

WHEN CARS CRASH: THE AUTOMOBILE'S TORT LAW LEGACY

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Everyone understands that the invention of the automobile has had a profound effect on daily life in America. It has transformed our workplaces, altered our neighborhoods, and radically changed our environment. But cars have never been perfectly safe, and, as the years have passed, injuries and fatalities have mounted. This Article contends that, just as motor vehicles have remade our culture, these injuries and deaths—some 3.5 million fatalities and counting—have catalyzed fundamental changes in the contours, purposes, and limits of our law.

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I. INTRODUCTION

Alongside baseball, jazz, and apple pie, one could add two more things Americans are known for and peculiar about: automobiles and legal adversarialism.¹ We travel more auto-miles per year than anyone else, guzzle more fuel, and boast more miles of open road.² We also have more lawyers and more lawsuits, and thus we rely more heavily on legal processes.³ What happens when these two American standbys collide?

Of course, collide they do—and frequently. These days, there are roughly 6.3 million police-reported car crashes per year in the United States.⁴ For 35,000 Americans, these crashes are fatal.⁵ Auto accidents constitute the leading cause of death for those from age fifteen to twenty-four,⁶ and, for all ages, they rank third in terms of years of life lost, behind only heart disease and cancer.⁷

1. For the seminal work on American legal adversarialism, see generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2d ed. 2003).

2. See Praveen Duddu, *The World's Biggest Road Networks*, ROAD TRAFFIC TECH. (Jan. 12, 2014), <http://www.roadtraffic-technology.com/features/featurethe-worlds-biggest-road-networks-4159235>; William Pentland, *The World's Top Car-Owning Countries*, FORBES (July 30, 2008, 1:00 PM), https://www.forbes.com/2008/07/30/energy-europe-automobiles-biz-energy-cx_wp_0730cars.html#27e2f33cfa5f.

3. For more on our distinctive legal culture, see THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 2–3 (2002); and KAGAN, *supra* note 1, at 3. For our outsized attorney supply, see Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 646 (1992).

4. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., *TRAFFIC SAFETY FACTS: RESEARCH NOTE, 2015 MOTOR VEHICLE CRASHES: OVERVIEW* 1, 3 tbl.2 (2016), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812318>.

5. *Id.* at 1, 2 & fig.2.

6. Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 261 (2017).

7. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., *MOTOR VEHICLE TRAFFIC CRASHES AS A LEADING CAUSE OF DEATH IN THE U.S., 2002 – A DEMOGRAPHIC PERSPECTIVE* 12, 44 (2005), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/809843>. Eleven children die in car wrecks per week, and we have more motor vehicle deaths on a per capita basis than any other industrialized nation. Nicholas Bakalar, *Car Accidents Remain a Top Child Killer, and Belts a Reliable Savior*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/health/car-accidents-child-deaths-seat-belts.html>; *Vital Signs: Motor Vehicle Crash Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/motor-vehicle-safety/index.html> (last visited Apr. 28, 2018). All told, these injuries, accidents, and deaths cost us

Even those who are comparatively lucky do not walk away unscathed. Car crashes injure roughly 4.6 million Americans annually.⁸ Of those hurt in auto accidents, roughly half seek third-party compensation.⁹ These compensation attempts are the 800-pound gorilla of the tort liability system, accounting for more than half of all trials, nearly two-thirds of all injury claims, and three-quarters of all damage payouts.¹⁰

No one denies that lowly car wreck claims have had a huge *practical* effect on the American tort system, in terms of claims initiated, lawsuits filed, dollars transferred, and trials concluded. As Samuel Gross and Kent Syverud have put it, “The traffic accident trial is the cultural archetype for civil litigation in late twentieth-century America.”¹¹ But this Article asks a slightly different question: Is the auto claim’s impact similarly consequential when we think beyond mere filings and payouts? What do we see, in other words, when we step back and consider the automobile’s tort law legacy?

Now is an auspicious time for the inquiry, for, when it comes to the automobile, we are on the precipice of profound transformation. Some changes, in fact, are already here; given the proliferation and popularity of ride-hailing apps, ever more drivers on the roads are professionals (of sorts).¹² A recent study found that Uber and Lyft make a combined 170,000 trips per day in the city of San Francisco alone—roughly 15% of all vehicle trips taken each day within the metropolis.¹³ Assuming this trend continues, over time fewer Americans will own cars or carry liability insurance, and an ever

roughly \$870 billion annually. MICHAEL R. LEMOV, *CAR SAFETY WARS: ONE HUNDRED YEARS OF TECHNOLOGY, POLITICS, AND DEATH*, at xii (2015).

8. NAT’L SAFETY COUNCIL, *NSC MOTOR VEHICLE FATALITY ESTIMATES 1* (2017), https://www.nsc.org/Portals/0/Documents/NewsDocuments/2018/December_2017.pdf.

9. DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 120 (1991), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3999.pdf>.

10. For relevant statistics, see JAMES M. ANDERSON ET AL., *THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE* 1 (2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf; THOMAS H. COHEN, *BUREAU OF JUSTICE STATISTICS BULLETIN: TORT BENCH AND JURY TRIALS IN STATE COURTS*, 2005, at 2 (2009), <https://www.bjs.gov/content/pub/pdf/tbjtsc05.pdf>; HENSLER ET AL., *supra* note 9; and Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1072 (2000).

11. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 356 (1991).

12. See Lisa Eadicicco, *Uber Drivers Aren’t Worried About Self-Driving Cars — Yet*, TIME (Apr. 10, 2017), <http://time.com/4729931/uber-self-driving-cars-2017/>.

13. S.F. CTY. TRANSP. AUTH., *TNCs TODAY: A PROFILE OF SAN FRANCISCO TRANSPORTATION NETWORK COMPANY ACTIVITY* 1 (2017), http://www.sfcta.org/sites/default/files/content/Planning/TNCs/TNCs_Today_112917.pdf.

higher proportion of drivers will be supervised by, and beholden to, big companies, thus altering insurance markets and bringing enterprise liability principles, long foreign to automobile accident litigation, finally to the fore.¹⁴

Even more radical change is on deck. Self-driving car technology is developing quickly, and few doubt that autonomous vehicles are on their way, though the details of their arrival are still being worked out—including what precisely these vehicles will look like, how safe they will be, and how swiftly and completely they will be integrated into the current fleet.¹⁵ However it happens, though, over the next quarter-century we are apt to leave the *current* world of auto accidents—one with many accidents, the vast majority (some 94%) of which are caused by human error and a small sliver (less than 3%) of which are caused by a manufacturing or design defect—for a world that is flipped 180 degrees.¹⁶ Once autonomous vehicles dominate, there will be comparatively few accidents—some predict an 80% reduction from current rates.¹⁷ And, of this smaller universe of

14. Enterprise liability is the idea that a profit-making enterprise that reliably generates harm ought to be compelled to bear the cost of the harm it generates. For a primer, see generally Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997). Relevant to this inquiry, a fight is now raging as to whether or not Uber and Lyft drivers are employees or independent contractors for purposes of tort liability. This fight is consequential because, under the doctrine of respondeat superior, principals are vicariously liable for the torts of the former, as long as the tort is committed within the “scope of employment”; conversely, principals are typically not liable for the torts of independent contractors, except in a few limited circumstances. See generally Lauren Geisser, Note, *Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft, and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers*, 89 S. CAL. L. REV. 317 (2016). In the meantime, many states have enacted legislation compelling Uber and Lyft drivers to maintain a minimum in insurance coverage. See Brian O’Connell, *Do States Regulate How Uber and Lyft Operate?*, INSURANCEQUOTES (Oct. 7, 2016, 2:25 PM), <https://www.insurancequotes.com/business/ridesharing/state-laws-regulating-uber-100816>. And, even absent legislation, Uber and Lyft promise that passengers injured during trips will be covered up to \$1 million for medical expenses. E.g., *Insurance: How You’re Covered*, UBER, <https://www.uber.com/drive/insurance/> (last visited Apr. 28, 2018).

15. See Mark A. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, 105 CALIF. L. REV. 1611, 1616–17 (2017) (offering analysts’ predictions regarding self-driving vehicles); Enrique Dans, *Autonomous Vehicles: Moving Forward*, FORBES (July 5, 2017, 8:34 AM), <https://www.forbes.com/sites/enriquedans/2017/07/05/autonomous-vehicles-moving-forward/#5e1e75a64626>.

16. For estimates, see NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., FEDERAL AUTOMATED VEHICLES POLICY: ACCELERATING THE NEXT REVOLUTION IN ROADWAY SAFETY 5 (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf>; and NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., NATIONAL MOTOR VEHICLE CRASH CAUSATION SURVEY: REPORT TO CONGRESS 25–26 (2008), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811059>.

17. Geistfeld, *supra* note 15, at 1615 (compiling estimates).

accidental injury, just a small proportion will be caused by the driver's slow reflexes, bad judgment, or momentary inattention. The vast majority will, instead, be caused by programming and instructional errors that are ultimately traceable to the car's manufacturer or the maker of a component part.¹⁸ Our traditional negligence system, designed for the Model T and premised on personal responsibility, will fit this new world awkwardly, indicating that fundamental change ought to come.¹⁹ With these changes in sight—and, particularly, as many are now hard at work figuring out how our system of compensation following auto injury ought to be adapted to new conditions²⁰—now is a good time to look back and take stock.

An examination of the automobile's tort law legacy is also warranted because, to this point, the topic has attracted surprisingly little attention.²¹ To be sure, legions have evaluated the automobile compensation system from 50,000 feet (though most of this scholarship is now decades old), and many have proposed ways to make the system less adversarial and more efficient, equitable, and predictable.²² Some have studied particular hot-button cases and claims.²³ Many have written about the National Highway Traffic Safety Administration ("NHTSA"), including the agency's now-

18. See, e.g., Victor Luckerson, *Google's Self-Driving Cars Still Need Human Help*, TIME (Jan. 13, 2016), <http://time.com/4179166/google-cars-self-driving-autonomous/> (discussing incidents during the testing phase of autonomous vehicles where vehicles would have crashed without human intervention).

19. For the personal responsibility premise of our negligence system, see, for example, Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 253 (1908), which explains that "[t]he courts are the last resort of him who not merely does not, but cannot, protect himself."

20. Many have debated what this new world should look like. See, e.g., Geistfeld, *supra* note 15, at 1619–20, 1619 n.25 (expressing various conclusions from scholars regarding how claims and liability determinations may be handled with autonomous vehicles).

21. Valerie P. Hans, *Faking It? Citizen Perceptions of Whiplash Injuries*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 131, 132 (B.H. Bornstein et al. eds., 2008) ("[T]hus far, the lowly automobile case has attracted minimal scholarly attention."); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1602 (2004) (discussing the limited "literature on automobile accidents").

22. See generally, e.g., COMM. TO STUDY COMP. FOR AUTO. ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932); ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964); DEPT. OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (1971); ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

23. See, e.g., Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1013 (1991).

notorious struggles.²⁴ Some have teased out jurors' perspectives,²⁵ while others have written about claims adjustment from the auto insurers' points of view.²⁶ Even I have written quite a bit about particular lawyers who, in a routinized way, handle a particular subset of claims.²⁷ But few have tried to put the pieces of the puzzle together, to get a clearer picture of contemporary motor vehicle litigation, to distinguish auto claims from other claims within the tort liability system, and to understand how the automobile has contributed to contemporary policy struggles, theoretical debates, and doctrinal evolution.

That is the task pursued in this Article—although, admittedly, what follows is not comprehensive, for a thorough study of the automobile's tort law legacy could stretch for thousands of pages and fill volumes. As Kenneth Abraham has observed, there is a strong case to be made that “[i]t was in auto liability where an active plaintiffs' bar first arose.”²⁸ It was in an effort to attract car wreck cases that attorney advertising finally took off.²⁹ And, as John Witt and Sam Issacharoff have shown, it was in the early settlement of auto accident claims that we glimpsed the first “privatized systems of aggregate settlement,” which we now see replicated in numerous other areas.³⁰ But this Article at least scratches the surface and hopefully paves the way forward. Part II sets the stage, showing that, while auto claims are common, they are also atypical in crucial respects. Part III then revisits perhaps the greatest debate involving auto claims: whether they should be resolved by the tort system at

24. See generally JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); Mashaw & Harfst, *supra* note 6 (providing an overview of the role and development of NHTSA); Robert L. Rabin, *Pathways to Auto Safety: Assessing the Role of the National Highway Traffic Safety Administration, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW* 297 (Nicholas R. Parrillo ed., 2017) (detailing implications of inadequate highway safety designs).

25. See Hans, *supra* note 21, at 131–50.

26. For the most comprehensive study to date, see generally H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970).

27. See generally Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485 (2009) [hereinafter Engstrom, *Run-of-the-Mill Justice*]; Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 *N.Y.U. L. REV.* 805 (2011).

28. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 69, 82–85 (2008); see also Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 *DEPAUL L. REV.* 303, 303–24 (2012) (explaining that the American Trial Lawyers Association—once the “ATLA,” now the “AAJ”—came of age during battles over the future of auto litigation).

29. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 *STAN. L. REV.* 633, 657–59 (2013) (discussing how personal injury lawyers became the dominant attorney advertisers).

30. Issacharoff & Witt, *supra* note 21, at 1603.

all. Part III shows that this debate—and our (mostly) ill-fated experiment with no-fault automobile compensation—has had lasting repercussions, particularly in cooling support for ambitious no-fault reforms in other areas. Finally, Part IV reveals that auto claims, and debates surrounding these claims, have been a source of both theoretical insight and intense doctrinal innovation, affecting broad swaths of the law.

II. SETTING THE STAGE: COMMON BUT NOT TYPICAL

Scholars have observed that “automobile claims have become the paradigm case for the way in which tort deals in individualized dispute resolution.”³¹ That’s true, to a point. But auto claims also differ from “typical” tort claims in myriad respects. This Part catalogs their differences while also corraling evidence concerning what auto claims tend to look like and how they tend to be resolved. Specifically, Subpart A offers an overview of the contemporary auto claims liability system, showing that, compared to other tort law causes of action, auto claims are brought more frequently, tried more often, and resolved at faster speeds and lower costs. Subpart B then evaluates auto claims from a political perspective. It reveals that these claims have been affected by the litigation wars that have raged over the past four decades but, for a number of reasons, have not been in tort reformers’ crosshairs. Subpart C situates auto claims in their broader regulatory milieu, finding that driving is unique because it is already so comprehensively regulated by so many overlapping authorities. Finally, Subpart D draws on the above discussion to offer a concluding insight about the need for disaggregation and specificity when we describe the “tort” system, as there is not really one system at all.

A. *Contemporary Auto Claims Practices: Frequently Filed and Easily Resolved*

Compared to other tort claims, the filing, litigation, and resolution of auto accident claims are distinctive. For starters, as compared to most accident victims, those injured in auto accidents are far more likely to seek compensation. Deborah Hensler’s classic study of injury compensation found, for example, that “about half of all those injured in motor vehicle accidents make some informal or formal attempt to collect from another party to the accident. In contrast, in non-work, non-motor-vehicle accidents, only three injuries out of 100 lead to liability claims.”³²

Then, of those who initiate claims for compensation, roughly half hire lawyers,³³ while only a small proportion (11%, by one estimate)

31. *Id.* at 1602–03.

32. HENSLER ET AL., *supra* note 9, at 110.

33. See INS. RESEARCH COUNCIL, ATTORNEY INVOLVEMENT IN AUTO INJURY CLAIMS 3, 7 (2014) (reporting on bodily injury claimants).

actually file lawsuits.³⁴ Meanwhile, regardless of the action a claimant takes, she is likely to obtain recovery; a 1991 RAND study found that approximately 73% of auto accident claimants recover *some* third-party compensation for their injuries.³⁵

Next, and more dismally, auto claims are significantly overrepresented among the subset of claims within the tort liability system where the plaintiffs' claimed damages are exaggerated or wholly fabricated.³⁶ In general—and contrary to the views of some critics—there is no evidence that the tort system as a whole is awash in fraudulent filings. Evidence suggests that the majority of claims within the system are genuine and meritorious.³⁷ Yet, there are a couple of pockets within the tort system beset by a relatively high incidence of fraud—and one such pocket is the auto-claims system, especially the corner of that system involving claims for soft-tissue injuries, such as sprains, strains, contusions, and whiplash. Roughly 20% of all paid auto-accident claims appear to involve the deliberate inflation of damages.³⁸ And, if you zero in on soft tissue claims, more than half of claimed damages appear to be “excess.”³⁹

Auto claims are also distinctive when it comes to the actors. As compared to most tort law areas, auto defendants are more likely to be individuals as opposed to enterprises.⁴⁰ Further, in car-wreck

34. *See id.* at 41.

35. STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS 200 tbl.G.7.1 (1991), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R4019.pdf>. The 73% figure represents those in tort states and excludes those who receive only first-party compensation. *Id.* at vii–viii, 200. By way of comparison, in the medical malpractice system only about 56% of those who initiate claims receive compensation. *See* David Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2026 (2006).

36. For more on the incidence of fraudulent claiming, see Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 641, 652–65 (2017).

37. *Id.* at 647–48.

38. *See* INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN AUTO INJURY INSURANCE CLAIMS 2, 14 (2008) (reporting on bodily injury claims).

39. STEPHEN CARROLL ET AL., THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 22–23 (1995), https://www.rand.org/content/dam/rand/pubs/documented_briefings/2007/DB139.pdf; *see also* INS. RESEARCH COUNCIL, FRAUD AND BUILDUP IN AUTO INJURY CLAIMS: PUSHING THE LIMITS OF THE AUTO INSURANCE SYSTEM 21–22 (1996); INS. RESEARCH COUNCIL, *supra* note 38, at 2.

40. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS BULLETIN: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 3 (2004), <https://permanent.access.gpo.gov/gpo70912/ttvlc01.pdf> (“Nearly three-fourths of automobile accident trials involved individuals suing other individuals. In comparison, individuals sued other individuals in 28% of non-automobile accident tort trials.”). Only a small percentage of auto accident litigation alleges a product defect and, as such, is initiated against the car dealer or manufacturer. MARIKA F.X. LITRAS ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN: TORT TRIALS

cases, the plaintiff and defendant are especially likely to be strangers without any prior personal or contractual relationship.

At the same time, and somewhat paradoxically, auto cases are also distinctive in the extent to which they implicate, and are affected by, repeat-play dynamics.⁴¹ Fortunately, this is not because the same drivers keep getting in wrecks. (As Issacharoff and Witt have wryly observed, “Even the very worst drivers can hardly expect to develop much repeat-play expertise, and those who do acquire repeat-play status are usually not with us for long.”⁴²) Rather, the ubiquity of repeat play is traceable to the fact that nearly all driver-defendants are insured; thus, cases are settled or litigated between plaintiffs (or plaintiffs’ lawyers) and insurance adjusters, while driver-defendants take a back seat or check out altogether.⁴³ Two consequences follow. First, insurance adjusters and plaintiffs’ lawyers, who both handle claims in high volumes, tend to settle at least minor-injury claims in a fairly routinized manner—using claims categories, computer programs, going rates, or rules of thumb.⁴⁴ Second, and relatedly, compared to other tort claims, auto claims settled by such professionals tend to be resolved with greater haste and lower transaction costs than other kinds of litigation.⁴⁵

AND VERDICTS IN LARGE COUNTIES, 1996, at 4 tbl.4 (2000), <https://www.bjs.gov/content/pub/pdf/ttvlc96.pdf>.

41. See generally Issacharoff & Witt, *supra* note 21 (describing the emergence of repeat players and the relationship between automobile accidents and aggregate settlements).

42. *Id.* at 1603.

43. In terms of checking out, one (admittedly dated) study found that 33% of driver-defendants who were sued following auto accidents did not even know their cases’ ultimate outcome. CONARD ET AL., *supra* note 22, at 296–97. Defendants can afford to check out, in part, because plaintiffs tend not to seek “blood money,” i.e., damages in excess of liability limits. See generally Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC’Y REV. 275 (2001).

44. For the early development of these rules of thumb, see ROSS, *supra* note 26, at 134–35; and Issacharoff & Witt, *supra* note 21, at 1605–08. For a contemporary discussion, see Engstrom, *Run-of-the-Mill Justice*, *supra* note 27, at 1532–35. For a discussion of computer programs, see, for example, Jerry Guidera, “Colossus” at the Accident Scene—Insurers Use a Software Program to Pay Out Claims for Injuries, but Lawsuits Claim It’s Misused, WALL ST. J., Jan. 2, 2003, at C1.

45. As Christopher Robinette has put it, “Automobile accidents . . . are the paradigmatic example of routinization in tort law.” Christopher J. Robinette, *Party Autonomy in Tort Theory and Reform*, 6 J. TORT L. 173, 178 (2013). For times to disposition, see COHEN, *supra* note 40, at 6 fig.1, which shows that, for auto cases, roughly twenty months elapsed between filing and resolution, compared to twenty-two months for tort cases generally. Another perspective comes from the Insurance Research Council, which shows that approximately 30% of third-party auto claims (not necessarily lawsuits) are resolved within three months. See INS. RESEARCH COUNCIL, *supra* note 33, at 7, 39 fig.26 (reporting that 50% of third-party bodily injury claimants are represented by counsel and that 40% of unrepresented claimants’ claims are resolved within three months, while 25% of represented claimants’ claims are resolved within

If an auto claim is not dropped or settled, the lawsuit will generally culminate in, and be resolved by, a trial—the ultimate fate for 3–6% of auto accident lawsuits.⁴⁶ (Unlike in other contexts, resolution via pretrial motion, such as a motion to dismiss or for summary judgment, is rare.⁴⁷ Seemingly as a consequence, some evidence suggests that trials are more common here than in other areas.⁴⁸)

Occurring at unusually high rates, these trials are themselves distinctive: Unlike medical malpractice and product liability suits, auto accident trials tend not to rely heavily on technical expert testimony.⁴⁹ Instead, they tend to involve accessible and familiar fact patterns that jurors can easily understand.⁵⁰ And they are often

three months); *see also* ANDERSON ET AL., *supra* note 10, at 90 tbl.5.5 (reporting that, between 1998 and 2002, 20.3% of those asserting third-party auto claims saw those claims settled within three months). For transaction costs, *see* DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 29 (1987), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3583.pdf> (reporting that “in more complex cases (non-auto torts) the costs of litigation were higher”); and JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, at x–xii, 40–51 (1986), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3391.pdf> (showing that, for the average tort lawsuit terminated in 1985, successful auto claimants recovered net compensation of 52%, with the remainder taken up by transaction costs, whereas all other claimants recovered net compensation of only 43%).

46. *See* INS. RESEARCH COUNCIL, *supra* note 33, at 41 (reporting that, in 2012, 6% of auto claimants saw their cases tried to a verdict, while an additional 3% settled during trial); Engstrom, *Run-of-the-Mill Justice*, *supra* note 27, at 1495 & n.43 (collecting evidence on trial rates).

47. For a historical perspective, *see* Morris D. Forkosch, *Summary Judgment in Automobile Negligence Cases: A Procedural Analysis and Suggestions*, 53 CORNELL L. REV. 814, 815 (1968), which describes courts’ “hesitancy to use the summary judgment procedure in automobile negligence cases.”

48. *Compare* INS. RESEARCH COUNCIL, *supra* note 33, at 41 (providing the trial rate in auto cases), *with* Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. (forthcoming 2018) (manuscript at 1–3) (on file with author) (providing trial rates generally). *Accord* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2016 ANNUAL REPORT OF THE DIRECTOR tbl.C-4 (2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_c4_1231.2016.pdf (reporting that, in 2016, 4.6% of motor vehicle personal injury claims litigated in federal court reached trial, compared to 3.4% of “other personal injury” claims and 1% of civil claims overall); Eaton et al., *supra* note 10, at 1077. *But see* BRIAN OSTROM & NEIL KAUDER, NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 30 (1996), <https://www.bjs.gov/content/pub/pdf/ewsc95-npcsp.pdf> (reporting that, in 1992, 1.9% of state court auto cases were resolved by jury trial compared to 2.9% of tort cases overall).

49. Gross & Syverud, *supra* note 11, at 357–58 (reporting that auto cases feature an average of 2.1 expert witnesses for the plaintiff, as compared to an average of 2.5 experts in other personal injury cases).

50. *Id.* at 357 (“Most California jurors probably feel at a loss when asked to judge escalator design, or the standard of care for newborns with congenital heart defects; their decisions may be quirky. Evaluating the conduct of a driver on a

aided by the negligence per se doctrine, which offers an easy shorthand for determining negligence (i.e., the defendant's breach is established merely by looking to whether she violated a traffic law).⁵¹ So simplified, not surprisingly, these trials tend to be relatively short: the average auto accident trial lasts 5.4 days, compared to 9.5 days for personal injury trials generally.⁵² And, auto plaintiffs' trial win rates are abnormally high: auto plaintiffs who proceed to trial prevail around 60% of the time, compared to 50% for tort plaintiffs overall.⁵³ But while winning is comparatively easier, the spoils of victory are smaller. In a comprehensive study of trials from the nation's seventy-five largest counties, prevailing auto plaintiffs were awarded an average of \$16,000, while tort plaintiffs generally received \$28,000.⁵⁴ In fact, one study finds that juries award less to auto claimants even when holding the severity of injury constant.⁵⁵

B. *Comparatively Uncontroversial*

The political salience of auto claims is also unique. Though the public doesn't much like auto-accident lawyers' sometimes colorful television advertisements, and though there is occasional grumbling about the high cost of auto-liability insurance, on the whole, complaints about the auto-liability system are fairly muted.⁵⁶ Compared to other torts, auto litigation has not elicited much of a public outcry and has not been a focal point for tort-reform efforts.⁵⁷

freeway poses fewer difficulties: the jurors will have extensive knowledge of the issues, personal experience at the task, and a common vocabulary.”).

51. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. d (AM. LAW INST. 2010); Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 631–32 (2000). Insurance adjusters also look to traffic laws when assessing whether the insured was negligent. ANDERSON ET AL., *supra* note 10, at 8; ROSS, *supra* note 26, at 237–39.

52. Gross & Syverud, *supra* note 11, at 357–58.

53. See COHEN, *supra* note 40, at 4 & tbl.3; LITRAS ET AL., *supra* note 40, at 1, 4 tbl.5.

54. COHEN, *supra* note 40, at 7 (reporting median figures); see also LITRAS ET AL., *supra* note 40, at 1 (finding that the median auto accident verdict was \$17,931, compared to \$30,500 for all tort cases, in a survey of cases from 1996 in the nation's seventy-five largest counties); Gross & Syverud, *supra* note 11, at 358 (finding that the mean judgment for auto accident cases in California was about a third of that for other personal injury trials). Auto claimants are also particularly unlikely to recover punitive damages. LITRAS ET AL., *supra* note 40, at 7 tbl.7 (reporting that only 0.7% of prevailing plaintiffs in motor vehicle trials were awarded punitive damages, as compared to 3.3% of plaintiffs overall).

55. HENSLER ET AL., *supra* note 45, at 21 (“[J]uries are likely to award substantially more money in a product liability, malpractice, or work injury case than in an auto accident case for an injury of the same degree of severity.”).

56. ABRAHAM, *supra* note 28, at 70.

57. *Id.* at 70, 101–02 (making this point and attributing it to “the routinization of auto liability” and “the absence of a discrete group of defendants who face substantial auto liability and whose interests therefore warrant investing in reform efforts”).

I chalk this up to five facts: First, as noted above, those sued tend to be individuals, not entities, and driver-defendants are diffuse and unorganized.⁵⁸ Second, and relatedly, when it comes to car wrecks, any individual is just as likely to be the injured as the injurer, so nobody has much of an incentive to organize.⁵⁹ (Contrast this with medical malpractice or product liability litigation, where doctors and product manufacturers know, *ex ante*, that they are more likely to be on the receiving end of litigation.⁶⁰) Third, even if you are sued following an auto accident, liability insurance—which is mandatory in essentially every state—blunts the impact, and damages in excess of insurance coverage are extremely rare.⁶¹ Fourth, over the past three to four decades, the auto-claims system has been on something like autopilot; it has grown some but (unlike some other areas) has not seen big spikes in filing rates, a spate of blockbuster verdicts, or significant changes to settled doctrine.⁶² Finally, because claims handling is routinized, and most cases (even that are tried) result in comparatively small verdicts, auto cases have resisted sensationalization.⁶³ Thus, the media has not distorted auto claiming to the same extent that it has so distorted and sensationalized litigation of other types.⁶⁴

Of course, the modern tort reform movement of the past four decades has affected auto litigation. Car wreck cases have not dodged the litigation wars entirely.⁶⁵ Indeed, the median auto-accident jury verdict dropped sharply between 1992 and 2001—falling from \$37,000 to \$16,000 in inflation-adjusted dollars—in part owing to

58. See *supra* notes 40–43 and accompanying text.

59. See Schwartz, *supra* note 51, at 615 (discussing this “interchangeability”). One caveat here is that auto insurers do have an incentive to organize and, at times, auto insurers and their allies *have* organized to push for—or to resist—various reform efforts. See, e.g., *infra* note 193 and accompanying text (describing how auto insurers rallied in support of comparative negligence reforms to expand liability under the existing tort system in an effort to forestall no-fault compensation legislation).

60. ABRAHAM, *supra* note 28, at 104–05, 139–40.

61. For the rarity of excess damages, see *supra* note 43. For the compulsory insurance laws (and minor exceptions thereto), see *infra* note 75.

62. HENSLER ET AL., *supra* note 45, at 3 (noting that “[s]ettled law and routine procedures lend an air of stability” to the auto accident realm). Indeed, in recent years, it seems that third-party claiming for bodily injury following an auto accident that results in property damage is modestly down. See INS. RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS 8, 11, 13, 23 (2008).

63. ABRAHAM, *supra* note 28, at 101–03.

64. See generally WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (William M. O’Barr & John M. Conley eds., 2004).

65. For further context, see generally Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004); and Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445 (2016).

changes that the tort reform movement helped to instigate.⁶⁶ But, unlike class actions, product liability suits, or medical malpractice claims, auto litigation has not been directly caught in reformers' crosshairs.⁶⁷

C. *But One Strand in a Complex Regulatory Fabric*

Third and finally, auto claims are distinctive to the extent these claims comprise but one strand in a much larger regulatory fabric. True, this general reality exists in other areas too: When it comes to defective consumer products, tort law exists alongside regulations and recalls from the Consumer Product Safety Commission.⁶⁸ Or, when it comes to medical malpractice, malpractice insurers impose checks on careless physicians and, in cases of serious misfeasance, hospitals and state licensing authorities can step in.⁶⁹ But rarely is the idea as clearly expressed or as keenly felt as in the auto realm.⁷⁰

When it comes to promoting safety on the streets, the United States has a dense web of obligations and prohibitions.⁷¹ These requirements are imposed by a range of authorities, including

66. See COHEN, *supra* note 40, at 7 & tbl.7.

67. See generally AM. TORT REFORM ASS'N, TORT REFORM RECORD (2017), <http://www.atra.org/wp-content/uploads/2017/07/Record-07-06-17.pdf> (tracking state enactment of a number of areas of tort reform while failing to mention auto litigation as a topic of interest).

68. See Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051–2089 (2012).

69. See FED'N OF STATE MED. BDS., U.S. MEDICAL REGULATORY TRENDS AND ACTIONS 8, 41 (2016), https://www.fsmb.org/Media/Default/PDF/FSMB/Publications/us_medical_regulatory_trends_actions.pdf.

70. See Schwartz, *supra* note 51, at 614 (discussing this comprehensive regulation and declaring that it is a “distinguishing feature” of the auto accident context). In facing such intense regulation, traffic accidents are akin to two other intensively regulated areas: prescription drugs (regulated by the FDA) and aircrafts (regulated by the FAA).

71. This patchwork has been pieced together slowly over time. In 1901, New York was the first state to enact a speed limit, prohibiting speeds greater than “were ‘reasonable and proper.’” Legislation, *Development of Standards in Speed Legislation*, 46 HARV. L. REV. 838, 838–39 (1933) (quoting Act of Apr. 25, 1901, ch. 531, § 2, 1901 N.Y. Laws 1313, 1316). Compulsory insurance also came slowly. As of 1932, only Massachusetts made liability insurance compulsory; elsewhere, it was optional. 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, 527, 564–65 (1998). Congress only passed the National Traffic and Motor Vehicle Safety Act in 1966, and it was only in 1978 that Tennessee enacted the first child safety passenger safety law. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., AN ANALYSIS OF THE SIGNIFICANT DECLINE IN MOTOR VEHICLE TRAFFIC FATALITIES IN 2008, at 14 fig.8 (2010), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811346>. Mandatory seat belt laws didn't make their appearance until 1984. *Id.* Additionally, airbags weren't compulsory in passenger cars until 1997. See 49 U.S.C. § 30127(b) (2012).

localities, states, and the federal government.⁷² They are imposed on a wide range of actors, including drivers, passengers, car owners, insurers, and automobile manufacturers.⁷³ And, in cases of noncompliance, authorities have at their disposal a wide assortment of “sticks,” including civil fines, criminal penalties, and recall mandates.⁷⁴ Thus, states require drivers to have valid licenses, registered vehicles, and adequate liability insurance up to statutory minimums.⁷⁵ If a driver lacks any of these, she is not authorized to take to the streets. Insurers are also subject to an array of requirements, including the kinds of insurance they must offer and whom they must insure.⁷⁶ Once a vehicle hits the road, state regulations further govern the safety equipment used therein—as most now mandate the use of seatbelts, child restraints, and motorcycle helmets.⁷⁷ States also have dozens of laws—including speed limits, open-container laws, and restrictions on permissible blood alcohol content—that govern the safe operation and use of motor vehicles.⁷⁸ For the less serious of these violations, drivers are

72. See National Highway and Motor Vehicle Safety Act of 1966, 23 U.S.C. § 401 (2012).

73. See *id.* § 402 (imposing general guidelines for motor vehicle users and other actors); 49 C.F.R. § 579.3 (2017) (applying motor vehicle safety requirements to manufacturers).

74. See 49 U.S.C. § 30116 (2012) (requiring recalls for defective equipment that relates to motor vehicle safety); *id.* § 30165 (authorizing civil fines for noncompliance); *id.* § 30170 (authorizing criminal penalties for falsifying reporting requirements).

75. *Background on: Compulsory Auto/Uninsured Motorists*, INS. INFO. INST (Feb. 2, 2018), <http://www.iii.org/issue-update/compulsory-auto-uninsured-motorists>. There are two minor exceptions: (1) New Hampshire does not have a compulsory insurance liability law but requires drivers to demonstrate that they are able to provide sufficient funds in the event of an “at-fault” accident; (2) Virginia requires motorists to have insurance or register an uninsured vehicle for a significant fee. *Id.* For a state-by-state list of minimum requirements, see Mila Araujo, *Understanding Minimum Car Insurance Requirements*, BALANCE (May 18, 2017), <https://www.thebalance.com/understanding-minimum-car-insurance-requirements-2645473>.

76. For example, insurers must at least offer uninsured and underinsured motorist coverage; in some states, that coverage is compulsory. 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, 76 (2010).

77. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 71; NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 7, at 3. For motorcycle helmet laws, which are universal in nineteen states, partial in another twenty-eight states, and nonexistent in three states, see *Motorcycles: State Laws*, INS. INST. FOR HIGHWAY SAFETY, <http://www.iihs.org/iihs/topics/laws/helmetuse/mapmotorcyclehelmets> (last updated Apr. 2018).

78. See, e.g., CAL. VEH. CODE § 22349(a) (West 2018) (establishing a California statewide highway speed limit of 65 mph); ME. REV. STAT. tit. 29-A, § 2411 (2017) (establishing as illegal a motor vehicle operator’s blood alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood); N.C. GEN. STAT. § 20-138.7(a) (2017) (prohibiting an alcoholic beverage in an open container in the

merely ticketed; more serious violations are backed up by stiff criminal penalties.⁷⁹ Meanwhile, the federal government, chiefly through NHTSA, imposes numerous ex ante regulations on car manufacturers, requiring, for example, the installation of seatbelts, airbags, and electronic stability controls—and, on the back end, NHTSA oversees millions of recalls annually.⁸⁰

In sum, here, more than in other areas, tort law is far from the only game in town, raising persistent questions as to whether tort law complements the mechanisms above or works at cross purposes. Sometimes, it is the latter. For example, in *Geier v. American Honda Motor Co.*,⁸¹ the Supreme Court famously found that the plaintiffs' product liability claim—premised on the notion that their 1987 Honda Accord had a design defect because it lacked a driver's side airbag—was preempted by a NHTSA regulation which, at the time, authorized manufacturers to install a “variety and mix” of safety devices.⁸² Tort law, the Court found, threatened to trim Honda's sails, whereas the regulatory scheme NHTSA constructed sought to give Honda maximum flexibility.⁸³

Often though, tort law supports and reinforces the above architecture. The Melton lawsuit, described below, is a case in point.⁸⁴ This case, and the information it revealed, undeniably facilitated NHTSA's adequate regulation and also prompted NHTSA

passenger area while driving a motor vehicle on a highway). The federal government encouraged states to enact these laws by threatening to withhold federal funds from recalcitrant states. See COMM. FOR THE STUDY OF TRAFFIC SAFETY LESSONS FROM BENCHMARK NATIONS, TRANSP. RESEARCH BD., ACHIEVING TRAFFIC SAFETY GOALS IN THE UNITED STATES: LESSONS FROM OTHER NATIONS 147 (2011), <http://onlinepubs.trb.org/onlinepubs/sr/sr300.pdf>.

79. See, e.g., CAL. VEH. CODE § 22348 (imposing fines and suspension of the driver's license for driving upon a California highway at a speed greater than 100 mph); ME. REV. STAT. tit. 29-A, § 2411 (imposing minimum incarceration requirements for repeat OUI offenders); N.C. GEN. STAT. § 20-138.7(e) (classifying the violation of the motor vehicle open container law as a misdemeanor).

80. In 1968, the Department of Transportation required manufacturers to install manual seatbelts in all automobiles. See Initial Federal Motor Vehicle Safety Standards, 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). In 1998, the Department required all manufacturers to install airbags. See 49 U.S.C. § 30127(b) (2012); 49 C.F.R. § 571.208, S4.1.5.3 (1998). In 2007, it required all passenger cars to install electronic stability controls. See Federal Motor Vehicle Safety Standards, 72 Fed. Reg. 17,236, 17,236 (Apr. 6, 2007) (codified at 49 C.F.R. pts. 571, 585).

81. 529 U.S. 861 (2000).

82. *Id.* at 881–82. More recently, in *Williamson v. Mazda Motor of America, Inc.*, the Court held that a NHTSA regulation which gave manufacturers the choice of installing either simple lap belts or lap-and-shoulder belts did not preempt tort law claims. 562 U.S. 323, 326 (2011). The Court reasoned that, while the relevant regulation gave the manufacturer a choice, unlike in *Grier*, giving manufacturers that choice was not a “significant regulatory objective.” *Id.* at 332.

83. See *Grier*, 529 U.S. at 864–65.

84. See *infra* Subpart IV.B.1.

to take steps to improve going forward.⁸⁵ There is also complementarity when, as is oft the case, the violation of a traffic safety law is deemed negligence per se in a tort case where one motorist was injured in the course of another motorist's statutory or regulatory violation.⁸⁶ In those instances, the regulatory mandate is enforced by the private cause of action, while the existence of the state law, and the helpful shorthand it supplies, simplifies the negligence inquiry considerably. Likewise, state laws that require drivers to have adequate liability insurance, and demand that insurance companies insure even those drivers they would rather not insure, have supported—and arguably funded—our entire system of auto claiming. Our system of third-party compensation following automobile injury would not exist in anything near its current form in the absence of such requirements.⁸⁷

D. *More Evidence for Multiple Worlds*

The above discussion shows that auto claims are common but simultaneously atypical. They differ from “typical” torts in the frequency with which they are brought, the relative ease with which they are resolved, the comparatively muted controversy that they engender, and the particularly dense regulatory milieu that they occupy.⁸⁸ This distinctiveness, in fact, surfaces an important insight and offers fresh evidence to support a claim made by Deborah Hensler and co-authors exactly thirty years ago: Though everyone talks about “typical” tort lawsuits and about “the” tort liability system, really, there is no such thing.⁸⁹ What we call the tort liability system is comprised of separate and distinct ecosystems—including auto claims, one-off product liability claims, medical malpractice claims, legal malpractice claims, mass tort claims, slip-and-fall claims, and so forth—that are sometimes overlapping and occasionally competing but often simply spinning in their own orbits.⁹⁰

Just as crucially, no single ecosystem is especially representative of the broader whole. Each has its own practices and norms. Each is

85. See *infra* note 260 and accompanying text.

86. See *supra* note 51 and accompanying text.

87. See ANDERSON ET AL., *supra* note 10, at 8 (noting that, in the absence of compulsory insurance, more litigation would focus on other parties, such as auto manufacturers or municipalities, “whose decisions may have contributed to auto accidents”); Wriggins, *supra* note 76, at 71 (observing that mandatory insurance laws “enable compensation for auto accident victims”).

88. See ANDERSON ET AL., *supra* note 10, at 8.

89. See HENSLER ET AL., *supra* note 45, at 2–3.

90. *Id.* This “overlap” is traceable to the fact that one injured motorist's claim can give rise to an auto claim against the negligent motorist as well as a product liability design defect claim on the theory that the car was insufficiently crashworthy—and even a medical malpractice claim on the theory that the physician who cared for the motorist following the crash failed to exercise reasonable care. In that case, it is likely that one plaintiff's lawyer or law firm would handle the three kinds of claims.

beset by its own particular challenges. (Damage caps, for example, have been a disaster for medical malpractice litigation,⁹¹ while they have left a smaller imprint on other areas. The Supreme Court's decisions limiting class actions have complicated mass tort litigation,⁹² but it certainly has not affected plaintiffs' ability to seek compensation following a botched medical procedure or car wreck.) And each of these ecosystems has its own personnel, as the plaintiffs' bar tends to be highly specialized and stratified, such that those who bring medical malpractice claims tend not to handle car wrecks, and vice versa.⁹³

III. OUR SECOND MOST AMBITIOUS EXPERIMENT WITH NO-FAULT COMPENSATION

Stepping back, the automobile has provided the occasion for our second most ambitious experiment with no-fault compensation.⁹⁴ Furthermore, the fact that, in the auto realm, no-fault was something of a fizzle has cooled no-fault's prospects in other areas and, in an indirect way, helped to ensure the tort system's very survival.

The idea for no-fault compensation for auto accidents—which is to say, compensation for injured motorists which would skip the processes above and would be supplied quickly and easily, irrespective of fault⁹⁵—has been around for more than a century. As early as 1919, one commentator discussed the need to “eliminate entirely the question of negligence in motor vehicle accidents,”⁹⁶ while another, writing on the heels of the successful enactment of workers' compensation, published a *Proposal to Extend the Compensation Principle to Accidents on the Streets*.⁹⁷ But, in retrospect, all this was

91. See, e.g., Scott DeVito & Andrew W. Jurs, “Doubling-Down” for Defendants: The Pernicious Effects of Tort Reform, 118 PENN. ST. L. REV. 543, 546 (2014) (discussing the impact of damage caps on medical malpractice claims).

92. See, e.g., Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783 (2017) (holding that class members who were not injured in California could not sue in that state because they were not residents); Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (complicating the resolution of tort suits via Rule 23(b)(1)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (complicating the resolution of tort suits via Rule 23(b)(3)).

93. For a discussion of this stratification, see Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 248 (2007).

94. Our most ambitious was, of course, workers' compensation. For more on the origins of workers' compensation, see generally JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2006).

95. Jeffrey O'Connell, *It's Time for No Fault for All Kinds of Injuries*, 60 A.B.A. J. 1070, 1070 (1974).

96. Ernest C. Carman, *Is a Motor Vehicle Accident Compensation Act Advisable?*, 4 MINN. L. REV. 1, 2 (1919).

97. Weld A. Rollins, Letter to the Editor, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392, 392–96 (1919).

just prologue. Auto no-fault did not really come to the fore until 1965 when Professors Robert Keeton and Jeffrey O'Connell published a book entitled *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*⁹⁸ and, in so doing, ushered in the modern no-fault era.⁹⁹

In *Basic Protection for the Traffic Victim*, Keeton and O'Connell began by detailing the auto-accident status quo: compensation for motor vehicle accidents was, they argued, too infrequently awarded and, when it was awarded, too small in amount and too slow in delivery, especially for those suffering from catastrophic injury.¹⁰⁰ Thus, they believed that the tort system for auto accidents needed to be abolished.¹⁰¹ In tort law's place, Keeton and O'Connell proposed a comprehensive no-fault plan in which the burden of providing traffic victims' basic protection would fall on motorists as a cost of driving.¹⁰²

Under their plan, all motorists were to be covered by mandatory first-party protection known as personal injury protection ("PIP").¹⁰³ PIP would cover the driver's and passengers' pecuniary losses (including medical expenses, lost wages, and replacement services) "arising out of the operation of a motor vehicle" and would be awarded automatically, irrespective of the driver's own negligence.¹⁰⁴ But, while broad, this coverage would also be shallow: PIP would not compensate for noneconomic loss (such as pain and suffering, loss of enjoyment of life, and the like) and it would be capped at a fairly modest sum.¹⁰⁵ Meanwhile, recognizing PIP's limits—and also cognizant that the complete elimination of tort would be, in their words, "doomed to founder as unable to muster the necessary widespread political support"—Keeton and O'Connell created an exit ramp into the tort system for "seriously injured" claimants.¹⁰⁶ If a claimant were "seriously injured," she could obtain PIP benefits and *also* file a traditional third-party lawsuit against an at-fault motorist, whereas if a claimant sustained a *nonserious* injury, PIP would supply her sole source of payment.¹⁰⁷

The Keeton-O'Connell plan was the right idea at the right time—and, soon after the book's publication, it took off. Puerto Rico passed the first (government-administered) no-fault scheme in 1968.¹⁰⁸ Massachusetts passed a no-fault law explicitly modeled on Keeton and O'Connell's proposal in 1970, with Florida following suit the

98. KEETON & O'CONNELL, *supra* note 22.

99. See O'Connell, *supra* note 95.

100. KEETON & O'CONNELL, *supra* note 22, at 43–46.

101. *Id.* at 1–3, 6–10.

102. *Id.* at 268.

103. *Id.* at 268–70.

104. *Id.* at 274–76, 303.

105. *Id.* at 283, 285.

106. *Id.* at 164.

107. *Id.* at 274–75.

108. Engstrom, *supra* note 28, at 318.

following year.¹⁰⁹ From there, the no-fault idea steadily gained momentum to the point where, by 1975, every state had considered at least one of the more than 600 no-fault bills then in existence, and more than a dozen states had enacted some version of no-fault compensation for injuries sustained in motor vehicle accidents.¹¹⁰

Right out of the gate, these plans performed exceptionally well. In 1971, for example, Massachusetts's insurance commissioner described his state's early experience as "[e]xcellent, extraordinary, incredible, unbelievable,"¹¹¹ while the *Boston Globe* reported "convincing evidence" that the state's no-fault legislation had "worked better than even its most optimistic advocates had expected."¹¹² In 1974, Daniel Moynihan declared auto no-fault "the one incontestably successful reform of the 1960s."¹¹³ In 1975, O'Connell boasted that "no-fault auto insurance is one . . . proposal that seems to be working as well as the professors said it would."¹¹⁴ In 1976, Michigan's insurance commissioner reported, "I am pleased to report to you that no-fault has in fact fulfilled your hopes and the hopes of its many other supporters."¹¹⁵ In 1977, Pennsylvania's insurance commissioner declared that the plan in his state was a "smashing success."¹¹⁶ And that same year, the United States Department of Transportation conducted a study of the various plans in operation and approvingly concluded that "no-fault automobile insurance accomplishes in practice what it was designed to do in principle."¹¹⁷

Early on, in fact, no-fault plans seemed to succeed along every relevant dimension. Soon after no-fault was adopted, auto-insurance

109. *Id.* at 318–19.

110. *Id.* at 319. For a list of the sixteen enacting states by year the legislation became effective, see *id.* at 306 n.17.

111. *Farnam Ecstatic over Early Results of Massachusetts No-Fault Program*, BUS. INS., Apr. 26, 1971, at 10.

112. Editorial, *The No-Fault Rate*, BOS. GLOBE, Nov. 29, 1971, at 10.

113. Daniel P. Moynihan, *Foreword* to JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES, at ix, xi (1975). He further gushed, "Overnight it became evident that O'Connell and Keeton had substantially solved a major social problem—that *this* was the way to allocate the costs of personal injuries and property damages that arise through the automobile transportation system." *Id.*

114. O'CONNELL, *supra* note 113, at 95.

115. Letter from Thomas C. Jones, Comm'r of Ins., to William G. Milliken, Governor of Mich. (Oct. 6, 1976), in INS. BUREAU, MICH. DEP'T OF COMMERCE, NO-FAULT INSURANCE AFTER THREE YEARS: A REPORT TO THE GOVERNOR (1976).

116. Louise Cook, *No-Fault Insurance Has Faults, but Main Goal Succeeds*, WINONA DAILY NEWS, Oct. 31, 1977, at 8.

117. U.S. DEP'T OF TRANSP., STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE, 1971–1977, at 31 (1977). A subsequent study also gave no-fault high marks. See U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 3–6 (1985) [hereinafter U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS].

premiums, which had been spiraling upward, dipped sharply.¹¹⁸ Courts that had been “chok[ed]” by an onslaught of auto cases prior to no-fault’s adoption became noticeably less congested.¹¹⁹ And the number of phony, feigned, or fabricated claims also appeared to diminish.¹²⁰

Yet, suffice it to say, the above enthusiasm subsequently cooled. In part, this cooling is reflected in legislative activity: no new state has enacted auto no-fault legislation since 1976, and the laws have been repealed in a handful of states, including Colorado, Connecticut, Georgia, Nevada, New Jersey, and Pennsylvania.¹²¹ This loss of enthusiasm can also be seen in scholarly commentary, where no-fault is variously described as “fundamentally broken,” “a bust,” “a dead letter,” or an idea that has “breathed its last breath.”¹²²

The reasons for no-fault’s loss of momentum are complicated and also contested, as I and others have discussed elsewhere at length.¹²³

118. See, e.g., *Faultless Victory*, NEWSWEEK, May 13, 1974, at 118, 120 (reporting on steep drops in New York); Editorial, *No-Fault Is Coming*, WALL ST. J., Aug. 4, 1972, at 6 (reporting the same in Massachusetts).

119. For the fact courts had been “choking” on auto claims, see KEETON & O’CONNELL, *supra* note 22, at 15. For the subsequent relief, see U.S. DEP’T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 117, at 113–17.

120. See Michael S. Dukakis & Stephen Kinzer, *Auto Accidents: Blame Is Not the Principal Issue*, L.A. TIMES, Apr. 9, 1972, at D-1; *No-Fault Catches Fire*, TIME, Mar. 6, 1972, at 64, 64.

121. Engstrom, *supra* note 28, at 306 & n.18 (discussing repeals). New Jersey and Pennsylvania have replaced their no-fault laws with “choice” systems, which give motorists the option of choosing between less expensive limited tort insurance (which restricts recovery for noneconomic loss) and more expensive full tort insurance (which retains such recovery). See generally Jeffrey O’Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986) (comparing traditional fault insurance to no-fault insurance and proposing that states give motorists a choice between the two); Stephanie Owings-Edwards, *Choice Automobile Insurance: The Experience of Kentucky, New Jersey, and Pennsylvania*, 23 J. INS. REG. 25 (2004) (describing the use of choice auto insurance over no-fault auto insurance in three states).

122. ABRAHAM, *supra* note 28, at 100 (characterizing no-fault as an idea that has “breathed its last breath”); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1637 n.21 (2015) (describing it as a “bust”); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 725 (2005) (calling it “a dead letter”); Trevor M. Gordon, Note, *To Reform or Repudiate? An Argument on the Future of No-Fault Auto Insurance*, 17 QUINNIPIAC HEALTH L.J. 63, 104 (2014) (arguing that the no-fault systems in many states are “fundamentally broken”).

123. See ABRAHAM, *supra* note 28, at 97–100 (discussing the factors that led to no-fault’s demise, including that the legislation was “not a demonstrable cost saver,” that “the accident rate—especially the rate of fatal accidents—was greater in no-fault than in negligence states,” and that, by the time no-fault “might otherwise have had its greatest appeal,” other non-auto-related sources of compensation had started to become more readily available); ANDERSON ET AL., *supra* note 10, at xvi (concluding that the decline in no-fault’s popularity is traceable to “(1) its unexpectedly high claim costs and (2) the political debate shifting from an overall assessment of the optimal insurance system to the impact of those high costs on consumers”); Engstrom, *supra* note 28, at 307–13

But, for our purposes, the hard fact is that the American tort system's second most ambitious experience with no-fault compensation has been a disappointment. Though proponents promised that no-fault would offer huge cost savings and generate recovery without the need for attorney involvement, it has been surprisingly expensive and adversarial.¹²⁴ Some evidence suggests that relieving at-fault drivers of liability, and even compensating them for pecuniary loss, has led to an uptick in auto fatalities, though the empirical evidence on this point is mixed.¹²⁵ Though it was sold as a mechanism to "minimize inducements to dishonesty,"¹²⁶ it has done little to stem the tide of fraudulent filings (and might, in fact, encourage them).¹²⁷ And, though supporters promised that no-fault would alleviate court congestion, it has done little to channel cases out of the court system.¹²⁸ In fact, today, the three states with the most robust no-fault laws—Florida, Michigan, and New York—have more per capita auto filings than three states where auto claims sound in traditional tort.¹²⁹

This failure of automobile no-fault has had a dramatic impact on tort law, as it has helped to ensure the tort system's very survival. If auto no-fault had been a roaring success, that is, we quite possibly would have exported the no-fault idea to other broad areas. Indeed, in the 1970s, before no-fault's difficulties were clear—and while the laudatory reviews were still rolling in—O'Connell had set his sights on transforming everything from medical malpractice to product liability.¹³⁰ As he put it in 1975, "The next crucial question facing the law of personal injury is how to adapt the no-fault principle to all kinds of accidents—those from manufactured products, medical malpractice, falls in stores, and many other causes."¹³¹ During that brief moment in time, all this seemed probable. But, as the tide

(explaining that no-fault's failure is traceable to a number of factors, including its surprisingly high cost, the revelation of an unanticipated—and still contested—association between the legislation and an uptick in auto fatalities, a shifting socio-legal environment, and a provocative convergence between no-fault and traditional tort).

124. For no-fault's high cost, see ABRAHAM, *supra* note 28, at 98; ANDERSON ET AL., *supra* note 10, at 63–131; and Engstrom, *supra* note 28, at 333–47. For its unexpectedly adversarial nature, see Engstrom, *supra* note 28, at 346–47, 376–78.

125. ANDERSON ET AL., *supra* note 10, at 80–82 (summarizing the many studies that have evaluated whether auto no-fault is associated with an uptick in fatal accidents, about half of which find some relationship).

126. KEETON & O'CONNELL, *supra* note 22, at 6.

127. See ANDERSON ET AL., *supra* note 10, at 97–111; Engstrom, *supra* note 28, at 378–79.

128. Engstrom, *supra* note 28, at 375–77.

129. *Id.* at 376.

130. See O'CONNELL, *supra* note 113, at 70.

131. *Id.* Elsewhere, O'Connell declared, "The issue in the United States is no longer whether but what kind of no-fault laws we shall have." O'Connell, *supra* note 95.

turned and the bad news about auto no-fault began to pile up, those calls lost their resonance, and even O'Connell scaled back his once bold ambition.

As it is, we have not turned our backs on the no-fault idea completely. Congress created a no-fault system for vaccine injury back in 1986.¹³² Both Florida and Virginia have since enacted funds to compensate those who sustain catastrophic injury during birth.¹³³ In 2001, Congress enacted the September 11th Victim Compensation Fund and, more recently, the James Zadroga 9/11 Health and Compensation Act.¹³⁴

Meanwhile, the no-fault idea continues to generate scattered scholarly attention. Recent years have witnessed periodic calls for no-fault schemes in a wide variety of disparate areas—from those injured by airline crashes and in athletic competition to those harmed following contact with a variety of products, including prescription drugs, medical devices, contraceptives, asbestos, lead paint, cigarettes, and firearms.¹³⁵ But the cold reality is that, over the past half-century, our no-fault programs—and even our no-fault proposals drawn from academics' imaginations—have been notable mainly for their small size and limited scope.¹³⁶ As we have gone from trying to upend the present system to tinkering in discrete, disjointed, and sparsely populated areas, tort law—and our (mostly) fault-based system of accident compensation—continues on.

132. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-10 to -34 (2012)). For more on the Act's enactment and (dismal) contemporary operation, see Engstrom, *supra* note 122, at 1655–66.

133. For more on these systems, see Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 104–13 (2015); and Gil Siegal et al., *Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation*, 34 AM. J.L. & MED. 493, 494–501 (2008). These programs are quite small. For example, as of 2007, Virginia's program had received only 192 claims. Siegal et al., *supra*, at 502.

134. See Engstrom, *supra* note 133, at 78 n.15. Following the BP oil spill in the Gulf of Mexico, President Obama helped create the Gulf Coast Compensation Fund (though scholars disagree about whether the Fund qualifies as a true no-fault mechanism). *Id.* In addition, the Price-Anderson Act supplies some no-fault compensation in the event of a nuclear accident; the Black Lung Benefits Act provides relief to injured coal miners; and the Radiation Exposure Compensation Fund offers payment to, or on behalf of, certain individuals who fell ill following radiation exposure. *Id.*

135. See Engstrom, *supra* note 122, at 1641 (compiling sources).

136. For examples of the programs' small sizes and limited scopes, see Engstrom, *supra* note 133, at 78 n.15 (describing programs enacted by Congress and tailored for specific, narrow purposes); and Siegal et al., *supra* note 133 (describing the birth injury compensation programs in Virginia and Florida).

IV. SOURCE OF DOCTRINAL EVOLUTION AND THEORETICAL INSIGHT

Last but not least, the automobile has also been the site of intense doctrinal experimentation and innovation and theoretical insight as the changes born in this area have powerfully affected, and arguably remade, the “House of Tort.”

A. *Doctrinal Evolution*

In terms of doctrinal evolution, car wreck cases have produced many of the most significant tort cases of all time. After all, in 1914, an auto case out of New York—*MacPherson v. Buick Motor Co.*¹³⁷—abolished the privity bar for product claims and opened the door to that entire field.¹³⁸ In 1920, in a second car wreck case out of the Empire State, Justice Benjamin Cardozo established the negligence per se doctrine for statutory violations.¹³⁹ Then, nearly twenty years later in yet another car crash case, the New York Court of Appeals revisited and refined the doctrine to create a carve-out when an actor who violates the statute has a bona fide excuse.¹⁴⁰ In 1960—in an opinion that straddled contract and tort law—a car accident case out of New Jersey limited manufacturers’ ability to disclaim the implied warranty of merchantability and, in so doing, put us on a path to strict liability.¹⁴¹ In 1968, following a tragic auto accident in California, the California Supreme Court opened the door to bystander emotional distress claims, substantially expanding horizons for plaintiffs’

137. 111 N.E. 1050 (N.Y. 1916).

138. *Id.* at 1053. Even beyond products, *MacPherson* “set the stage for expansionary developments in the scope of duty” and “turned pre-existing conceptual thinking . . . inside-out.” Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, in *EXPLORING TORT LAW* 52, 58 (M. Stuart Madden ed., 2005).

139. *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920).

140. *Tedla v. Elman*, 19 N.E.2d 987, 990–91 (N.Y. 1939).

141. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 69 (N.J. 1960). Drawing a straight line between *Henningsen* and subsequent developments, Kenneth Abraham has declared, “A cause of action for breach of implied warranty that cannot be disclaimed, running from a manufacturer to a party who suffers injury but is not in privity with the manufacturer is simply strict liability in tort masquerading under another name.” KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 224 (5th ed. 2017). Stepping back, as is hopefully clear from the discussion above, auto cases have been the site for much of the development of contemporary modern product liability law. See MASHAW & HARFST, *supra* note 24, at 39–43 (giving the automobile credit for spawning modern product liability law, while noting that nearly half of states adopted modern product liability law “for the first time in cases involving automobiles”); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 632 (1992) (observing that “[c]ar manufacturers loom large in the jurisprudence of products liability” and offering myriad examples of how early car wreck cases spurred doctrinal innovation).

recovery.¹⁴² The following year, in *Elmore v. American Motors Co.*,¹⁴³ this same court extended product liability doctrine to offer protection to bystanders rather than just the purchasers or users of products.¹⁴⁴ This is to say: a comprehensive study of “doctrinal evolution and the American automobile” could fill many pages and span many areas.

Here, though, I will zero in on just three episodes. First, I will examine the back-and-forth of *Goodman*¹⁴⁵ and *Pokora*¹⁴⁶: two Supreme Court cases that clarified our collective thinking about clear rules versus open-textured standards and judge versus jury.¹⁴⁷ Second, I will recount how automobile no-fault legislation, in a roundabout way, dealt the death blow to the doctrine of contributory negligence. Third, I will explore how automobile claims have helped to give rise to so-called “enabling torts.”

1. *Rules v. Standards and Jury v. Judge*

First, as any 1L tort student well knows, it was two mundane auto cases where the two giants of tort law—Justice Oliver Wendell Holmes and Justice Benjamin Cardozo—famously squared off regarding two of the most enduring questions in all of law. Decided in 1927, *Goodman* came first.¹⁴⁸

a. *Baltimore & Ohio Railroad Co. v. Goodman*

Goodman arose on November 6, 1923, when Nathan Goodman drove his Ford truck across railroad tracks in Montgomery County, Ohio, and was killed when he was hit by a train traveling at over 60 mph.¹⁴⁹ Goodman’s widow, Dora Goodman, sued for wrongful death and initially prevailed.¹⁵⁰ After a short trial, on December 12, 1924, the jury found in her favor and awarded damages of \$7000.¹⁵¹ The railroad company appealed, insisting that Nathan Goodman had been contributorily negligent and that the trial court had erred in refusing to direct the jury to return a verdict in the company’s favor.¹⁵² The

142. *Dillon v. Legg*, 441 P.2d 912, 925 (Cal. 1968). That same year, the Eighth Circuit published the landmark opinion *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). Observing that collisions are “a frequent and inevitable contingency,” the *Larsen* court ruled that tort law imposes a “duty” on manufacturers to design cars (and, by implication, other motorized vehicles) so as to reduce the seriousness of occupants’ injuries. *Id.* at 502.

143. 451 P.2d 84 (Cal. 1969).

144. *Id.* at 89.

145. 275 U.S. 66 (1927).

146. 292 U.S. 98 (1934).

147. *Pokora*, 292 U.S. at 99; *Goodman*, 275 U.S. at 69. *Goodman* and *Pokora*, along with associated commentary, are highlighted in MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 62–67 (10th ed. 2016).

148. *Goodman*, 275 U.S. at 66.

149. Transcript of Record at 1, 14, *Goodman*, 275 U.S. 66 (No. 58).

150. *Goodman*, 275 U.S. at 69.

151. Transcript of Record, *supra* note 149, at 13.

152. *Id.* at 93.

case made its way to the Supreme Court.¹⁵³ Writing for the Court, Justice Holmes agreed with the railroad company: “[N]othing is suggested by the evidence to relieve Goodman from responsibility for his own death.”¹⁵⁴ He explained:

When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.¹⁵⁵

In laying down this bright-line rule—and in doubling down on judicial supremacy—Holmes was no doubt guided by his own long-held distrust of juries. In his collected papers, Holmes wrote that, in his experience, the jury was not “specially inspired for the discovery of truth.”¹⁵⁶ And he was heeding his own advice, as he had written in *The Common Law* almost a half-century before, that “[a] judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than the average jury.”¹⁵⁷

b. *Pokora v. Wabash Railway Co.*

In the follow-up case decided seven years later, Justice Cardozo had replaced Holmes on the Court, and that change in personnel proved crucial.¹⁵⁸ In this case, at 5:45 a.m. on August 17, 1929, John Pokora came upon a railway crossing in Springfield, Illinois. He stopped his truck, looked, and listened.¹⁵⁹ “[H]earing no train

153. *Balt. & Ohio R.R. Co. v. Goodman*, 271 U.S. 658 (1926) (granting certiorari); *Balt. & O. R. Co. v. Goodman*, 10 F.2d 58 (6th Cir. 1926).

154. *Goodman*, 275 U.S. at 69.

155. *Id.* at 69–70.

156. OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 237 (1920).

157. O.W. HOLMES, JR., *THE COMMON LAW* 124 (1881). *Goodman* was not the first case where Holmes flexed his judicial muscles to set forth a per se rule. For an earlier example, see *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898). For additional insight into Holmes’s “long-held preoccupation with narrowing the range of uncertainty in tort cases,” see Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 432 (2011).

158. For a contemporary news account of Justice Cardozo’s nomination to replace Justice Holmes, see *Cardozo Is Named to Supreme Court: Nomination Hailed*, N.Y. TIMES, Feb. 16, 1932, at A1.

159. Even Wabash Railway conceded that Pokora had “stopped his truck at a point from ten to fifteen feet east of the east switch” and “remained in the truck

coming," he drove out on the tracks where he was struck by a passing train that had blown "neither bell nor whistle."¹⁶⁰ Miraculously, Pokora survived, though he was, as he put it, "torn up every place."¹⁶¹ He ultimately sought compensation for his nearly six-month hospital stay, and, on June 22, 1932, a jury was empaneled to hear his case.¹⁶² Later that day, though, Pokora took the stand, resulting in the following testimony on cross-examination:

Q. You didn't get out of your truck, did you?

A. I looked out.

Q. You didn't get out?

A. I just stopped like that and looked.

Q. You stayed right in there?

A. Yes sir.¹⁶³

The following day, the trial judge directed a verdict for the defendant, quoting as support the part of the *Goodman* case which held that "an automobile driver should get out of his car for the purpose of looking, if he cannot be sure otherwise, whether a train is dangerously near."¹⁶⁴

Pokora appealed.¹⁶⁵ Apparently betting that *Goodman* wasn't up for debate, Pokora sought not to repudiate the *Goodman* get-out-of-the-car rule but rather to distinguish it and, grasping at straws, limit it to rural settings.¹⁶⁶

and . . . looked north and south and listened for trains." Brief of Respondent at 4, *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (No. 585).

160. *Pokora*, 292 U.S. at 100; Petition for a Writ of Certiorari and Brief of Petitioner in Support Thereof at 6-7, *Pokora*, 292 U.S. 98 (No. 585) [hereinafter Petition and Brief].

161. Transcript of Record at 4-5, 30, *Pokora*, 292 U.S. 98 (No. 585).

162. *See id.* at 26, 30.

163. *Id.* at 32.

164. Petition and Brief, *supra* note 160, at 25.

165. *Pokora v. Wabash Ry. Co.*, 66 F.2d 166, 166 (7th Cir. 1933), *rev'd*, 292 U.S. 98 (1934).

166. This rule from *Goodman*, Pokora insisted, "was rendered in a crossing case in the country where trains may operate without any restricted speed limits, and is not applicable to travelers in populous cities." Petition and Brief, *supra* note 160, at 13; *accord id.* at 25. The appellate court gave short shrift to this argument, observing:

[W]e are unable to understand why the rule there laid down does not apply to a crossing in a city as well as in the country; if it were otherwise a traveler would be required to exercise more care in crossing a railroad

In a unanimous opinion, the Supreme Court did him one better.¹⁶⁷ After observing that getting out of one's vehicle to "reconnoit[er]" is "uncommon," "very likely . . . futile," and "sometimes even dangerous," the Court emphasized the need for "caution in framing standards of behavior that amount to rules of law."¹⁶⁸ Because *Goodman* had been a "source of confusion in the federal courts" and had earned "only wavering support in the courts of the states," the Court limited it accordingly.¹⁶⁹

c. The Cases' Legacies

Now, more than nearly a century after this exchange of Supreme Court opinions, the issues at their cores continue to be debated. Many continue to debate the proper role of juries—namely when, whether, and to what extent juries ought to get the final say.¹⁷⁰ Indeed, spurred by skepticism concerning jury capacity and reliability, some areas of law have witnessed attempts to remove juries from the fact-finding role entirely in favor of dedicated, specialized fact-finders.¹⁷¹ Elsewhere, tort law has been preempted altogether, amid discussions that betray a distrust of jury decision-making.¹⁷²

Scholars and judges also continue to debate whether clear, knowable, and predictable rules are preferable to flexible but unpredictable standards—and, of course, there is much to be said on both sides.¹⁷³ Contemporary tort law reflects a grab bag of both, as we employ either rules or standards depending on the jurisdiction at

track in the country where his vision was less obstructed than in a congested city where it is more restricted.

Pokora, 66 F.2d at 168.

167. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 99 (1934).

168. *Id.* at 104–05; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 8, reporters' note cmt. c (AM. LAW INST. 2010) ("*Pokora* is correctly interpreted as rebuking Holmes and his approach in *Goodman* and as favoring instead an individualization of assessments of parties' negligence.").

169. *Pokora*, 292 U.S. at 106.

170. See, e.g., *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408 (1997) (offering a comprehensive account of the civil jury, including its contested capacity to resolve complex cases); see also Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 303 (2012). Some suggest that even the positive question—whether juries or judges have won out—remains unanswered. See Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 347 (2011).

171. See Carl W. Tobias, *Health Courts: Panacea or Palliative?*, 40 U. RICH. L. REV. 49, 49–50 (2005) (noting that many advocate for health courts, where specially trained judges would adjudicate medical malpractice claims and "ascertain law and fact without juries").

172. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) (preempting tort law when it comes to medical devices and, in so doing, expressing skepticism concerning juries' ability to engage in sophisticated cost-benefit analysis).

173. For a primer on the classic rules-standards debate, see generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

issue and the matter at hand. In some areas where we particularly worry about floodgates and fabrication (such as bystander emotional distress claims), there is a broad consensus in favor of bright-line, *Goodman*-style rules.¹⁷⁴ In other areas (including, usually, the negligence inquiry itself), we use general standards, deploying a *Pokora*-inspired “ethics of particularism” and tolerating the unpredictability that such an ethic entails.¹⁷⁵ Some areas (such as the scope of landowner-occupier liability) continue to be split, with roughly half of the jurisdictions embracing familiar rule-like categories and the other half following California’s lead in *Rowland v. Christian*¹⁷⁶ to jettison the categories in favor of an open-textured, reasonable person analysis.¹⁷⁷ In sum, as Robert Rabin has aptly put it, “*Pokora* lives on, but *Goodman* shows signs of continuing vitality.”¹⁷⁸ And there is no question that these two car wreck cases, and the debates they inspired, have helped to enrich and modernize our law.

2. *Dealt the Death Blow to Contributory Negligence*

Second, in a roundabout way, car wrecks get the credit for toppling contributory negligence—the dusty tort doctrine that long barred a plaintiff from recovering for her injuries if her negligence, however slight, contributed to her predicament.¹⁷⁹ Interestingly though, contributory negligence finally met its demise not because of a particular statute or watershed decision but owing to a low din of criticism—which had been in the air for years but finally and fatefully crystallized in the midst of debates concerning, of all things, automobile no-fault legislation.¹⁸⁰

174. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 827–30 (Cal. 1989).

175. Citing both *Goodman* and *Pokora*, the RESTATEMENT (THIRD) declares, “Tort law has thus accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 8 cmt. c, reporters’ note cmt. c (AM. LAW INST. 2010). However, some states employ a *Goodman*-style rule when the actor is a child, holding that a child of younger than six or seven years of age is conclusively incapable of negligence. See, e.g., *DeLuca v. Bowden*, 329 N.E.2d 109, 111–12 (Ohio 1975).

176. 443 P.2d 561 (Cal. 1968).

177. See Rabin, *supra* note 157, at 434, 440 (discussing the landowner liability context).

178. *Id.* at 442.

179. I have made this point previously. See Engstrom, *supra* note 28, at 363–64.

180. With an even more direct tie to the automobile, in California it was a court decision in a car wreck case that dealt contributory negligence the final blow. *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1232 (Cal. 1975). Similarly, Florida—the first state to abrogate contributory negligence by judicial decision—also made its fateful ruling when puzzling through a case arising out of a “car-truck collision.” *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973); see also Jones

As noted above, auto no-fault burst onto the scene in the early 1970s, entering a world where contributory negligence was, by turns, criticized and circumvented. Regarding the former, as early as 1934 one commentator declared, "Little remains to be written about contributory negligence save its obituary,"¹⁸¹ while, in 1953, the Supreme Court dismissed it as "a discredited doctrine."¹⁸² Meanwhile, judges carved out numerous exceptions to its harsh provisions—including, most notably, the last clear chance doctrine¹⁸³—while sympathetic juries oftentimes ignored the rule altogether.¹⁸⁴ But, though the doctrine was a "chronic invalid," by 1968 only a handful of states had abolished it, and, somewhat surprisingly, there was no discernable push for reform.¹⁸⁵

Starting in 1969, debate over auto no-fault legislation upset this unsatisfying equilibrium.¹⁸⁶ At the time, those pushing for no-fault criticized many things about the tort system. One persistent and resonant criticism was that the tort system left too many seriously injured auto accident victims (45%, by the Department of Transportation's estimate) completely empty-handed.¹⁸⁷ No-fault, its supporters predicted, would narrow the "gaps in the fabric of compensation for auto-related accidents."¹⁸⁸ No-fault's opponents,

v. Hoffman, 272 So. 2d 529, 533 (Fla. Dist. Ct. App. 1973) (certifying the question of the contributory negligence rule to the Florida Supreme Court in a decision involving a "car-truck collision").

181. Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934).

182. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953); see also Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 36 (1944) (dubbing contributory negligence "the harshest doctrine known to the common law of the nineteenth century"); Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164, 178 (1925) (remarking that "[i]t is difficult to imagine a more anti-social doctrine"); Roscoe Pound, *Comparative Negligence*, 13 NACCA L.J. 195, 197 (1954) (dismissing it as "fundamentally and radically unjust").

183. For various common law exceptions, including the rule of last clear chance, see Lowndes, *supra* note 181, at 685–708.

184. See *id.* at 674 (discussing juries' "notorious" inability "to perceive contributory negligence").

185. For "chronic invalid," see WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 428 (3d ed. 1964). For the absence of a discernable push for reform, see Marianne M. Jennings, *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Dispositions*, 5 BYU J. PUB. L. 33, 41 (1990); and Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 697 (1978).

186. Henry Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 WASHBURN L.J. 1, 3 (1975) ("From 1955 to 1969 Mississippi, Wisconsin, and Arkansas were the only true comparative negligence jurisdictions. In 1969 the dam collapsed . . .").

187. AM. BAR ASS'N, SPECIAL COMM. ON AUTO. INS. LEGISLATION, *AUTOMOBILE NO-FAULT INSURANCE* 13 (1978) ("It is difficult to find any advocacy of changes in automobile insurance . . . that does not mention the DOT's finding[] that: Only 45% of all those killed or seriously injured in auto accidents benefited in any way under the tort liability system.").

188. ABRAHAM, *supra* note 28, at 99.

meanwhile, seized on this critique of the tort system and ran with it. They wholeheartedly agreed with proponents' diagnosis—compensation through tort *was* too stingy.¹⁸⁹ But they disagreed with proponents' proposed cure, insisting that, if the problem was that too few injured Americans benefited under the current liability system, the *liberalization* of tort doctrine—rather than its brute elimination—was the appropriate response.¹⁹⁰ It was widely believed that “comparative negligence increases the number of situations in which the plaintiff can recover damages.”¹⁹¹ As such, adopting comparative negligence became the goal of certain no-fault opponents.¹⁹²

By focusing legislators' attention on the tort system, shining the spotlight on gaps in compensation, and also (unintentionally) leading many to conclude that comparative negligence was the lesser of two evils, auto no-fault legislation rejiggered the political economy surrounding contributory negligence. In so doing, it caused some who had long defended the harsh all-or-nothing doctrine to come around. Auto insurers fell into this camp. In 1978, Gary Schwartz explained: “Auto liability insurers had traditionally resisted comparative negligence proposals. But by 1970, with auto no-fault plans looming, many insurers threw their support behind comparative negligence in an effort to expand the existing liability system so as to make it less vulnerable to the no-fault challenge.”¹⁹³ Much the same can be said of the American Bar Association (“ABA”). Indeed, it was while opposing no-fault that the ABA's powerful House of Delegates finally

189. Gordon, *supra* note 122, at 66–67.

190. Engstrom, *supra* note 28, at 360–61 (recounting this history while collecting sources).

191. Kenneth P. Grubb, Observations on Comparative Negligence, Address During the Ohio State Bar Association Meeting (May 26–27, 1950), in 23 OHIO BAR ASS'N REP. 237, 239 (1950).

192. See, e.g., *Automobile Insurance Reform and Cost Savings: Hearing on S. 945, S. 946, S. 976, and S. Con. Res. 23 Before the S. Comm. on Commerce*, 92d Cong. 1641 (1971) [hereinafter 1971 *Senate Hearings*] (statement of Joe W. Henry, President, Tennessee Bar Association) (suggesting that “gaps in compensation” should be addressed by abolishing the doctrine of contributory negligence without toppling the “House of Tort”); AM. BAR ASS'N, *supra* note 187, at 18–19, 71 (suggesting that, if there is a desire to broaden coverage, states should adopt comparative negligence, among other reforms).

193. Schwartz, *supra* note 185, at 697 n.5; see also 1971 *Senate Hearings*, *supra* note 192, at 475 (statement of Robert V. McGowan, President, National Association of Mutual Insurance Agents) (“We strongly urge the adoption of the Wisconsin comparative negligence rule wherever practical.”); *No-Fault Motor Vehicle Insurance: Hearing on H. Con. Res. 241 Before the H. Subcomm. on Commerce & Fin. of the Comm. on Interstate & Foreign Commerce*, 92d Cong. 606 (1971) [hereinafter 1971 *House Hearings*] (statement of André Maisonpierre, Vice President, American Mutual Insurance Alliance) (advocating for comparative negligence as part of a sweeping proposal).

went on record supporting comparative negligence for the first time.¹⁹⁴

Underscoring the indelible connection between the move to enact (or, alternatively, defeat) auto no-fault and the decision to discard contributory negligence in favor of “comparative responsibility,” some no-fault legislation simultaneously—in the same act—scrapped contributory negligence for auto claims, as in South Carolina and Connecticut.¹⁹⁵ Other states enacted no-fault and comparative negligence in different bills but close in time.¹⁹⁶ Meanwhile, other states that failed to enact no-fault legislation adopted comparative negligence and used this partial step to quiet calls for bolder reform. For example, the State Bar of Texas—long opposed to auto no-fault—successfully sponsored legislation in 1973 that sought, among other things, to abolish contributory negligence and thereby “bring[] swifter and more complete remedies to persons sustaining automobile accident injuries in the State.”¹⁹⁷ According to the State Bar’s former president, “Instead of closing the courthouse door to recovery . . . , the Texas statute broadens the right of recovery in a civilized and humane way.”¹⁹⁸ Echoing this sentiment, W. James Kronzer, Jr., of the Texas Trial Lawyers Association noted, “[W]e in Texas keenly appreciate the efforts of the Congress and the Department of Transportation, for without these herculean efforts to clean up the ‘Augean Stables’ we would still be confronted with an archaic pure contributory negligence system.”¹⁹⁹ In all, from 1969 to 1976—the

194. AM. BAR ASS’N, ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 395–96, 563 (1969) (reporting on the House of Delegates vote to repeal contributory negligence).

195. See An Act Concerning No-Fault Motor Vehicle Insurance, Pub. Act No. 72-273, §§ 2, 6, 1972 Conn. Acts 438, 440, 441 (Reg. Sess.) (partially codified as amended at CONN. GEN. STAT. ANN. § 52-572h (West 2018) and partially repealed 1993); South Carolina Automobile Reparation Reform Act of 1974, No. 1177, art. I, § 2, 1974 S.C. Acts 2718, 2719. There were also near misses. For example, Ohio’s House and California’s Assembly both passed no-fault laws that simultaneously enacted comparative negligence, though both bills stalled on their way to enactment. Engstrom, *supra* note 28, at 363 n.270.

196. The Oregon governor signed a bill enacting no-fault on June 28, 1971, and a bill enacting comparative negligence two days later. See Act of June 30, 1971, ch. 668, 1971 Or. Laws 1516 (codified as amended at OR. REV. STAT. § 31.600–.620 (2018)) (comparative negligence); Act of June 28, 1971, ch. 523, 1971 Or Laws. 912 (codified as amended at OR. REV. STAT. § 742.518–.548 (2018)) (no-fault). Kansas enacted both changes within the same month. Linda L. Pfalzgraf, Note, *No-Fault Automobile Insurance: An Analysis of the Kansas Automobile Injury Reparations Act*, 20 WASHBURN L.J. 375, 405 (1980).

197. *No-Fault Motor Vehicle Insurance: Hearings on H.R. Con. Res. 116 Before the H. Subcomm. on Commerce & Fin. of the Comm. on Interstate & Foreign Commerce*, 93d Cong. 476 (1974) (statement of Leroy Jeffers, Immediate Past President, State Bar of Texas).

198. *Id.*

199. 1971 *House Hearings*, *supra* note 193, at 570 (statement of W. James Kronzer, Jr., Texas Trial Lawyers Association).

years auto no-fault was robustly debated—nearly half of states made the switch.²⁰⁰

Thus, the move to comparative negligence, which has been one of the most profound doctrinal shifts in tort law over the past century (arguably, the most profound), can trace its origins to lowly car wreck cases and the wide-ranging debate those car wreck cases managed to ignite.²⁰¹ John Fleming wrote in 1976, “Comparative negligence, once the Cinderella of American law, is at long last blossoming into a princess.”²⁰² Car wrecks were the fairy godmother who brought that vaunted transformation about.

3. *Progenitor of Enabling Torts*

Auto cases have also been instrumental in promoting the evolution of the class of cases Robert Rabin has famously dubbed “enabling torts”—i.e., those causes of action where, “beyond the immediate perpetrator of harm,” a tort victim is able to lay blame at the feet of, and obtain compensation from, the individual or enterprise that “set the stage” for the victim’s suffering.²⁰³

Such suits weren’t always permitted. To the contrary, tort law initially had a cramped and compartmentalized view of individual responsibility.²⁰⁴ Seen most clearly in the last wrongdoer rule, some courts, for decades, accepted that “if after the defendant’s wrongful conduct there intervened the wrongful (culpable) act of a third person, the latter relieved the defendant from liability, and ‘the last human wrongdoer’ was solely responsible for the plaintiff’s harm.”²⁰⁵ Over time, however, this constricted (albeit certain and easy-to-apply) view

200. See John G. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice, The Supreme Court of California 1974–1975*, 64 CALIF. L. REV. 239, 240–41 (1976). Tellingly, contemporaneous observers gave auto no-fault legislation credit for the doctrinal shift. See, e.g., Frank T. Abraham & Don R. Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411, 411 (1973) (“The recent legislative reforms of modified comparative negligence . . . are a direct outgrowth of the earlier ‘no-fault insurance’ proposals.”); Woods, *supra* note 186 (noting in 1975 that “[m]uch of the impetus [for states’ widespread adoption of comparative negligence] undoubtedly arose from the threat of so-called ‘no-fault’ automobile accidents statutes”).

201. See Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996) (suggesting that the move toward apportioning liability—which is seen most clearly in the advent of comparative negligence—is the most “important” development in tort law since “the coming of insurance”); Rabin, *supra* note 138, at 52–53, 72 (identifying comparative fault, and its “erosion of the all-or-nothing character of the common law tort system,” as one of the five “most critical” developments “in restructuring the very foundations of tort law in the Twentieth Century”).

202. Fleming, *supra* note 200, at 239.

203. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436–38 (1999).

204. *Id.* at 441.

205. Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124 (1937). For more on the last wrongdoer rule, see Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 806–08 (1951).

of responsibility was blurred and expanded. As in so many other areas, automobiles paved the way.

One early exception to the above principles is the doctrine of negligent entrustment. Arising roughly a century ago, this doctrine offered an early way in which a car owner could be held liable for another driver's subsequent negligence.²⁰⁶ The paradigmatic example arose when the vehicle's owner permitted an unlicensed, intoxicated, inexperienced, or otherwise unfit individual to drive the owner's car and an accident ensued.²⁰⁷ Though the driver behind the wheel *caused* the crash, and the car owner was often miles away at the time of the collision, courts had no trouble holding the owner responsible.²⁰⁸ As a Kentucky court put it, "[W]hen one of two innocent parties must sustain a loss that has resulted from an act of a third party, the loss must fall on him, who put it into the power of the third party to cause the loss."²⁰⁹ Published in 1934, the *Restatement (First) of Torts* heartily endorsed this principle of liability with the illustration: "A permits B, a boy of ten, who has never previously driven a motor car, to drive his motor car on an errand of B's own. B drives the car carelessly, to the injury of C. A is liable to C."²¹⁰

Another early exception to the above bright lines was the family purpose doctrine. Over a century old, this doctrine holds that one who owns a motor vehicle and who purchased it "for the pleasure of his family" is liable for injuries caused by any family member's negligent operation of the vehicle, even if the driver-family member was *neither* obviously incompetent or unfit *nor* even on an errand for the family because the family member, in driving at all, was fulfilling the vehicle owner's ambition.²¹¹ Though loosely based on agency principles and,

206. Recent Cases, *Automobiles—Liability of Owner for Driver's Negligence*, 8 TEX. L. REV. 416, 416 (1930) ("If the owner was negligent in intrusting [sic] the car to a person whom he should have known to be an incompetent driver, the courts are uniform in holding him liable.").

207. See, e.g., *Dep't of Water & Power v. Anderson*, 95 F.2d 577, 582 (9th Cir. 1938) ("[I]f one entrusts his automobile to another, knowing that the latter is an incompetent, reckless, or careless driver, and likely to cause injuries to others in the use of the automobile, the owner is negligent."); *Raub v. Donn*, 98 A. 861, 862 (Pa. 1916) (endorsing a jury instruction stating that "[i]t is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skillful and competent person"); Rabin, *supra* note 203, at 438 n.15 (collecting citations); Recent Cases, *supra* note 206 (same).

208. *Raub*, 98 A. at 862.

209. *Sanders v. Lakes*, 109 S.W.2d 36, 38 (Ky. 1937).

210. RESTATEMENT (FIRST) OF TORTS § 390 cmt. b., illus. 2 (AM. LAW INST. 1934); see also *id.* § 390 cmt. b, illus. 3, 4 & 5 (describing scenarios involving car wrecks); *id.* § 390 cmt. d, illus. 7 (same).

211. R.E. Barber, Annotation, *Modern Status of Family Purpose Doctrine with Respect to Motor Vehicles*, 8 A.L.R.3d 1191, 1196 (1966). For early applications, see *Fuller v. Metcalf*, 130 A. 875, 875–76 (Me. 1925); *Birch v. Abercrombie*, 133 P. 1020, 1022–23 (Wash. 1913); and *Jones v. Cook*, 111 S.E. 828, 830 (W. Va.

specifically, respondeat superior, the doctrine represents a significant expansion of that well-accepted theory since, as one court observed, an “[a]ction by one person for his own benefit or pleasure is legally incompatible with service or agency for another.”²¹²

So-called “key-in-the-ignition” cases offered a third, and particularly controversial, exception. These cases arise when a defendant vehicle owner does not affirmatively *lend* her car to another (as she might in the negligent entrustment context), but instead merely leaves her keys in her unlocked vehicle.²¹³ If a thief subsequently steals the vehicle, and the thief’s unsafe driving ultimately injures a third party, some courts will reach back to hold the car owner responsible—particularly if the owner-defendant left the car and keys in a crime-ridden area.²¹⁴

The impulse animating all three doctrines is plain and, in early cases, was often expressly articulated. For one, automobiles cause visible, sudden, and sometimes ghastly injuries—meaning that, in the early cases, courts confronted instances when the plaintiff was badly hurt and urgently in need of relief.²¹⁵ Second, courts worried about deterrence principles and wanted to use tort law to incentivize necessary precautions, namely, to ensure that vehicle owners take adequate care when securing their vehicles or lending them to others.²¹⁶ Third and finally, courts were expressly mindful of

1922). For early discussion, see generally Walter E. Treanor, Comment, *The Family Automobile and the Family Purpose Doctrine*, 1 IND. L. REV. 89 (1926).

212. *Jones*, 111 S.E. at 831 (Poffenbarger, J., dissenting); accord *Nelson v. Johnson*, 599 N.W.2d 246, 248 (N.D. 1999) (“The respondeat superior theoretical basis for the [family purpose] doctrine is a fiction created in furtherance of the public policy of giving an injured party a cause of action against a financially responsible defendant.”). Enacting “owner consent statutes,” some states expanded on this impulse via legislative action. Going further than the family purpose doctrine, these statutes render a vehicle owner liable for injuries to third persons caused by the vehicle if, at the time of the accident, the driver was driving with the owner’s consent, even if the driver was not a member of the owner’s family. For more on the origins and operation of owner consent statutes, see *Zimmer v. Vander Waal*, 780 N.W.2d 730, 733 (Iowa 2010); *Hutchings v. Bourdages*, 189 N.W.2d 706, 708–09 (Minn. 1971); 4 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 34:10 (2d ed., 2017 update); and Comment, *The Owner Consent Statutes: The Distinctions Between Enterprise and Instrumentality Liability*, 31 U. CHI. L. REV. 355, 364 (1964).

213. Rabin, *supra* note 203, at 440–41 nn.29–33 (describing key-in-the-ignition liability).

214. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc.*, 245 N.W.2d 186, 189 (Minn. 1976); *Mezyk v. Nat’l Repossessions, Inc.*, 405 P.2d 840, 843 (Or. 1965); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1255 (Utah 1996); see also Rabin, *supra* note 203, at 440–41 (collecting authority).

215. See, e.g., *Raub v. Donn*, 98 A. 861, 861–62 (Pa. 1916) (describing how the driver of the automobile “violently ran into and hurled plaintiff a distance of 60 feet”).

216. Said the Tennessee Supreme Court while imposing liability on the father vehicle owner for his grown son’s accident,

economic realities. By and large, the secondary defendants in these early cases (the automobile owners) were either wealthy or insured, which blunted the impact of an adverse judgment, whereas the primary defendants (the drivers) tended to be uninsured and impecunious such that any judgment imposed against them would be, as one court put it, “an empty form.”²¹⁷ This meant that courts were given the choice to either “deprive the injured party of any remedy” or, alternatively, “insure justice to parties injured by the negligence of drivers of automobiles without imposing undue hardship upon the owners.”²¹⁸ Faced with this choice, opting for the latter made undeniable sense, and courts were willing to bend traditional doctrinal categories to do it.

Over time, this basic notion—that, whether for reasons of compensation, deterrence, or some conception of justice, a defendant ought to be liable if she negligently paves the way for the victim’s injury even if she did not make the product, pull the trigger, light the match, or drive the bus—has been firmly accepted and is now expressly interwoven into tort law’s fabric.²¹⁹ Expanded well beyond its humble origins, the basic idea is, in fact, at the root of many of the most innovative and variously celebrated or derided tort cases of the past half-century—from claims against gun manufacturers,²²⁰ to

[W]hen moving rapidly upon the streets of a populous city, [the automobile] is dangerous to life and limb and must be operated with care. . . . The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether.

King v. Smythe, 204 S.W. 296, 298 (Tenn. 1918).

217. *Id.* Defending the family purpose doctrine, the Tennessee Supreme Court elaborated, “We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent.” *Id.*

218. *Hutchins v. Haffner*, 167 P. 966, 968 (Colo. 1917). Likewise, the Supreme Court of Maine insisted that the owner “shall not be permitted to ‘shuffle [themselves] down to the bottom of the pack’ . . . and turn up a probably impecunious and irresponsible driver as the only person subject to legal liability.” *Fuller v. Metcalf*, 130 A. 875, 877 (Me. 1925). Others recognized what courts were up to but were more critical. See, e.g., Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 486–88 (1936) (criticizing these extensions, while suggesting that courts that recognize them “are concerned more with the desirability of insuring recovery to injured plaintiffs than they are with maintaining the symmetry and balance of traditional liability patterns”).

219. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 (AM. LAW INST. 2010) (“The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of . . . a third party.”); see also *id.* § 7 (creating a default duty of reasonable care whenever a defendant’s conduct causes physical harm, providing a limited escape hatch only “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases”).

220. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999) (“[A] manufacturer who does business with a distributor it knows is likely to dispose

suits against therapists and caretakers,²²¹ actions against landowners for crime prevention,²²² and even social host liability following the host's provision of alcohol to a minor or intoxicated person.²²³

B. Theoretical Insight: Incontrovertible Evidence of the Information-Forcing Function of Tort Law

The auto lawsuit is also where litigation has made some of the largest contributions, not just to modernizing tort doctrine, as discussed above, but to enriching our understanding of the law's capabilities and comparative advantage. A recent example, involving a car wreck case in Georgia, illustrates the point nicely.

1. The Melton Case and Its Consequences

On March 6, 2010, Brooke Melton's 2005 Chevy Cobalt shut off while she was driving, and she lost her power steering and her brakes.²²⁴ She was able to pull her car over to the shoulder and restart it.²²⁵ Shaken, she called her dad, and together, they took the car to the dealership.²²⁶ There, the service report said, "Customer states engine shut off while driving, please check."²²⁷ Technicians cleaned the fuel injector, and Brooke reclaimed her car on March 9, 2010.²²⁸ The following day, her twenty-ninth birthday, Brooke was

of handguns in such a manner as to pose an unreasonable risk of harm to the public may be regarded as having 'negligently entrusted' its products."), *vacated*, 264 F.3d 21 (2d Cir. 2001).

221. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342–44 (Cal. 1976).

222. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 61 (2006) (reporting that, from 2000 to 2004, the "vast majority" of tort claims filed by sexual assault victims that resulted in appeals "involve[d] at least some claims against a third-party defendant").

223. For discussion of commercial and social host liability, see Rabin, *supra* note 203, at 441–42; and Sharon E. Conaway, Comment, *The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 409–10 (1988).

224. See Gabe Gutierrez et al., *Parents "Boiling with Anger" After Daughter's Death in GM Car*, NBC NEWS (Mar. 14, 2014, 8:10 AM), <https://www.nbcnews.com/storyline/gm-recall/parents-boiling-anger-after-daughter-s-death-gm-car-n52316>; Gregory Wallace et al., *How Brooke Melton's Death Led to the GM Recall*, CNN MONEY (June 4, 2014, 2:57 PM), <http://money.cnn.com/2014/06/04/autos/general-motors-melton-crash/index.html>.

225. Max Blau, *No Accident: Inside GM's Deadly Ignition Switch Scandal*, ATLANTA MAG. (Jan. 2016), <http://www.atlantamagazine.com/great-reads/no-accident-inside-gms-deadly-ignition-switch-scandal/>.

226. *Id.*; Wallace et al., *supra* note 224.

227. David Goldman, *Feds Open Criminal Probe into General Motors over Recall*, CBS NEWS (Mar. 12, 2014, 3:35 PM), <https://www.cbsnews.com/news/feds-open-criminal-probe-into-general-motors-over-recall/>.

228. *Id.*

killed when her Cobalt (again) abruptly turned off, hydroplaned on the wet highway, and was struck by another vehicle.²²⁹ The airbags failed to deploy in the collision.²³⁰ The police concluded the accident was caused by the fact that Brooke, who was driving 58 mph in a 55-mph zone, was “traveling too fast for the roadway conditions.”²³¹ Her parents doubted it. “She was just so responsible about driving. I mean, we even called her scaredy cat because she was so responsible about driving,” her father said.²³² “I knew in my heart and in my gut there was something wrong with the car, that it wasn’t her fault.”²³³

Convinced there was more to the story, her parents hired Georgia personal injury lawyer Lance Cooper to represent them in a wrongful death lawsuit against General Motors (“GM”), the Cobalt’s manufacturer.²³⁴ Cooper subsequently purchased the remains of Brooke’s Cobalt for \$548.²³⁵ Then, Cooper examined the “black box” from the accident scene, and he found something peculiar: Brooke’s key had slipped from the “on” to the “accessory” position three seconds before the collision, shutting off her power steering and power brakes.²³⁶ This finding undermined the police report and convinced Cooper that “something had affected her ability to steer and brake her car.”²³⁷ Ultimately, Cooper trained his focus on the car’s ignition switch.²³⁸ So focused, Cooper’s investigator photographed, x-rayed, and then disassembled Brooke’s ignition switch and compared it to a new ignition switch he had purchased at a local GM dealer.²³⁹ This comparison revealed—quite astonishingly—that the switch from Brooke’s car differed from the switch in later models.²⁴⁰ Further, it suggested that GM had violated its own policy by changing the switch design without assigning a new product identification number.²⁴¹

229. Wallace et al., *supra* note 224.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Blau, *supra* note 225.

235. *Id.*

236. *Id.*

237. Lance A. Cooper & Patrick A. Dawson, *Switched Off*, TRIAL, Nov. 2014, at 14, 15.

238. Blau, *supra* note 225.

239. Bill Vlasic, *An Engineer’s Eureka Moment with a G.M. Flaw*, N.Y. TIMES, (Mar. 28, 2014), <https://www.nytimes.com/2014/03/29/business/a-florida-engineer-unlocked-the-mystery-of-gms-ignition-flaw.html>.

240. *Id.* When Cooper revealed all this during a 2013 deposition in the Melton case, the lawyer representing GM sent an email referring to the information as a “bombshell.” ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 199 (2014) [hereinafter VALUKAS REPORT].

241. VALUKAS REPORT, *supra* note 240, at 10 (“DeGiorgio’s deliberate decision not to change the part number prevented investigators for years from learning what had actually taken place.”); Rabin, *supra* note 24, at 308.

The rest of the story has now come to light. Certain GM personnel knew that the Cobalt's ignition switch failed to conform to specifications as early as 2002—eight years before Brooke's fatal crash.²⁴² As a consequence of the anomaly, it was easy for keys (especially keys attached to heavy key chains) to slip out of the ignition, which disabled the car's power-assisted steering, brakes, and airbags—turning motorists into sitting ducks.²⁴³ In 2004 and again in 2005, GM engineers considered the problem and even developed potential fixes, but GM decided the “tooling cost and piece price [were] too high” and “none of the solutions represent[ed] an acceptable business case,” so the repair ideas were scrapped.²⁴⁴ In 2005, GM created a snap-on key cover to try to help with the ignition issue and advised dealers to install the part if owners complained (but not otherwise, even on new vehicles).²⁴⁵ Then, the following year, GM asked its part supplier to replace its old faulty switch design with a better model with more torque.²⁴⁶

Apparently, though, all this was kept quiet. Few at GM knew of the ignition switch problem and subsequent fix, and those who did know seemingly concealed it, even as the years passed and 124 Americans died and 275 more were injured.²⁴⁷ GM's CEO, Mary Barra, insisted that she only learned about the issue on January 31, 2014.²⁴⁸ Meanwhile, NHTSA apparently saw a suspicious pattern of airbag nondeployment in GM's cars, particularly the Cobalt, back in 2007.²⁴⁹ But, year after year, the regulators dithered. Lacking a

242. VALUKAS REPORT, *supra* note 240, at 1, 32.

243. Blau, *supra* note 225.

244. VALUKAS REPORT, *supra* note 240, at 69–70. The Valukas Report suggests that engineers would have been willing to go the extra mile if they had understood that the stalls posed a “safety concern.” *Id.* at 8, 69–70. Others pointed out (even contemporaneously) that it was bizarre not to acknowledge that sudden, unanticipated stalls could result in accidents and injury. *Id.* at 85–87. For the fact that this violated GM's own policy, see *id.* at 34.

245. *Id.* at 90, 93–94; James R. Healey & Fred Meier, *Lawsuit: GM Knew of Cobalt Ignition Problem*, USA TODAY (Feb. 18, 2014, 8:23 PM), <https://www.usatoday.com/story/money/cars/2014/02/18/gm-cobalt-g5-faulty-ignition-switches-recall-deaths-airbags/5582241/>.

246. VALUKAS REPORT, *supra* note 240, at 96–100.

247. Kirsten Korosec, *Ten Times More Deaths Linked to Faulty Switch than GM First Reported*, FORTUNE (Aug. 24, 2015), <http://fortune.com/2015/08/24/feinberg-gm-faulty-ignition-switch/>. Others in GM, who did not have firsthand knowledge of the switched switch, failed to figure it out. See VALUKAS REPORT, *supra* note 240, at 4 (“While stumped by the inability to determine why different model year Cobalts performed differently, the investigating engineers nonetheless failed to take certain basic investigative steps, such as taking apart both poorly and properly functioning switches to compare the two.”).

248. VALUKAS REPORT, *supra* note 240, at 228. Barra learned “some aspect of the Cobalt's Ignition Switch Issue in December 2013,” but reportedly did not learn the full story until January 2014. *Id.*

249. OFFICE OF INSPECTOR GEN., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., INADEQUATE DATA AND ANALYSIS UNDERMINE NHTSA'S EFFORTS TO IDENTIFY AND INVESTIGATE VEHICLE SAFETY CONCERNS 1 (2015),

“fundamental understanding” of how airbag systems operate and hobbled by insufficient resources, NHTSA’s watchdogs failed to put the pieces together and opted not to investigate.²⁵⁰ It was, everyone seems to agree, the Melton’s lawsuit that finally cut through the haze and brought the defect to light.²⁵¹

Once the defect and subsequent cover-up were made public, the repercussions were serious. GM and NHTSA resolved the matter by consent after GM admitted it violated the National Traffic and Motor Vehicle Safety Act and paid a \$35 million fine—NHTSA’s maximum penalty.²⁵² Barra was repeatedly made to testify before Congress.²⁵³ Some 8.7 million vehicles with faulty ignition switches were recalled.²⁵⁴ GM set up a privately run no-fault compensation system to offer payments to those hurt or killed.²⁵⁵ Numerous ignition-

<https://www.oig.dot.gov/sites/default/files/NHTSA%20Safety-Related%20Vehicle%20Defects%20-%20Final%20Report%5E6-18-15.pdf>.

250. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 113TH CONG., STAFF REPORT ON THE GM IGNITION SWITCH RECALL: REVIEW OF NHTSA 2–3 (2014) [hereinafter HOUSE STAFF REPORT]; OFFICE OF INSPECTOR GEN., *supra* note 249, at 3, 20, 23, 26.

251. VALUKAS REPORT, *supra* note 240, at 4 (“In 2013, an outside expert working for a plaintiff’s attorney took apart two switches and quickly found the cause it took GM years to determine.”); *id.* at 11 (“It was only when a plaintiff’s expert in a products liability case compared switches from pre- and post-MY 2008 Cobalts by x-raying them—something GM investigators had never done—that GM engineers came to understand that the early model year Cobalts had a different ignition switch than the later model year vehicles, and that the switch used in the early model years suffered from torque well below GM specifications.”); Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1067 (2015) (“The truth came to light during the litigation of a case brought by the parents of Brooke Melton . . .”). Back in 2007, a trooper from the Wisconsin Safety Patrol and researchers from Indiana University identified the connection between the switch and the airbag nondeployment, though they did not unearth critical details (including the fact the switch had been switched), and others failed to grasp the import of their discovery. See VALUKAS REPORT, *supra* note 240, at 3, 143. For its part, GM did not even know about the Wisconsin/Indiana studies “until 2012 when a plaintiff’s expert brought [the information] to their attention.” *Id.* at 115; see *id.* at 161, 180–82.

252. Consent Order at 4, TQ 14-001, NHTSA Recall No. 14V-047 (May 16, 2014); Matthew L. Wald & Danielle Ivory, *G.M. Is Fined over Safety and Called a Lawbreaker*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/17/business/us-fines-general-motors-35-million-for-lapses-on-ignition-switch-defect.html>.

253. Consent Order, *supra* note 252, at 5.

254. OFFICE OF INSPECTOR GEN., *supra* note 249. In all, between January and September 2014, GM initiated sixty recall campaigns, affecting more than 25 million vehicles in the United States. HOUSE STAFF REPORT, *supra* note 250, at 5.

255. Ultimately, Ken Feinberg, who ran the compensation fund, doled out \$594.5 million. David Shepardson, *GM Fund Approves \$594.5 Million in Ignition Claims*, REUTERS (Dec. 10, 2015, 12:11 AM), <https://www.reuters.com/article/us-gm-recall-compensation/gm-fund-approves-594-5-million-in-ignition-claims-idUSKBN0TT0DE20151210>.

switch-related lawsuits have been filed and consolidated in New York, involving claims of fraud, breach of warranty, unjust enrichment, and state law statutory violations.²⁵⁶ And in September 2015, GM agreed to pay the Justice Department a \$900 million penalty.²⁵⁷

Further, the episode has set off rounds of inspection of—and introspection within—both GM and NHTSA, with both entities insisting that, as a consequence, they have cleaned up their acts. In the months after the debacle became public, GM fired fifteen employees; reorganized its entire engineering division; started a “Speak Up for Safety” campaign aimed at encouraging employees to alert higher-ups when they see a potential safety issue; vowed to “revise its product quality analytics to improve its ability to identify safety consequences . . . relating to potential safety-related defects”; and made public an internal inquiry by Anton Valukas, which found an eleven-year “history of failures” and “pattern of incompetence and neglect.”²⁵⁸ Meanwhile, the episode prompted the Department of Transportation’s Inspector General (“IG”) to investigate NHTSA’s abysmal performance.²⁵⁹ In June 2015, the IG issued a blistering report calling for sweeping reforms, and NHTSA promptly agreed to “aggressively implement” the IG’s proposals, while noting that “extensive changes have already been implemented with many others underway.”²⁶⁰

2. *Implications of the Melton Episode*

The above episode is critically important because, in recent years, a debate has raged in the tort law literature concerning the utility of

256. For the latest motions, documents, and court orders, see *IN RE GEN. MOTORS LLC IGNITION SWITCH LITIG.*, <http://gmignitionmdl.com/> (last visited Apr. 28, 2018).

257. Danielle Ivory & Bill Vlasic, *\$900 Million Penalty for G.M.’s Deadly Defect Leaves Many Cold*, N.Y. TIMES (Sept. 17, 2015), <https://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html>.

258. Consent Order, *supra* note 252, at 9; Press Release, Gen. Motors, GM CEO Mary Barra’s Remarks to Employees on Valukas Report Findings (June 5, 2014), https://www.autosafety.org/sites/default/files/imce_staff_uploads/GM%20Barra%20Town%20Hall.pdf; Tanya Basu, *Timeline: A History of GM’s Ignition Switch Defect*, NPR (Mar. 31, 2014, 4:33 PM), <http://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect>. For more on GM’s safety campaign, see Jena McGregor, *Getting GM Employees to Speak Up About Safety*, WASH. POST (Apr. 11, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/04/11/getting-gm-employees-to-speak-up-about-safety/?utm_term=.f2d6d275c886.

259. See generally OFFICE OF INSPECTOR GEN., *supra* note 249.

260. *Id.* According to Mark Rosekind, NHTSA’s former chief, “The GM ignition switch has triggered change at NHTSA.” Frank Witsil, *NHTSA Chief: Ignition Switch Triggered Change at NHTSA*, DETROIT FREE PRESS (July 20, 2015, 5:33 PM), <https://www.freep.com/story/money/cars/auto-leadership/2015/07/20/nhtsa-rosekind-detroit-ignition-switch-general-motors/30412571/>. For the many concrete actions NHTSA has agreed to undertake as a result of the GM debacle, see OFFICE OF INSPECTOR GEN., *supra* note 249, at 26–28, 39–41.

tort litigation in general and product liability litigation in particular.²⁶¹ This litigation is undeniably time consuming, costly, and burdensome, which tees up the perennial question: Relying on regulators, reputations, and markets, can't we get reasonably safe products without that time and trouble?

Some answer the question with a resounding "yes." Indeed, a recent article in the *Harvard Law Review* suggests that there is little or no evidence that product liability litigation has "enhanced product safety."²⁶² Likewise, Peter Huber has declared that tort law is just a costly add-on as lawyers seek to profit from others' discoveries.²⁶³ In his words, "Key scientific and engineering investigations are completed and published long before the legal claims are pressed or decided."²⁶⁴

Others disagree. One response claims that tort litigation is valuable because of the standard law-and-economics story of cost internalization.²⁶⁵ Other scholars argue that tort law enhances product safety, not because of the well-worn pathway of cost-internalization but because it offers the best way to bring "stubborn information" to light.²⁶⁶ With ample resources and steely resolve,

261. See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010).

262. Polinsky & Shavell, *supra* note 261, at 1473 ("[W]e found no statistical evidence suggesting that product liability has in fact enhanced product safety for the three widely sold products that have been studied: general aviation aircraft, automobiles, and the DPT vaccine."); accord KAGAN, *supra* note 1, at 141–42 (suggesting that "efforts to sort out how much tort law really adds to the regulatory equation generally have been rather inconclusive" and that "systematic studies of particular industries have found little evidence that American tort law consistently or significantly affects product design or safety"); MASHAW & HARFST, *supra* note 24, at 44 ("[T]hrough the automobile has had a major impact on the common law, the common law has only minimal influence on the characteristics, use, and effects of the automobile.").

263. See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 174 (1991).

264. *Id.* Similarly, a recent piece published in the *Georgetown Law Journal* reports, "High profile tort suits do have the ability to publicize new dangers in ways that sometimes lead to their elimination, but the system itself typically relies on others to make the case that a product or behavior should be outlawed or modified as a regulatory matter." Alexander B. Lemann, *Coercive Insurance and the Soul of Tort Law*, 105 GEO. L.J. 55, 76 (2016).

265. The standard account provides that, when the law requires defendants to compensate for the harm they cause, this cost internalization provides appropriate incentives for defendants to invest in precaution (or scale back activities) up to the point where social welfare is maximized, i.e., where the marginal cost of increased precaution equals the marginal benefit of reduced accident costs. See generally STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

266. Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 271, 271 (Timothy D. Lytton ed.,

plaintiffs' lawyers are well equipped to connect dots, cultivate whistle-blowers, and pry incriminating information out of company vaults.²⁶⁷ That information, some scholars believe, is the third leg of the stool; it is necessary to help regulators regulate effectively and also to ensure that reputations reflect reality such that reputational effects steer consumers to safer, not shoddier, goods.²⁶⁸ Under this view, tort law doesn't operate at odds with regulators and reputation; it is the grease that makes the whole system work.²⁶⁹

Writing in 2010, in a famous defense of product liability litigation, John Goldberg and Ben Zipursky made this point—but tentatively, in a paragraph studded with qualifiers:

The filing of litigation is presumably sometimes necessary for the discovery of the newsworthy story behind a product's dangers, and litigation can itself be news that focuses consumer attention on alleged product dangers and attracts regulatory attention. News of alleged product-related injuries can foment litigation and regulation. . . . Given these probable synergies, it is almost certainly a mistake to posit that, once tort law is removed from the bundle of regulatory sticks, market and regulatory forces will have the same deterrent effect that they now have.²⁷⁰

2005). For further discussion and contemporary examples, see, for example, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 56–83 (2017); Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1842 (2008); Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 DEPAUL L. REV. 293, 302 (2007); Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2069–70 (2000); and Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 715 (2007). In a series of articles, Joanna Schwartz has advanced a similar thesis: tort law is valuable, in her conception, because it can “generate valuable information previously unavailable to the very entity that is sued.” Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 890 (2012); see also Schwartz, *supra* note 251, at 1057 (“Outside auditors and regulators may not have the authority, tools, or motivation to pry the information from corporate executives’ white-knuckled grip.”).

267. For why plaintiffs’ lawyers seem to have a comparative advantage when it comes to “unearth[ing] information that has gone unnoticed by other investigators,” see Schwartz, *supra* note 251, at 1069–72.

268. In terms of reputation, Polinsky and Shavell recognized that “[t]he degree to which consumers will punish manufacturers for unsafe products or reward them for safe products clearly depends on the information that consumers have about product safety.” Polinsky & Shavell, *supra* note 261, at 1445. It is notable then that, as of October 26, 2010, *Consumer Reports* continued to rate GM favorably in terms of safety. Basu, *supra* note 258.

269. See Goldberg & Zipursky, *supra* note 261, at 1930 (criticizing Polinsky and Shavell for “treat[ing] public information, regulatory action, and the tort system as, for the most part, operating independently of one another”).

270. *Id.* at 1930–31. Elsewhere, Goldberg & Zipursky noted, “[I]t is entirely plausible . . . that some market pressure for manufacturers to attend to product

The above episode shows that such qualifiers are not necessary. What followed from a single, tragic car wreck on a highway in Cobb County, Georgia, should inform our understanding of tort law's information-forcing role and, more generally, the complementary interplay between tort law and other regulatory mechanisms.²⁷¹

V. CONCLUSION

It has been a long time since 1893, when two brothers in Springfield, Massachusetts, put an internal combustion engine into a modified horse carriage and, in so doing, invented the automobile—the machine that, as the *New York Times* put it in 1913, “literally changed the face of the earth.”²⁷² In the ensuing years, the automobile has claimed the lives of over 3.5 million Americans and inflicted injury on 300 million more.²⁷³ Along the way, it has radically transformed our culture, offering “inexpensive, individualized transportation to an individualistic, highly mobile people.”²⁷⁴ It has altered our workplaces, cities, and neighborhoods; affected our self-conception; and radically transformed our environment.²⁷⁵ Just as

safety is dependent on knowledge made available by media coverage of products liability litigation.” *Id.* at 1941.

271. See Rabin, *supra* note 24, at 308 n.53 (noting that the Melton episode “nicely illustrat[es] the potential interplay between regulation and tort in promoting auto safety”). Even apart from the Melton episode in particular, the Valukas Report reveals the extent to which, inside GM, it is understood that product liability suits bring valuable information to light. In particular, GM hosts a weekly litigation “Roundtable” where product liability cases are discussed. VALUKAS REPORT, *supra* note 240, at 107–08. A clear goal of this Roundtable is to “spot trends indicating safety issues . . . and refer them to engineers.” *Id.* at 108. GM has created and cultivated a structure, in other words, where litigation-generated information is gathered and passed to experts who can use the information to address safety concerns. This is concrete evidence of a direct and undeniable link between litigation and the promotion of product safety.

272. From “Horseless Carriage” to Palace Motor Car: A Story of Twenty Years, N.Y. TIMES, Jan. 12, 1913, at A1. For the story of the two brothers in Springfield, see MASHAW & HARFST, *supra* note 24, at 27. When telling the history of the automobile, others turn the clock back even later. See, e.g., JOHN B. RAE, THE AMERICAN AUTOMOBILE: A BRIEF HISTORY 1–32 (Daniel J. Boorstin ed., 1965). See generally BEVERLY RAE KIMES, PIONEERS, ENGINEERS, AND SCOUNDRELS: THE DAWN OF THE AUTOMOBILE IN AMERICA (2005);

273. See LEMOV, *supra* note 7, at xii, 9. As Lemov notes, “That is three times the number of Americans killed and two hundred times the number wounded in all the wars our nation has fought in since the Revolution.” *Id.* at 10.

274. See MASHAW & HARFST, *supra* note 24, at 27 (quoting JOEL W. EASTMAN, STYLING VS. SAFETY: THE AMERICAN AUTOMOBILE INDUSTRY AND THE DEVELOPMENT OF AUTOMOBILE SAFETY, 1900–1966, at ix (1984)). For further discussion of how the automobile has transformed our culture and society, see generally JAMES J. FLINK, THE AUTOMOBILE AGE (1988); and Anedith Jo Bond Nash, Death on the Highway: The Automobile Wreck in American Culture, 1920–40 (June 1983) (unpublished Ph.D. dissertation, Univ. of Minnesota) (on file with author).

275. As one writer puts it:

surely, the automobile—and the carnage it has wrought—has revolutionized our law.

A providential instrument for a people with much space and little time, the automobile has diffused and leveled and stirred and homogenized a continent civilization. It has spread the freedom to travel among all classes and at the same time has helped remove the very differences between parts of the country, between kinds of landscapes which were once an incentive to travel. The automobile has brought farmers to the city and the city to the farm The automobile, then, has long ceased to be only an instrument of technology and has become a characteristic American institution.

Daniel J. Boorstin, *Preface to RAE*, *supra* note 272, at vii, vii–viii.