supra* note 28, at 1586 n.72 (stating that abnormally dangerous activities may be "instances in which tort law functions as a scheme of liability rules (or as Keeton-esque 'conditional duties')").

40. Goldberg & Zipursky, *supra* note 10, at 1141 n.58 ("Considerations of deterrence frequently influence the size of [a punitive damages] award."). Still, punitive damages are

are more significant: statutes⁴¹ and routinization.⁴² The remainder of the Article is devoted to routinization. As a whole, the amount and scope of the concessions renders civil recourse theory implicitly pluralist.

What is routinization and why is it at odds with a unitary vision of tort law as a system of individualized justice for the redress of wrongs? Tort law as a system of individualized justice with a jury as decision maker is necessarily fact specific and, at least on a case-by-case basis, often unpredictable. According to Goldberg and Zipursky, routinization is an attempt to create a form of “orderliness and predictability that is conducive to individuals’ planning their lives.”⁴³

Workers’ compensation is a prime example, but “informal” routinization has occurred in tort law without legislation.⁴⁴ Goldberg and Zipursky describe the process and the benefits to affected parties. The stakeholders in the tort system—repeat-player defendants, insurers, and practicing lawyers—generally have an interest in tort law operating more predictably.⁴⁵ Defendants prefer predictable liability payments because it allows them to plan ahead. Insurers also prefer predictable payments because it allows them to set premiums more accurately and ensure that they earn profits. Plaintiffs’ lawyers working on a contingent fee prefer a large judgment or settlement in relation to the amount of hours spent on the case. Within ethical bounds, this often favors the prompt resolution of cases. Thus, Goldberg and Zipursky acknowledge, “lawyers have increasingly sought to manage the resolution of tort cases privately through pretrial negotiations and settlement.”⁴⁶ In its simplest form, this involves only the filing of a claim, the defense lawyer’s failed attempt to have it dismissed, and then settlement at the amount of the insurer’s coverage.⁴⁷

Goldberg and Zipursky concede the benefits of routinization: reduced transaction costs, swifter compensation, and a reduction in uncertainty and variation.⁴⁸ Still, routinization “raises potential red flags”⁴⁹ for Goldberg and Zipursky. First, Goldberg and Zipursky assert that “[t]ort claimants often are looking not just for a payment, but also for a sense that their claims are being taken seriously and that they have to some extent been vindicated.”⁵⁰ Second, they believe that the demise of judicial proceedings in favor of insurance-driven routinization “will somewhat weaken the elaborate system of checks and balances that has been regarded in Anglo-American political thought as central to sound

“largely” a matter of the “plaintiff’s expanded right of individual redress.” *Id.* (citing Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005)).

41. See Robinette, *supra* note 7, at 456; E-mail from Benjamin C. Zipursky, Assoc. Dean for Research, Professor of Law, Fordham Univ. Sch. of Law, to Christopher J. Robinette, Assoc. Professor of Law, Widener Univ. Sch. of Law (Dec. 5, 2010, 11:56:25 EST) (on file with author).

42. GOLDBERG & ZIPURSKY, *supra* note 3, at 394–97.

43. *Id.* at 394.

44. *Id.* at 394–96.

45. *Id.* at 395.

46. *Id.*

47. *Id.* at 395–96.

48. *Id.* at 396.

49. *Id.*

50. *Id.*

political design,”⁵¹ specifically “the right to have one’s claims heard and adjudicated.”⁵² Third, they contend that routinization “threatens to undermine tort law as a public practice in which standards of right and wrong are set,”⁵³ such that “the law may increasingly fail to provide guidance to the citizenry as to how they are obligated to act toward one another.”⁵⁴ In short, Goldberg and Zipursky acknowledge that “[a]s a body of law that requires often nuanced, context-specific judgments about wrongdoing and responsibility, tort law is in some ways out of synch with [routinization].”⁵⁵

III. ROUTINIZATION IN AUTOMOBILE ACCIDENT CLAIMS

The problem with simultaneously arguing that tort law is unified by wrongs and acknowledging that it is out of synch with routinization is that routinization is prevalent in the American tort system. Routinization is neither a recent development nor an anomaly in tort law. Before workplace injury claims were formally routinized by workers’ compensation in the early twentieth century,⁵⁶ they were informally routinized. Samuel Issacharoff and John Fabian Witt chronicle the settlement practices that arose between insurers and workplace injury tort claimants, sometimes represented by “brokers.”⁵⁷ They conclude: “[W]hen one actually looks beyond the [formal system], and instead focuses on the ground-level practices of claims resolution in the first American experience of mass harm, one finds a tort system that informally functioned much like the formal workmen’s compensation system that replaced it.”⁵⁸ In fact, according to Issacharoff and Witt, “[m]ature torts [are those] that over time develop repetitive fact patterns and repeat-play constituencies[, and] have persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures.”⁵⁹ In short, they are routinized.

As Goldberg and Zipursky describe it, routinization is an attempt to make tort law more predictable and efficient; enhanced administrability is the goal. The repeat players in the tort system all benefit in some way. The predictability allows defendants to plan ahead, insurers to set premiums, and plaintiffs’ lawyers to manage the risk in their portfolio of cases. From the claimants’ perspective,

51. *Id.* at 396–97.

52. *Id.* at 397.

53. *Id.*

54. *Id.*

55. *Id.* at 394.

56. *See* Robinette, *supra* note 7, at 458–63.

57. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1584–96 (2004).

58. *Id.* at 1595.

59. *Id.* at 1573; *see also* MICHAEL D. GREEN, BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 255 (1996) (“It is no secret to those even modestly familiar with the personal injury system that the ideal of individualized adjudication, with respect for and attention to the details of the claim, faithful attorney-agents reflecting the interests and desires of the clients, and arbiters listening carefully and respectfully to the claims and stories of the parties is a myth.”).

routinization provides compensation that is certain and delivered more swiftly, and, in automobile accident cases, almost always from a pool of compulsory insurance funds. Thus, routinization is based in instrumental principles of administrability and compensation.

Modern examples of routinization in tort law include asbestos and Dalkon Shield claims. Asbestos is “the paradigmatic case” of routinization.⁶⁰ High concentrations of claims are handled by particular claimants’ agents (creating repeat players), there are very few trials, and there is standardized treatment of settlement amounts.⁶¹ Moreover, asbestos firms began going bankrupt in 1988 and now the vast majority of claims are administered by trusts, further increasing routinization.⁶² Nearly all of the existing asbestos personal injury trusts with assets of more than \$1 billion have retained the Analysis Research Planning Corporation (ARPC) to manage them.⁶³ To help serve the trusts, ARPC “developed and implemented state-of-the-art, web-based claims-processing systems.”⁶⁴ As a result, the “trusts have processed millions of claims and paid billions of dollars efficiently and expeditiously, with cost to benefit ratios that are far lower than comparable settlement approaches.”⁶⁵

A similar trust-based resolution was reached for Dalkon Shield claims. The Dalkon Trust (the “Trust”) was established with approximately \$2.3 billion to compensate the thousands of women claiming injuries from the Dalkon Shield birth control device.⁶⁶ The Trust offered three settlement options. Under Option 1, the claimant merely had to state she had used the device and suffered an injury; claimants received \$725 each under Option 1 (and their husbands received \$300).⁶⁷ The Trust paid nearly 85,000 Option 1 claims for a total amount of \$60 million.⁶⁸ Option 2 was for claimants who had good medical proof of use of the device and associated injuries, but who also had serious alternative causation problems.⁶⁹ Option 2 provided compensation that was reduced from the pre-petition claims values because of the causation difficulties;⁷⁰ payments ranged from \$850 to \$5500.⁷¹ Option 3 was supposed to provide settlement offers based on pre-petition

60. Issacharoff & Witt, *supra* note 57, at 1618.

61. *Id.* at 1619.

62. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 16 (2011), available at <http://www.gao.gov/assets/590/585380.pdf> (“Since the establishment of the first trust in 1988 through 2010, available data indicate that asbestos trusts have paid about 3.3 million claims valued at about \$17.5 billion.”). I thank Mike Rustad for this point.

63. ARPC, CASE STUDY: MANAGEMENT OF OPERATIONS OF MASS TORT TRUSTS, available at <http://www.arpc.com/case-study/management-operations-mass-tort-trusts>.

64. *Id.*

65. *Id.*

66. Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 617 (1992).

67. *Id.* at 633.

68. *Id.*

69. *Id.* at 631.

70. *Id.* at 654 n.135

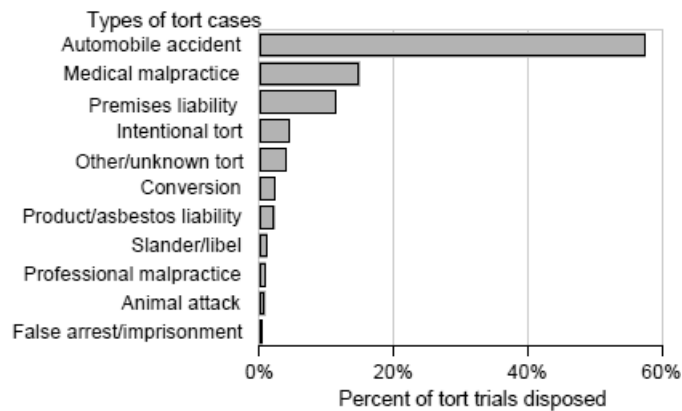
71. *Id.*

claims values. These figures were put together by about thirty attorneys who had been active in Dalkon Shield litigation before the bankruptcy.⁷²

Yet it is automobile accident claims that are emblematic of the importance of routinization in our civil justice system. In automobile cases, routinization reduces or even eliminates the significance of wrongdoing, the essence of civil recourse. Insurance adjusters and plaintiffs' attorneys resolve many automobile accident claims with little or no regard to the fault of the parties. This is a significant problem for civil recourse theory because automobile accidents are responsible for "an enormous amount of litigation."⁷³ Automobile accidents constitute a majority of all tort claims, and "three-quarters of all payouts in the personal-injury liability system."⁷⁴

Figure 1.

Types of tort cases concluded by trial in 2005



Automobile accidents as a percentage of tort cases.⁷⁵

A. Automobile Liability Insurance Becomes Compulsory

Routinization in automobile accident claims can be traced primarily to liability insurance. Policies covering automobile liability appeared soon after the first

72. *Id.* at 641.

73. ANDERSON ET AL., *supra* note 1, at 1–2.

74. *Id.* at 1. For comprising such a large portion of tort law, automobile accidents have not received a lot of sustained attention in recent years. For exceptions, see Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165 (2007); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012); Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the "Choice Architecture" of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69 (2010).

75. Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Bureau of Justice Statistics), November 2009, at fig.1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

automobiles were produced at the end of the nineteenth century.⁷⁶ Coverage, originally part of a policy on horse-drawn coaches and carriages, evolved rapidly.⁷⁷ Most significantly, the justification of automobile insurance shifted from protecting the assets of wealthy drivers to providing compensation for victims.⁷⁸ Once the automobile became common, it caused “a hellish carnage.”⁷⁹ Automobile accidents from 1915–1932 “multiplied over seven times,”⁸⁰ and, in 1932, “the automobile fatality rate ha[d] increased more than 500% since 1913, while the death rate for other kinds of accidents show[ed] a decline of over 30% for the same period.”⁸¹ The increased accidents led to increased reliance on tort law to cover the losses.⁸² Absent insurance, most individuals and even many businesses could not cover the losses caused in automobile accidents.⁸³

The proliferation of automobiles, and the damage caused by them, as well as the need to compensate victims of automobile accidents, caught the attention of legislators. In January 1927, new insurance requirements for automobile owners went into effect in Massachusetts and Connecticut; Massachusetts adopted a compulsory automobile insurance law⁸⁴ and Connecticut adopted a financial responsibility law.⁸⁵ In the short term, financial responsibility laws were more significant. Under a financial responsibility law, a motorist generally did not have to purchase automobile insurance until after being involved in an automobile accident. After an accident, the motorist was required to prove the ability to pay future damages in order to avoid a penalty, frequently the loss of driving privileges.⁸⁶ Typically this proof was made by the purchase of insurance. The

76. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 70–71 (2008).

77. *Id.* at 71.

78. MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES* 801 (9th ed. 2011).

79. *See, e.g.*, Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 *CONN. INS. L.J.* 521, 540 (1998) (“The rapid growth of motoring coupled with unimproved roads and a population with no historical experience driving such machines, combined to generate a hellish carnage that is difficult to appreciate in our era of air bags, engineered highways, and automobile conscious people.”).

80. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 17 (1932) [hereinafter *COLUMBIA PLAN*].

81. *Id.*

82. *See id.* at 20. As a result, the courts became congested. Thirty percent of all new cases on the calendar of the Supreme Court of New York County between October 1928 and April 1930 were automobile accidents. *Id.* A contemporary study of the Court of Common Pleas of Philadelphia County found that half of all jury trials were automobile accident cases. *Id.*

83. *See, e.g.*, ROBERT E. KEETON & JEFFREY O’CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* 251 (1965).

84. 1925 Mass. Acts 426–31.

85. 1925 Conn. Pub. Acts 3956–58.

86. *See, e.g.*, JEFFREY E. THOMAS, *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION* § 61.01 (Lexis 2011).

inability to cover damages in the initial accident, however, was a weakness, and eventually compulsory automobile insurance, under which it is illegal to operate a vehicle without an insurance policy already in effect, became the dominant approach to automobile insurance.

Currently forty-nine states and the District of Columbia have enacted compulsory automobile insurance.⁸⁷ Compulsory liability insurance and voluntary liability insurance have different focuses. As the Supreme Judicial Court of Massachusetts stated: “The purpose of the compulsory motor vehicle insurance law is not, like ordinary insurance, to protect the owner or operator alone from loss, but rather is to provide compensation to persons injured through the operation of the automobile insured by the owner.”⁸⁸

B. Reform Efforts: The Columbia Plan and Keeton-O’Connell

Indeed, the existence of insurance had a major impact on whether an automobile accident victim recovered. In 1932, the Committee to Study Compensation for Automobile Accidents, a group of academics, lawyers, and social scientists under the auspices of Columbia University, published the “Columbia Plan.” In studying the problem of compensation for automobile accidents, the Committee reviewed voluminous data. The Committee investigated 2500 closed cases of temporary disability in which the defendants were insured and 900 cases in which the defendants were uninsured.⁸⁹ Claimants received money in 86% of the insured cases, but only in 27% of the uninsured cases.⁹⁰ For cases of permanent disability, the gap was even more significant. In the 192 closed cases with insured defendants, claimants recovered 96% of the time, whereas in the ninety cases without insured defendants, claimants recovered only 21% of the time.⁹¹ Based on these figures and similar data from case studies, the Committee stated, “[I]nsurance companies pay in so large a proportion of the cases in which liability insurance is carried, that the principle of liability without fault seems almost to be recognized.”⁹² No American jurisdiction enacted the Columbia Plan’s reform proposal; the nation’s attention shifted to World War II, and automobile accident reform faded from the spotlight.⁹³

The next major reform effort for automobile accidents came in 1965, when Robert E. Keeton and Jeffrey O’Connell published *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*.⁹⁴ Writing over thirty years after the Columbia Plan, Keeton and O’Connell reached a similar conclusion regarding the role of fault in automobile accident claims. In the automobile claims system, compensation was not conditioned on fault of the tortfeasor and nonfault of

87. *Id.* The lone holdout, New Hampshire, has a financial responsibility law. *Id.* § 61.02[1].

88. *Wheeler v. O’Connell*, 9 N.E.2d 544, 546 (Mass. 1937).

89. COLUMBIA PLAN, *supra* note 80, at 203.

90. *Id.* at 204.

91. *Id.*

92. *Id.* at 203.

93. See Joseph A. Page, *Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling*, 26 T.M. COOLEY L. REV. 637, 668 (2009).

94. KEETON & O’CONNELL, *supra* note 83.

the victim; instead “the theory of full compensation or none yields to the practice of partial compensation in almost every one of the multitude of settlements.”⁹⁵ Keeton and O’Connell also cited statistics, partially derived from studies in the Columbia Plan, which showed an extremely high recovery rate in automobile accidents when the defendant was insured. Eighty-seven percent of people suffering serious personal injury received some money if insurance was involved.⁹⁶

Keeton and O’Connell offered a basic description of the process by which insurance affects the fault requirement. The most important way in which insurance reduces the significance of fault in automobile cases is through settlement practices.⁹⁷ Insurers take a collective view of risk; they appraise claims “impersonally by standards appropriate to the management of a large pool of risks.”⁹⁸ An insurer will settle individual claims “whenever this can be done for a sum representing an appropriate discount from the probable amount of an award if the case should be tried and lost. This discount is tailored to the degree of likelihood that the insurer would win if the claim were litigated.”⁹⁹ The insurer will “lose” some by settling cases it could have won at trial, but will “win” some by settling for less than it would have lost at trial. “The insurer’s major concern is the most economical allocation of available funds to all the claims in the risk pool.”¹⁰⁰ Evidence from the Columbia Plan and Keeton and O’Connell demonstrate that automobile accident law has been routinized for at least eighty years.¹⁰¹

C. The Role of Claims Adjusters

Five years after Keeton and O’Connell’s book was published, H. Laurence Ross provided the classic account of routinization in automobile accidents from the perspective of insurance claims adjusters. Entitled *Settled Out of Court: The Social Process of Insurance Claims Adjustments*,¹⁰² the book provided considerable empirical data about how claims adjusters actually work.¹⁰³

95. *Id.* at 254.

96. *Id.* at 254 n.14 (citing 2 HARPER & JAMES, TORTS 781 (1956)).

97. *Id.* at 254.

98. *Id.*

99. *Id.*

100. *Id.*

101. Moreover, twelve jurisdictions retain a form of Keeton and O’Connell’s “no-fault” law today, meaning approximately one-fifth of American jurisdictions formally routinized “nonserious” automobile accident claims by eliminating both the fault requirement for recovery and noneconomic damages. *See, e.g.*, Paul J. Barringer, David M. Studdert, Allen B. Kachalia & Michelle M. Mello, *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, 33 J. HEALTH POL. POL’Y & L. 725, 732 (2008).

102. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970).

103. Ross’s approach was that in order “[t]o understand the legal system and the nature of rights and duties, it is not sufficient to know the formal rules; one must know the law in action.” *Id.* at 6. He recruited three insurance companies willing to cooperate with his investigation. One was an established company writing all lines of insurance and the other two were very large mass-market insurers prominent in automobile insurance. From the three companies, Ross interviewed sixty-seven adjusters and their supervisors in six different

Ross found further evidence that the fault requirement for automobile accidents was not strictly applied. Pursuant to formal law, which at that time included contributory negligence in all but a handful of jurisdictions, studies suggested “that a literal application of these rules would result in very few recoveries.”¹⁰⁴ Yet actual results were different. Based on the files Ross reviewed, in the “large majority of cases . . . a claimant who has provable economic loss will recover something.”¹⁰⁵ Moreover, “[f]lat denials are very largely confined to trivial losses.”¹⁰⁶ How did insurance lead to these results? Ross found that the “principal pressure”¹⁰⁷ on adjusters from their supervisors is to “close cases promptly,”¹⁰⁸ and adjusters learn quickly that “claims are extinguished most easily by paying them.”¹⁰⁹

More significantly, Ross found that when the law is applied by claims adjusters, “[l]iability is understood in mechanical terms rather than those of morality which are embodied in the formal law.”¹¹⁰ Pursuant to formal law, automobile accident claims revolve around issues of liability and damages. As to liability, Ross found that individualized treatment of claims was reduced to a focus on traffic laws:

The formal law of negligence liability, as stated in casebooks from the opinions of appellate courts, is not easily applied to the accident at Second and Main. It deals with violation of a duty of care owed by the insured to the claimant and is based on a very complex and perplexing model of the “reasonable man,” in this case the reasonable driver. . . . It is not with this intellectual model, however, that claims men must deal. In their day-to-day work, the concern with liability is reduced to the question of whether either or both parties violated the rules of the road as expressed in common traffic laws. Taking the doctrine of negligence *per se* to an extreme doubtless unforeseen by the makers of the formal law, adjusters tend to define a claim as one of liability or no liability depending only on whether a rule was violated, regardless of intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge. Such a

locations. The interviews were lengthy, often as long as two hours, and covered topics such as investigation and evaluation of claims, techniques of negotiation with claimants and their lawyers, and treatment of the problems posed by uncertain liability. In addition, Ross observed adjusters in the field; on about thirty days, Ross followed an adjuster during all of the appointments for one day. He took notes and discussed the appointments with the adjuster when they were finished. Ross supplemented this data with notes from sixty negotiation sessions between adjusters and plaintiffs’ lawyers and interviews with seventeen plaintiffs’ lawyers. Finally, he tested his hypotheses with an analysis of 2216 bodily injury claims closed by one of the insurers in a two-month period in 1962. *Id.* at 9–12.

104. *Id.* at 199.

105. *Id.* at 81.

106. *Id.* at 247.

107. *Id.* at 19.

108. *Id.*

109. *Id.*

110. *Id.* at 21.

determination is far easier than the task proposed in theory by the formal law of negligence.¹¹¹

Adjusters put cases into broad categories, such as “rear-enders, red-light cases, stop sign cases, and the like.”¹¹² According to Ross, “[t]he price paid is reduction of any meaningful consideration of fault, and the substitution of mechanical presumption for scientifically based investigation.”¹¹³

Simplification is also seen in the damages portion of claims adjustment. Damages cases are divided into two categories based on level of severity of the injuries.¹¹⁴ For the smaller or “routine” cases, a formula is used. Formal law would have a claimant compensated for the pain and suffering she subjectively experienced. Yet, routine cases “are investigated very superficially, and their evaluation is relatively mechanical and conventional.”¹¹⁵ Routine cases are valued by some multiple of medical bills.¹¹⁶ Ross noted, “[t]he formula method is mechanical and artificial, but it is efficient as a means of disposing of a large workload of claims.”¹¹⁷ Even in the larger, nonroutine cases in which there is a deeper and more subtle evaluation, the formula provides a starting point for negotiation.¹¹⁸

It is an important caveat that Ross found formal law relevant to the claims process. He did not assert that the two were disconnected: “payment does follow liability and damages, at least as these are interpreted by the insurance company.”¹¹⁹ Still the limitations are quite loose, especially for liability: “As liability becomes more questionable, the claim becomes ‘worth’ less in the adjuster’s eyes. When there are strong doubts as to the insured’s negligence, or . . . evidence of contributory negligence[,] . . . the adjuster will define the claim as one ‘for compromise.’”¹²⁰ Yet, even under these circumstances “the adjuster is reluctant to pay less than medical bills.”¹²¹ Moreover, some payment is made in the vast majority of cases with high damages, regardless of the facts on liability.¹²² From a damages perspective, a potential jury verdict is irrelevant for routine cases.¹²³ Although a potential jury verdict is relevant for larger cases, even these

111. *Id.* at 98.

112. *Id.* at 135.

113. *Id.* at 100. This is not meant to be critical of the adjusters themselves because “no insurance system can undertake [an individualized investigation] on a routine basis.” *Id.* Instead, “[t]he main critical bearing of this observation is on the premises of those who believe that some more traditional understanding of fault is meaningful in the automobile insurance system.” *Id.*

114. *Id.* at 106.

115. *Id.*

116. *Id.* at 107–08. Often the value is three times the medical bills. *See id.* at 108.

117. *Id.* at 110–11.

118. *Id.* at 111.

119. *Id.* at 21.

120. *Id.* at 51.

121. *Id.*

122. *Id.* at 202–03.

123. *Id.* at 112.

are somewhat routinized.¹²⁴ Examples include comparison with other “similar” cases in jury verdict reports and various published formulas made available to plaintiffs’ attorneys.¹²⁵ In sum, “even a highly individualistic law, when required to handle masses of cases, becomes categorical.”¹²⁶

A final point from Ross’s book about the relationship between formal law and the claims adjustment process is the relative importance of the defendant-insured and a repeat-player plaintiffs’ attorney. In theory, the defendant-insured should play a large role in the process. He is the person allegedly in the wrong. Yet Ross notes the defendant-insured has a mere “walk-on” role in the claims process.¹²⁷ This conclusion is supported by the 1964 “Conard Study” of automobile accidents in Michigan.¹²⁸ Conard and his colleagues concluded “the defendant plays a relatively minor role in the litigation process, even though it is the determination of his guilt or innocence that is the focal point of the process.”¹²⁹ When asked if their case had settled, 92% of the defendants stated that it had; however, 33% did not know the outcome (whether plaintiff had received a settlement).¹³⁰ The remaining 8% incorrectly stated that “the case had not been settled, that no suit had ever been filed against them, or that they were not familiar with the outcome of the case.”¹³¹

On the other hand, a repeat-player plaintiffs’ attorney may lead to a higher evaluation of a claim, particularly one that is marginal.¹³² This is because, “[a]n attorney frustrated in his commitment to his client, or one who is forced to handle a claim at a net loss, may be a bitter and more formidable opponent in future negotiations.”¹³³ After all, the insurer’s primary incentive is to achieve profitability over its portfolio as a whole. Civil recourse theory does not account for the role adjusters play in tort law.

D. The Role of Plaintiffs’ Lawyers and Settlement Mills

The larger role of plaintiffs’ attorneys in routinizing automobile accident claims, accompanying that of claims adjusters, was refined by Issacharoff and Witt.¹³⁴ Except for some isolated exceptions in urban areas,¹³⁵ early twentieth century plaintiffs’ lawyers did not generally approach automobile accidents in a

124. *Id.* at 115.

125. *Id.* at 115–16.

126. *Id.* at 23.

127. *Id.* at 66.

128. ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964).

129. *Id.* at 296.

130. *Id.* at 296–97.

131. *Id.* at 297.

132. ROSS, *supra* note 102, at 120.

133. *Id.*

134. Issacharoff & Witt, *supra* note 57; *see also* JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 211–278 (2007); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 263–71 (2007).

135. *See* WITT, *supra* note 134, at 267.

coordinated, systematic way. That began to change in 1946, when a group of workers' compensation claimants' lawyers formed the National Association of Claimants' Compensation Attorneys (NACCA)¹³⁶ to increase the clout of claimants and their lawyers in the administration of workers' compensation. Soon thereafter, the group's focus expanded to include tort cases, particularly automobile accidents. Famed trial lawyer Melvin Belli joined the group in 1949 at its convention in Cleveland.¹³⁷ Belli was named NACCA's president in 1951; the following year he began giving "Belli Seminars" at the group's annual convention.¹³⁸ In these seminars, the lawyers shared information on trial and settlement practices, including specific information on expert witnesses, product defects, and other details about the cases they had across America.¹³⁹ In 1971, to acknowledge the expansion of the group's goals, it was renamed the American Trial Lawyers Association (ATLA).¹⁴⁰

The coordination of plaintiffs' lawyers had important effects. The sharing of information about settlement techniques and verdict values helped the plaintiffs' lawyers overcome the information advantage insurers had long enjoyed. Referral networks created specialization on the plaintiffs' side that already existed for defendants. Personal injury cases were being consolidated; generalists handled them less often.¹⁴¹ From a routinization standpoint, this was significant. Many more automobile accident cases now had repeat players on both sides. Although repeat-player plaintiffs' lawyers could be threatening to repeat-player defendants, there were also advantages: "the presence of bargaining agents who knew the short-cuts, the heuristics, and the rules-of-thumb often made the settlement process considerably more efficient."¹⁴² The repeat-player dynamics led to adjusters and plaintiffs' lawyers swapping cases,¹⁴³ whereby if one case was settled at 50% another would be as well, or engaging in "package deals" in which a great many cases were settled at one time.¹⁴⁴

Because of this efficiency, by the mid-1960s automobile accident claims were being settled at a much faster rate than other tort claims.¹⁴⁵ Issacharoff and Witt offered empirical data that automobile accident claims were settled so rapidly that

136. Issacharoff & Witt, *supra* note 57, at 1610.

137. WITT, *supra* note 134, at 242.

138. *Id.* at 242–43. Interestingly, Fleming James, who routinely argued that insurance undermined fault in tort law, addressed the Eighth Annual Convention of NACCA (1954) in Boston. His theme for the address was the increase in compensation to accident victims and the concomitant number of exceptions and distortions to the fault principle. See Fleming James, Jr., *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 (1954); Fleming James, Jr., *Inroads on Old Tort Concepts, Part II*, 15 NACCA L.J. 281 (1955).

139. WITT, *supra* note 134, at 243.

140. Issacharoff & Witt, *supra* note 57, at 1610. The group eventually changed its name to the Association of Trial Lawyers of America. WITT, *supra* note 134, at 242. It is now the American Association for Justice (AAJ). AM. ASS'N FOR JUSTICE, <http://www.justice.org>.

141. See Issacharoff & Witt, *supra* note 57, at 1611–12.

142. *Id.* at 1614.

143. *Id.* at 1611–12.

144. *Id.* at 1614 (citing Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 904–05 & n.48 (1953)).

145. *Id.*

they were more analogous to formally routinized workers' compensation claims than they were to other tort claims: "The striking feature is the similarity of the mature tort injury system in auto claims to the administrative system of workmen's compensation."¹⁴⁶ Both the formal and informal systems compensated much larger percentages of victims than formal tort doctrine would have allowed, by providing awards that were smaller, but more certain, than was theoretically available through litigation.¹⁴⁷ This was accomplished in both systems by simplification—rule-of-thumb categorization and "stereotyped claims practices, rather than conducting individualized inquiries, to determine questions of compensation."¹⁴⁸

Nora Freeman Engstrom recently chronicled the next stage in the routinization of automobile accident claims. Over the past three decades, a new business model in plaintiffs' personal injury firms has emerged: the "settlement mill."¹⁴⁹ Settlement mills are "high-volume personal injury law practices that aggressively advertise and mass produce the resolution of claims, typically with little client interaction and without initiating lawsuits, much less taking claims to trial."¹⁵⁰ The favorite claim of these settlement mills is the automobile accident.¹⁵¹

According to Engstrom, at least three factors led to an evolution of conventional plaintiffs' firms to settlement mills: (1) advertising; (2) the widespread acceptance of contingency fees, particularly tiered fees; and (3) the increasingly hostile litigation environment for personal injury cases.¹⁵² The most important factor was the Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*,¹⁵³ holding that attorney advertising was entitled to First Amendment protection. Because advertising tends to attract small claims, it is best suited for a high volume business model.¹⁵⁴ Moreover, Engstrom argues that the advent of the tiered contingent fee contract, originally designed to spur additional attorney effort, instead gave

146. *Id.* at 1615.

147. *Id.* at 1595, 1616–17.

148. *Id.* at 1595.

149. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485, 1486 (2009).

150. *Id.* Engstrom elaborates that there are ten characteristics that distinguish settlement mills from conventional personal injury firms:

Settlement mills necessarily[:] (1) are high-volume personal injury practices that (2) engage in aggressive advertising from which they obtain a high proportion of their clients, (3) epitomize "entrepreneurial legal practices," and (4) take few—if any—cases to trial. In addition, settlement mills generally (5) charge tiered contingency fees; (6) do not engage in rigorous case screening and thus primarily represent victims with low-dollar claims; (7) do not prioritize meaningful attorney-client interaction; (8) incentivize settlements via mandatory quotas or by offering negotiators awards or fee-based compensation; (9) resolve cases quickly, usually within two-to-eight months of the accident; and (10) rarely file lawsuits.

Id. at 1491–92 (footnote omitted).

151. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 *N.Y.U. L. REV.* 805, 807 (2011).

152. Engstrom, *supra* note 149, at 1521–29.

153. 433 U.S. 350 (1977).

154. Engstrom, *supra* note 149, at 1522–23.

attorneys a means to dissuade clients from insisting on proceeding with litigation.¹⁵⁵ Finally, increasing litigation costs and decreasing median jury trial tort awards, and awareness of the same by plaintiffs' lawyers, made it less attractive to take cases to trial.¹⁵⁶

Settlement mills push the law further from a focus on individualized justice and the fault standard. The focus of settlement mills is on volume; settlement mill attorneys often have triple the caseload of conventional personal injury attorneys.¹⁵⁷ Engstrom notes that "[e]fficiency trumps process and quality."¹⁵⁸ Settlement mills decline few cases; one interviewee noted the "*modus operandi* was to sign everything up."¹⁵⁹ Thus, "[f]actual investigations are short-circuited or skipped altogether."¹⁶⁰ Many of the settlement mill employees interviewed by Engstrom were explicit: "[T]here was never any investigation done of the claim The only investigation that was ever done was whether or not someone had insurance."¹⁶¹ Two other employees of the same firm answered simply "[n]one" to a question about the extent of an investigation performed by the firm.¹⁶² Much of the work in settlement mills, including negotiating with insurance adjusters, is performed by non-lawyers.¹⁶³ The primary incentive for settlement mill employees—lawyers and non-lawyers alike—is to close files.¹⁶⁴ Thus, when an insurance adjuster is negotiating with a representative from a settlement mill, the primary incentive on both sides is to close the file.¹⁶⁵ Although conventionally represented automobile accident plaintiffs rarely try a case to verdict—approximately 2.8%¹⁶⁶—the rates at settlement mills are far lower. Engstrom calculated rates of approximately 0.5%, 0.3%, and 0.2% for various settlement mills.¹⁶⁷ Despite settlement mills' "cattle call" nature of signing up clients, cases in which an insurer makes no offer at all are quite rare.¹⁶⁸

According to Engstrom, this system, providing "near universal (though sometimes partial) compensation," does not support the conventional wisdom that parties "bargain in the shadow of the law."¹⁶⁹ First, the parties are not motivated by their knowledge of how similar cases fared at trial because settlement mill negotiators typically lack this knowledge.¹⁷⁰ Second, the parties are not motivated by their prediction of how this particular case would fare at trial because settlement

155. *Id.* at 1524–27.

156. *Id.* at 1527–29.

157. *Id.* at 1492.

158. *Id.* at 1493.

159. *Id.* at 1499.

160. *Id.* at 1493.

161. *Id.* at 1508.

162. *Id.*

163. *Id.* at 1518.

164. *Id.* at 1501.

165. *See supra* notes 107–09 and accompanying text.

166. Engstrom, *supra* note 149, at 1495.

167. *Id.* at 1496–97.

168. *Id.* at 1517 n.207.

169. *Id.* at 1547.

170. *Id.* at 1530–31.

mill negotiators perform, at best, cursory investigations of the facts.¹⁷¹ Third, settlement mill attorneys are simply not prepared to go to trial, so there is no real alternative to settling the case.¹⁷²

How, then, are claims valued? “Going rates.”¹⁷³ Engstrom acknowledges that going rates “reflect well-established legal rules and entitlements and bear *some* relation to past trial verdicts,” but the relationship is “muted” and “relatively unaffected by the many merit- and non-merit-based factors that would serve to increase or decrease a claim’s value in a court of law.”¹⁷⁴ In essence:

Instead of an individualized and fact-intensive analysis of each case’s strengths and weaknesses alongside a careful study of case law and comparable jury verdicts, settlement mill negotiators and insurance claims adjusters assign values to claims with little regard to fault based on agreed-upon formulas, keyed off lost work, type and length of treatment, property damage, and/or medical bills, which in turn relate to the severity of the injury.¹⁷⁵

While ostensibly operating within traditional tort law, settlement mills function more like no-fault insurance, providing fairly certain and standardized sums at relatively low systemic cost.¹⁷⁶

A significant issue is the number of settlement mills operating in America. Engstrom admits that if the model she described was limited to the eight firms she investigated, it would be interesting but not very important.¹⁷⁷ She further acknowledges the impossibility of an exact calculation. Engstrom, however, presents anecdotal and empirical evidence that settlement mills are fairly common. First, anecdotal evidence exists from interviews with insurance claims adjusters. In a disciplinary hearing in Louisiana, an attorney sought to demonstrate that his use of non-lawyers to negotiate with insurance adjusters was unremarkable. The adjusters named at least ten firms in the state, exclusive of firms Engstrom interviewed, that followed the practice.¹⁷⁸ One adjuster even stated that the majority of her negotiations were with non-lawyers.¹⁷⁹ Conventional personal injury plaintiffs’ firms are extremely unlikely to allow non-lawyers to negotiate with insurers.¹⁸⁰ Moreover, researchers are beginning to publish descriptions of firms

171. *Id.* at 1531–32 (“Most of the cases I handled, I didn’t even know the facts of the case.”).

172. *Id.* at 1532.

173. *Id.*

174. *Id.* at 1533.

175. *Id.* at 1534 (footnote omitted).

176. Engstrom, *supra* note 151, at 809.

177. *See* Engstrom, *supra* note 149, at 1514. She has since compiled information on another four firms, bringing the total to twelve firms in ten different states. Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1083, 1083 (2011).

178. Engstrom, *supra* note 149, at 1518.

179. *Id.*

180. *Id.* I was an associate at a conventional personal injury plaintiffs’ firm from 1996 until 2003. Non-lawyers never negotiated with insurers at our firm, and I knew of no firm at

with settlement mill features.¹⁸¹ The empirical evidence consists of two sets of data indicating substantial decreases in tort filings during time periods in which automobile accident and injury rates increased.¹⁸² Engstrom notes these counter-intuitive trends, more accidents and injuries with more lawyer representation yet fewer lawsuits, are consistent with the rise of settlement mills. As RAND stated while trying to make sense of these trends: “[I]t appears they are being settled elsewhere, in forums that produce stable, predictable outcomes.”¹⁸³

In sum, civil recourse theory, an avowedly descriptive theory that holds tort law to be unified by wrongs, does not accurately describe the treatment of many automobile accident claims. Treatment of an automobile accident as a wrong is the exception and not the rule because many repeat players on both sides are more interested in their portfolios as a whole than the outcome of particular cases. Thus, even when adjusters have strong doubts on liability, they are reluctant to pay less than the medical bills, and some amount of payment is made in the vast majority of cases with high damages regardless of the facts on liability.¹⁸⁴ For most automobile accident claims, the system provides not the redress of wrongs, but predictability of payments for insurers and compensation that is more swift and certain for plaintiffs.

which that occurred.

181. *Id.* at 1520–21. See also Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers: Dealing with the Possible But Not Certain*, 60 DEPAUL L. REV. 337, 356 (2011).

One highly respected plaintiffs’ lawyer was emphatic in his criticism of television advertising, which to him seems unprofessional. What especially bothered him “are the people who are not competent to handle business, that advertise, get the business, and then instead of referring the better cases, they handle those cases in a less than satisfactory way. They make a fee on it, but their client is not very well served. The way they make their money is on a volume practice. I view those people as bottom feeders.” Another lawyer said that heavy advertisers “are not fulfilling a role as an attorney, they’re doing nothing but adjusting claims from the plaintiffs’ standpoint.”

Id. A former student recently requested a reference for a position, but confided that she was worried the firm might be “a mill.”

182. Engstrom, *supra* note 149, at 1519–20. In one study, from 1977 to 1997, lawyer participation in the settlement of third-party automobile accident personal injury claims increased significantly, yet the chance that any particular claim would produce a lawsuit dropped dramatically. Mark J. Browne & Joan T. Schmit, *Patterns in Personal Automobile Third-Party Bodily Injury Litigation: 1977-1997* (Sept. 2, 2004) (unpublished manuscript), <http://ssrn.com/abstract=588481>. In the second study, during 1992–2001, the National Center for State Courts reports that automobile tort filings declined 14% in the seventeen states (with 53% of the U.S. population) covered by available data. Engstrom, *supra* note 149, at 1519 (citing NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (2002)). During the same period, the number of traffic accidents with injuries and the number of overall traffic accidents both increased. *Id.* at 1519–20 (citing NAT’L CTR. FOR STATISTICS & ANALYSIS, TRAFFIC SAFETY FACTS 2005, at 1).

183. Engstrom, *supra* note 149, at 1520 (citing DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION 8–9, 32 (1987)). In many ways, the foregoing critique is an elaboration of Mike Rustad’s point that civil recourse does not sufficiently account for major players in the tort system, such as insurers and plaintiffs’ lawyers. See Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 480 (2011).

184. See *supra* notes 120–22 and accompanying text.

As noted recourse theorist Jason Solomon stated: “Because of the now-routinized system of insurance claims, it may well be that the most common type of tort claim is quite far from the ideals of civil justice.”¹⁸⁵

E. Responses

Goldberg has already responded to the general idea that “settlement and insurance have rendered tort law obsolete.”¹⁸⁶ He made four main points in response. However, Goldberg’s arguments are weakened by the automobile accident context. Although I agree with Goldberg that settlement and insurance have not rendered tort law obsolete, at least as applied to automobile accidents, I believe they demonstrate that neither is tort law unitary.

First, and most significantly, Goldberg argued that tort claims are still processed in “the shadow of the law;”¹⁸⁷ the settlement process takes cues from formal law on liability and damages. The problem for Goldberg is that the shadow of the law becomes faint on the crucial issue of liability in many automobile accident cases.¹⁸⁸ On the question of whether torts are wrongs, the category that matters is liability. According to the more traditional model chronicled by Ross, the shadow of the law provides loose constraints to settlement. Even when evidence of liability was weak, adjusters were described as reluctant to offer less than the costs of medical bills.¹⁸⁹ The larger the damages in an automobile accident case, the more important the shadow of the law becomes.¹⁹⁰ However, even in the vast majority of claims with high damages, some amount of compensation was paid regardless of the facts on liability.¹⁹¹ Engstrom’s scholarship on settlement mills is suggestive of a category of law firm for which the shadow of the law on liability virtually disappears. In cases involving settlement mills, the firms accept almost all clients and receive an offer for some amount of compensation for almost all of them. Engstrom noted one mill accepted 2107 of 2204 potential automobile accident clients.¹⁹² Yet the proportion of cases that receive no offer from insurers is miniscule; in multiple interviews with settlement attorneys in different firms, the attorneys estimated the percentage of “no offer” cases at less than 1%.¹⁹³ Even if it were conceded that formal law was based on the non-instrumentalist wrongs described by civil recourse theory,¹⁹⁴ insurance-driven settlement practices reduce or eliminate the importance of wrongs in many cases.

185. Jason M. Solomon, *What is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 331 (2010).

186. Goldberg, *supra* note 6, at 1264. For a list of ways that liability insurance shapes tort, see Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2005).

187. Goldberg, *supra* note 6, at 1264–65.

188. I thank Tom Baker for helping me understand the scope of this point.

189. See *supra* notes 120–21 and accompanying text.

190. See ROSS, *supra* note 102, at 135.

191. See *supra* note 122 and accompanying text.

192. Engstrom, *supra* note 149, at 1511.

193. *Id.* at 1517 n.207. One attorney estimated his percentage of “no offer” cases as high as 20%, but his claims were all valued in excess of \$25,000. *Id.*

194. I think formal law is more complicated. Automobile accident claims in most

Second, Goldberg argued an actual jury holding is not necessary for tort law to operate as a law for redressing wrongs. As long as governments provide courts to adjudicate claims for wrongs and claimants have the ability to access them, that is sufficient. It is acceptable if such access results in “negotiated settlement conducted on terms shaped by governing law.”¹⁹⁵ As to this second point, I agree that an actual jury verdict is not necessary for tort to function as a system for redressing wrongs in the way that Goldberg and Zipursky describe. However, on the issue of liability, as just noted, governing law’s role in shaping automobile accident settlements is not robust. Moreover, the sheer amount of settled, as opposed to tried, cases demonstrates that claimants have multiple objectives in pursuing claims. Recall that less than three percent of automobile cases are tried to verdict.¹⁹⁶ Undoubtedly, as Goldberg and Zipursky remind us, some claimants want vindication and to be taken seriously. But the ultimate vindication is a jury verdict in the claimant’s favor, a public acknowledgment of the claimant’s victory. If that was all that motivated claimants, far fewer cases would end in a compromised claim with the claimant accepting the defendant’s statement denying wrongdoing and perhaps a confidentiality provision. Other factors, such as compensation—which can be especially pressing for some claimants—and general peace must factor into the calculations of many of them.

Third, Goldberg asserted that even though insurance can blunt the extent to which wrongdoers are required to answer for their wrongs, it also makes redress available to victims who would not otherwise obtain it. In fact, Goldberg argued it instantiates a sense of responsibility to others: “To purchase liability insurance is to acknowledge, at a basic level, one’s tort duties.”¹⁹⁷ Here, too, I agree with much of Goldberg’s argument. Insurance undermines the direct link between wrongdoers and the consequences of their actions. But it plays many positive roles. It allows for victims to be compensated, and it can serve a regulatory function.¹⁹⁸ Yet, on this point as well, automobile accidents differ from many tort causes of action. It is possible to see the purchase of liability insurance, especially voluntary liability insurance, as an acknowledgment of tort duties. On the other hand, it is also possible to see it as the selfish (but reasonable) desire to protect personal assets.

jurisdictions are formally premised on negligence. Every element of negligence includes instrumentalism. Duty is often a multi-factor policy analysis, including factors such as concern over “crushing exposure to liability.” *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985). In the breach analysis, formally governed by the instrumentalist-inspired objective standard, “utility” is often considered. *See* RESTATEMENT (SECOND) OF TORTS § 291 cmt. d (1965). Proximate cause often involves courts’ use of “public policy” and “practical politics” from Judge Andrews’s dissent in *Palsgraf*. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Finally, damages may be capped for instrumentalist efficiency reasons. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (LexisNexis 2006) (passing a \$350,000 cap on noneconomic damages in personal injury actions to ease perceived pressure on liability insurers); *see* Alan Calnan, *The Distorted Reality of Civil Recourse Theory*, 60 CLEV. ST. L. REV. 159, 183–92 (2012); Robinette, *supra* note 7, at 482–83.

195. Goldberg, *supra* note 6, at 1266.

196. *See supra* note 166 and accompanying text.

197. Goldberg, *supra* note 6, at 1269.

198. *See, e.g.*, Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433 (2010).

Automobile insurance, because it is compulsory, is another step removed. Motorists may purchase compulsory insurance because it is required of them. And it is required of them because the scope of automobile accident injuries reached such a level of “hellish carnage”¹⁹⁹ that it became an issue of public policy, acted on by legislatures.

Finally, Goldberg argued that tort law sets standards of proper conduct, and it often performs this function regardless of whether litigation arises.²⁰⁰ Although this argument may be stronger for non-automobile cases, there are two serious problems with arguing that automobile accident law sets standards of proper driving. First, the (vague) negligence standard in the automobile accident context has been largely subsumed by traffic law. Insurance adjusters and lawyers do not typically inquire as to whether a given driver has driven “reasonably under the circumstances” (which standard would provide no guidance to drivers anyway). They instead ask an easier question. Namely, Ross tells us they rely on traffic laws in adjusting the vast majority of claims.²⁰¹ In essence, the legislature sets the standard that tort law then borrows.²⁰² Of course, it is not then true that *tort* is setting standards. Second, even if the guidance of formal tort law was specific and useful, most drivers would not know it. Absent special circumstances, the average driver does not follow automobile accident decisions in her jurisdiction. Unlike tort causes of action involving institutional defendants, say medical malpractice and hospitals or products liability and manufacturers, drivers do not typically have a supervisor or someone with an incentive to follow tort doctrine and keep them apprised of it. Traffic laws, many of which are actually posted on signs on the highway, are quite different. But again, drivers do not know *tort* law; they know traffic law.

CONCLUSION

Civil recourse theory is rich, subtle, and comprehensive. It has been extremely influential in tort theory, and is now affecting areas of the law beyond torts. Moreover, I think Goldberg and Zipursky deserve considerable credit for shifting tort theory back from the view that tort law is only about public policy and that the parties’ sole role in a tort suit is implementing it. Yet civil recourse, which is a descriptive theory, does not accurately describe tort law.

Moreover, it distracts theorists from the crucial issue of when to treat claims as wrongs and when to treat them as routinized, compensable events. As a descriptive matter, tort law already treats claims both ways. The most critical normative question in tort law today is how to properly draw the line between the two. As discussed earlier, a routinized, compensable treatment of torts provides benefits to

199. See *supra* note 79 and accompanying text.

200. Goldberg, *supra* note 6, at 1269–70.

201. ROSS, *supra* note 102, at 20 (stating that the investigation of claims “consist[s] mainly in discovering violations of the traffic law”).

202. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. d. (2010) (“[I]n most highway-accident cases, findings of negligence depend on ascertaining which party has violated the relevant provisions of the state’s motor-vehicle code.”) I thank Nora Engstrom and Kyle Graham for this point.

both parties. For defendants, liability payments become more predictable; transaction costs such as time and attorneys' fees are reduced. Plaintiffs receive compensation that is much more certain and swift, and avoid many of the unpleasant aspects of pursuing a claim in litigation.²⁰³ Yet surely some defendants have engaged in acts for which this more casual treatment is not appropriate. Goldberg and Zipursky are surely correct to note that some claimants are not just looking for payment, but rather the sense that their claims are taken seriously; they seek vindication.²⁰⁴ There are two types of torts. We need to focus on the best way(s) to distinguish them.

203. For these reasons, Engstrom gives settlement mills a passing grade: "in substance, settlement mills have managed to shed a number of tort's most maligned attributes and achieve many of no-fault's laudable goals: They arguably expand access to compensation, reduce court congestion, and offer their clients relative speed, predictability, and certainty, all at fairly low systemic cost." Engstrom, *supra* note 151, at 809.

204. See *supra* note 50 and accompanying text.