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Claims on the Tracks

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ABSTRACT

Using original empirical evidence, this Article challenges the prevailing conception of a "dispute pyramid"—a smooth process of attrition from personal injury through claiming to litigation. Instead, I argue for the metaphor of a "salmon run," with huge drop-offs from the levels of injuries to claims and, especially, to litigation.

As support for the proposed model, the Article analyzes the claims department records of Alameda County's principal street railway company during the early twentieth century. Using data drawn from archival records of the street railway company's attorney, Harmon Bell, the Article examines the operation of the street railway's claims department in detail. This never-before-assembled data reveals the hidden operation of the systems of claims compensation within an industry that injured approximately one in 331 urban Americans in 1907. The assembled data include all the personal injury suits

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filed in Alameda County's Superior Court, all appellate cases involving the street railway company, and other sources concerning the street railway industry. In particular, the Article describes the relationship between the amount paid through the claims department and the amount paid in Superior Court judgments and costs. The average payments that successful claimants received were tiny, averaging just $127.32 in the claims department.

This Article presents a series of research and methodological critiques. No scholar has assembled a universe of data linking business operations, injuries, and claims to litigation and appeals. Empirical researchers who seek to understand compensation systems should collect data on the operation of claims departments. Today, such studies must include insurance claims departments. If I could find these data from more than a century ago, researchers today could do likewise.

Second, the common idea that injured claimants bargain in the shadow of the law is naïve. The claims department casts its own, longer shadow than the trial court.

The final critique focuses on anyone who relies upon reported appellate cases as representations of any realm below. Appellate cases, especially those in casebooks, misrepresent the trial court and, more dramatically, misrepresent the empirical world of the claims department and business operation.

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I. INTRODUCTION

This Article presents never-before-assembled empirical data on the operation of a claims department.[1] Today, car crashes comprise the majority of personal injury litigation.[2] In the late nineteenth and early twentieth century, railroads and street railways were defendants in almost sixty percent of the personal injury suits in the Superior Court of Alameda County,

1. *See infra* Parts I-VI.
2. Thomas D. Russell, *Blood on the Tracks,* 69 CLEV. STATE L. REV. 785 (2021).

California.[3] Between 1898 and 1910, Oakland Traction, Alameda County's principal street railway, was the defendant in thirty-six percent of all the Superior Court personal injury claims.[4] This street railway company—Alameda County's greatest tortfeasor and tort defendant in the early part of this century—is the subject of this Article.[5]

My previous article, *Blood on the Tracks*, looked at the lawsuits against Oakland Traction and tracked the resolution, settlement, and litigation of those claims.[6] I show that the street railway company was a successful litigant, which won more often than the injured plaintiffs.[7] The court system's cost to the street railway's business operation was like a flea bite.[8]

In contrast, this Article looks inside the business operation of the street railway company.[9] Here, I present the data from the claims department concerning street railway injuries and payments for claims.[10] This assembly of data, either in a contemporary or historical context, is novel.

This Article links the business's internal operation to the legal system's external operation.[11] I present and analyze data for the operation of the street railway company, including the number of passengers, injuries, and claims paid.[12] The claims data include payments for personal injury, death, and minor losses, such as damage to clothing.[13] The data show the costs of claims and offer insight into the transactional costs of settling claims—transcriptionists, typists, and expenses of attending inquests, for example.[14] This Article also links these claims department data to the universe of corresponding trial-court data and results.[15] No scholar has assembled systematic data this way—not just for streetcars but for any industry. The

3. There were 383 cases involving street railways and railroads, which was 57.2 percent of the 675 torts suits in Alameda County Superior Court between 1880 and 1910. Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295, 2908 (1990); Thomas D. Russell, *Blood on the Tracks*, 47 SEATTLE U. L. REV. 178, 805 (2023).

4. This figure is a slight revision of Friedman and Russell, *More Civil Wrongs*, *supra* note 3 at 296-99. Between 1898 and 1912, the name of the street railway company changed with the acquisition of additional, competing street railway lines. The names, along with effective dates, were Oakland Transit Company (1898-1901); Oakland Transit (1901-1902); Oakland Transit Consolidated (1902-1904); Oakland Traction Consolidated (1904-1906); Oakland Traction Company (1906-1912). I will refer generally to the streetcar company as Oakland Traction.

5. Russell, *supra* note 2 at 169.

6. *Id.* at 181-182.

7. *Id.* at 182.

8. *Id.* at 198-99.

9. *See infra* at 49.

10. *See infra* at 6.

11. *See infra* at 33.

12. *See infra* at 2.

13. *See infra* at 17-18.

14. *See infra* at 24-25.

15. *See infra* at 7.

presentation of these claims data in a historical or contemporary context is novel.

In addition to this novel presentation of claims data for injuries and the linking of these claims data to the practice of litigation, this Article offers methodological and historiographical critiques.[16] First, empirical researchers who seek to understand compensation systems should collect data on the operation of claims departments. Today, such studies must include insurance claims departments. If I could find these data from more than a century ago, researchers today could do likewise.

This Article also argues that sociolegal scholars should abandon the "dispute pyramid" metaphor to explore the transit from injuries through claims to litigation.[17] The architectural metaphor is too smooth and obscures the critical discontinuities between injuries and claims and, especially, between claims and lawsuits. Related, the idea that injured claimants bargain in the shadow of the law is naïve.[18] The claims department casts its own, darker shadow than the trial court.

The final methodological critique concerns those who continue to rely upon reported appellate cases as representations of any realm below.[19] The appellate cases, especially the ones that law professors select for casebooks, misrepresent the trial court and, even more dramatically, misrepresent the empirical world of business operation, particularly the claims department.[20]

The balance of the Article proceeds in four Parts.[21] In Part II, I assemble the pyramid or "salmon run" from the number of passengers through injuries, claims, lawsuits, and appeals.[22] Part III focuses on the resolution of claims within the claims department.[23] Part IV concerns types of accidents and demonstrates that reliance on appellate cases inverts the empirical world.[24]

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16. *See infra* at 5.

17. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099 (1996) ("In order to understand the system of tort litigation, it is useful to visualize it, in the standard way that legal studies scholars do, as a 'pyramid' made up of successive layers"). *See* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming* . . ., 15 L. & SOC'Y REV. 632 (laying out a framework for the emergence and transformation of disputes including before a dispute has reached the legal system).

18. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

19. *See, e.g.,* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Gary T. Schwartz, *Tort Law and Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

20. Schwartz, *supra* note 19 at 1764.

21. *See infra* at 5.

22. *Id.*

23. *See infra* at 10.

24. *See infra* at 32.

Part V focuses on the releases injured parties signed when settling their claims with the street railway company.[25]

II. THE SALMON RUN OF INJURIES, CLAIMS, LAWSUITS, AND APPEALS

Harmon Bell, Esq. knew well that demands or requests for compensation did not come only via litigation. Bell was the attorney for Oakland Traction, the principal street railway company in Alameda County, California, during the early twentieth century.[26] In addition to handling Oakland Traction's litigation, land deals, and other legal matters, Bell also helped oversee the company's claims department.[27] Before visiting a lawyer and before litigating, persons injured by streetcars might ask the company's claims agent for compensation. Injured persons did not always visit the claims department before suing, and there was no legal or administrative requirement for them to do so. The traction attorney knew that the amount of money the courts ordered the company to pay to successful plaintiffs was but a portion of the total amount the company paid as compensation to those whom streetcars injured. This Article presents details regarding claims that Oakland Traction paid, links the claims department's operation to trial-court litigation, and settles all these data within a larger context that Law and Society scholars call a "dispute pyramid."[28]

Table 1 shows that for the years for which the claims data are most complete—1903, 1904, and 1905—Oakland Traction carried passengers on more than seventy million trips. These seventy million individual voyages generated 3,843 injuries of varying sorts. The claims department made payment in connection with 581 of these injuries. Twenty-two injured persons filed lawsuits. Three won. There was one appellate case.

25. *See infra* at 42.
26. *See infra* at 5.
27. *Id.*
28. *See infra* at 9.

TABLE 1[29]
OAKLAND TRACTION, 1903-1905:
PASSENGERS, INJURIES, CLAIMS PAID, LAWSUITS, AND APPELLATE CASES

Passenger trips	70,201,229
Injuries	3,843
Claims Paid	581
Lawsuits filed	21
Appellate cases	1

Like other street railway companies, Oakland Traction injured a lot of people. As the Table indicates, the 70.2 million fares paid during the three years from 1903 through 1905 resulted in 3,843 injuries, one for every 18,267 trips. That may sound like a pretty good safety record, but it amounts to 5.4 injuries per every 100,000 passengers—an average weekly injury toll of about 25. The Alameda County population in 1900 was 130,197; by 1910, the county had nearly doubled to 246,131.[30]

The claims department made payments to or on behalf of fewer than one-seventh of the injured persons. The 581 persons for whom the claims department records reflect a payment comprise 15.1% of those injured. Of these 581 persons, about two-thirds (393) released their claims against the company.[31] There may have been a somewhat higher number of releases, but, as the next section explores, not every one of the payments that the claims agent made in connection with an injury represented a compromise of the injured person's claim.[32]

For the years 1903 through 1905, there were twenty-one lawsuits against Oakland Traction. In *Blood on the Tracks*,[33] I explored trial-court records to show the difficulty those who filed lawsuits faced as they worked through the trial courts of Alameda and Los Angeles counties. A fortunate ten percent of litigants ended up with judgments in their favor.[34] Table 1 puts these plaintiffs' achievements in a broader context by presenting the number of passenger trips, which is the relevant denominator for injuries, claims, lawsuits, and appellate cases. Were there many or few injuries, claims, or

29. Sources: Papers of Harmon Bell, Bancroft Library, University of California, Berkeley; Civil litigation case files, Superior Court, Alameda County, California; California Reports, 1902-1920 (appellate cases); 11 American Street Railway Investments 12 (1904); 12 American Street Railway Investments, at 12 (1905); 14 American Street Railway Investments, at 15 (1907).

30. 1 THIRTEENTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1910 104 (1913).

31. *See infra* at 8.

32. *See infra* at 10

33. Russell, *supra* note 2.

34. *Id*. at 207.

lawsuits? One cannot answer that question without knowing how many passengers boarded streetcars.[35]

Only one appellate case emerged from the injuries, claims, and lawsuits filed during these years.

Alas, there is no way to determine the payment rate for injured persons who came to Oakland Traction's claims department. There is no record of the total number of claims nor of rejected claims. That is, for the 3,262 injured persons for whose injury there is no record of a claims department payment, there is no way to know how many of these persons approached the company and made a claim only to have the company's claims agent reject it.

For the early years during which Bell supervised the claims department, there is some evidence regarding how James Ferrin, the claims agent, handled claims, but these data are insufficient to calculate the rate at which he rejected claims. Bell assumed control of the railway's legal affairs sometime in 1898. In late 1898, Ferrin delivered to Bell a lengthy report of fifteen typewritten pages in which Ferrin described his activities as a claims agent. Ferrin's tone is that of someone trying to impress his new manager to keep his job. Ferrin advises Bell, "[a] great many complaints and claims for damages are made without any just causes.[36] These," Ferrin explained, "unless the testimony of witnesses shows them to be such that the Company may be liable, are answered by letter that they have no claim."[37] Ferrin concluded his cover memo by highlighting his skill as an agent.[38] He wanted Bell to understand that his settlements saved the company money.[39] Ferrin explained that by settling cases within the claims department, the company saved money compared to what they would pay in the courts.[40] Ferrin lectured,

> [i]t will be seen by my report that the cases I have had the management of have been settled, and I think very reasonably, as all of them, if suit had been brought, could not have been settled for so small an amount, considering how serious some of them were.[41]

Within the report, Ferrin includes several examples of his handling of claims.[42] The examples suggest that he was an aggressive and unsympathetic

35. On the denominator problem, *see* Thomas D. Russell, Frivolous Defenses, 798-800.

36. John Ferrin, *Report of Accidents of the Oakland Transit Company, July 13, 1897, to Nov. 1, 1898*, at 2 (Carton 10, Papers of Harmon Bell).

37. *Id*.

38. *Id*.

39. *Id*.

40. *Id*.

41. Ferrin*, supra* note 36 at 2.

42. *Id.* at 4

bargainer, although he may have just been trying to impress the lawyer, his new boss.[43] For instance, on December 1, 1897, Ferrin reported that "Mrs. Stillwell stepped off a car at 13th and Grove Sts., and fell, injuring her hip, arm, and the side of her face. She claimed," Ferrin continued, "that the motorman started the car and threw her before she could step off." [44] For this alighting injury, she asked for sixteen dollars to cover a medical bill and another twenty-five dollars in damages.[45] Of her claim, Ferrin wrote: "I refused to pay anything as it was her own fault."[46] Concerning an incident a few months later, Ferrin related that "Car 20 struck a Chinaman's wagon at 1st Ave. and 11th St., breaking all the wheels off and breaking the front window of the car. The Chinaman was to blame," Ferrin reported,[47] "[h]e wanted $18 the cost of repairing the wagon, but I refused to pay anything."[48] Once again, though, there is no way to know to what extent the examples Ferrin selected for his report to Bell reflected the overall conduct of claims department operations; therefore, I cannot say how many claimants went away unpaid.[49]

The trial court was the next level at which injured persons might seek compensation.[50] As Ferrin made clear in his report to Bell regarding the settlements he made as claims agent, the stakes were higher when a claim became a lawsuit. [51] In all, 22 persons injured during these three years filed Superior Court lawsuits.[52] There was one lawsuit for every 175 injuries and one for every 3.2 million passenger trips.[53] These figures are somewhat misleading because they ignore those persons whose claims were satisfied at the previous level of compensation.[54] If I take the 393 releases as the minimum number and (unrealistically) the 581 payments as the maximum number of injured persons who received compensation and settled their claims in Oakland Traction's claims department, the uncompensated injured persons number would fall between 3,262 and 3,450.[55] Thus, there was one lawsuit for every 148 to 157 injured persons, with a filing rate of under

43. *Id.*
44. *Id.*
45. *Id.*
46. Ferrin, *supra* note 36 at 4.
47. *Id.*
48. *Id.* at 10 (Incident of Feb 28, 1898, Ferrin's racist use of the term "Chinaman" was typical of the time); *Anti-Chinese violence in California*, Wikipedia, https://en.wikipedia.org/wiki/Anti-Chinese_violence_in_California (last visited May 5, 2024).
49. *Id.*
50. *Id.*
51. Ferrin, *supra* note 36 at 10.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

0.7%.[56] Few persons leaped to the next level from the pool of uncompensated injured persons.[57]

As I made clear in my article *Blood on the Tracks*, filing a personal injury suit was nothing close to a guarantee of success.[58] Including 1902, a year for which I have Superior Court but not claims department data, injured persons filed twenty-two lawsuits from 1902 through 1905, and three of the twenty-two plaintiffs won.[59] The three plaintiffs retained their verdicts through post-trial motions and appeals, winning an average of $3,031.73 in their suits.[60] This average represents the average amount Bell lost at trial in lawsuits filed for injuries during these years.[61] The total amount that he lost in these suits was $9,095.20.[62] This total represents an average of $413.42 in judgments and costs for each of the twenty-two cases filed against the company.[63]

In one of the three suits that Bell lost, he took an appeal to the state's District Court of Appeals, which published an opinion in the case.[64] Between 1898 and 1910, there was only one other published appellate report involving Oakland Traction.[65] In terms of the rates of generation of appellate opinions between 1903 and 1905, there was one appellate opinion concerning Oakland Traction for every three plaintiff's judgments (33.3%), for every twenty-two lawsuits filed (4.5%), for every 3,841 injuries (.03%), and for every 70,201,229 passenger trips (0.000001%).[66] One-millionth of one percent of the passenger trips yielded a published appellate opinion.[67] This rate suggests that everyone should be cautious about presuming that appellate reports offer good representations of the underlying economic activity.[68] Law professors and law students, take note![69]

Law and Society scholars use the term "dispute pyramid" to describe the winnowing of disputes from the time of injury through claims and litigation.[70] The architectural metaphor suggests smoothness in transitioning from one level to the next, but the data do not delineate such a smooth transition.[71]

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56. Ferrin, *supra* note 36 at 10.
57. *Id.*
58. Russell, *supra* note 3 at 214, 216.
59. *Id.* (referencing *Arthur*, Alameda County Superior Court (hereinafter ACSC) # 21625; *Nilson*, ACSC# 22640; *Payne*, ACSC# 24318).
60. *Id.*
61. *Id.*
62. *Id.*
63. Russell, *supra* note 3 at 214, 216.
64. Nilson v. Oakland Traction Co., 10 C.A. App. 103 (1909).
65. Boone v. Oakland Transit Co., 139 Cal. 490 (1903).
66. *See generally Nilson,* 10 C.A. App. 103; *Boone,* 139 Cal. 490.
67. *Id.*
68. *Id.*
69. *Id.*
70. Russell, *supra* note 2 at 797-98.
71. *Id.*

First, the number of injuries was only a tiny fraction of the total number of passenger trips.[72] Perhaps something scholars call a "dispute pyramid" should not include the pre-injury or pre-dispute data.[73] However, even if I begin at the level of injuries, the drop-off is so sharp at the compensation levels that the "smooth pyramid" metaphor seems inappropriate.[74] Less than one in seven of the injured received compensation, and few injured persons sought compensation in the Superior Court.[75] To be sure, the negligence of the injured can account for a considerable portion of this drop-off.[76] To replace the "dispute pyramid," I have elsewhere suggested the metaphor of a "salmon run," with thousands of eggs yielding few fry who survive the trip to the ocean, fewer still becoming adults, and, finally, some few adults negotiating the obstacles that return them to the place where they hatched.[77] How adults know what stream they should return to and why some possess the endurance to complete the trip are questions scientists cannot answer, just as legal scholars cannot predict which injuries will end in litigation.[78]

The relationship of the different compensation levels to the underlying mass of injuries and passenger trips supports my conclusion that the Superior Court, Court of Appeals, and the Supreme Court were not all that important regarding the operation of the streetcar business.[79] One out of every 3.3 million nickels passengers paid led to a lawsuit: $165,000 in fares versus an average cost per lawsuit of $413.42.[80] Put differently, the ratio of either everyday life or everyday economic behavior to law was quite high.[81] This conclusion is one that legal scholars, of course, might be reluctant to make.[82] Still, I think that then, as now, injury claims generally are not a significant drain on businesses, despite what newspapers, talk show hosts, insurance companies, civil litigation reformers, and many legislators would have us believe.[83]

72. *Id.*
73. *Id.*
74. *Id.*
75. Russell, *supra* note 2 at 797-98
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Russell, *supra* note 2 at 797-98.
81. *See* BEYOND THE GREAT DIVIDE: FORMS OF LEGAL SCHOLARSHIP AND EVERYDAY LIFE, IN LAW IN EVERYDAY LIFE (Austin Sarat and Thomas R. Kearns eds., 1993) [hereinafter BEYOND THE GREAT DIVIDE].
82. Russell, *supra* note 2 at 797-98.
83. *Id.*

III. CLAIMS

The claims department did not simply settle claims by making one lump sum payment to the claimant, something I would expect today. [84] Mr. Ferrin, the claims agent, throughout the period of this study, paid money to claimants directly if he believed that the injured person merited compensation or that paying the claim would benefit the company.[85] Ferrin also often paid bills—such as medical or repair bills—on behalf of injured persons and claimants.[86] In addition, the claims department made payments incidental to litigation—clerical and investigative costs, for example.[87] Thus, any particular injury might lead to the claims department making various payments to different persons and businesses.[88]

The most original contribution of this Article is a close look at the compensation that took place within Oakland Traction Company's claims department.[89] In the number of claims made, claims paid, and amount of money, the claims department transactions exceeded the activity in the courts.[90] When evaluating the amount and adequacy of compensation injury victims received, legal historians have consulted court records but have not yet ventured into claims department records.[91] One reason for the paucity of empirical research is that scholars interested in the history of torts have had difficulty finding the records of claims departments.[92] One consequence of the inaccessibility or absence of claims records is that legal historians have overemphasized litigation results to measure injury victims' compensation.[93] Of course, one ought to expect that legal historians might show particular interest in courts, but, at the same time, part of the legacy of J. Willard Hurst that I wish to sustain with this work is that our law-centered focus ought to be sufficiently open to include other relevant aspects of social, economic, and, of course, legal life.[94] As I will show below, the narrow focus on the courts as realms where compensation takes place exaggerates the amount of compensation that injury victims received, in much the same way that

84. R. W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM, 1825-1875 373-88 (1994).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. KOSTAL, *supra* note 84 at 373–88.
90. *Id.*
91. *Id.* (This is the only systematic historical study of claims activity of which I know. There are also few contemporary studies. Though now dated, the most important of such studies is H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 107-08 (1970)).
92. KOSTAL, *supra* note 84 at 373–88
93. *See* Friedman & Russell, *supra* note 3; Randolph E. Bergstrom, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910 (1992).
94. *See* BEYOND THE GREAT DIVIDE, *supra* note 81, at 21-61.

appellate records exaggerate the success and compensation that plaintiffs experienced.[95] Trial-court awards look meager compared to appellate averages but lavish compared to the claims department's figures.[96] My principal empirical goal in this Part is to build upon the empirical comparison between levels of compensation that I established in the last Part by comparing the compensation that took place in the claims department with that of the Superior Court.[97]

This Article continues my engagement with the arguments of the late UCLA law professor Gary Schwartz, regarding the operation of the tort system and regarding the use of appellate reports to characterize the activity in trial courts and claims departments.[98] Professor Schwartz argued that the tort system was generous to plaintiffs, but the generosity that Professor Schwartz found in the appellate reports did not characterize Oakland Traction's claims department.[99] If the results in the appellate and trial courts were as favorable to plaintiffs as Schwartz suggested, then one would expect to find that claimants also fared well in the claims department.[100] Legal scholars know this phenomenon as "bargaining in the shadow of law."[101] The simple idea is that persons with disputes bargain with an eye toward the result they would get if they litigated.[102]

Likewise, this Article continues my critique of law professor and Judge Richard Posner's argument and data regarding tort litigation.[103] In *A Theory of Negligence,* Judge Posner defends his use of appellate data by explicitly assuming that settlement and trial-court awards were about the same as the amounts he derives from the appellate cases.[104] Posner notes, "it might be argued that the awards reported in appellate cases are likely to exceed those in equally meritorious cases that are not appealed or that are settled without any litigation."[105] However, Posner argues, "[i]t is not obvious why this should be so."[106] Posner minimizes the cost of moving from one level of the compensation system to the next.[107] He assumes that the costs of appeal were

95. *See supra* at 10-32.
96. *Id.*
97. *Id.*
98. *See generally* Schwartz, *supra* note 19; Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989).
99. Schwartz, *supra* note 98.
100. *See generally* Schwartz, *supra* note 19; Schwartz, *supra* note 98.
101. Mnookin & Kornhauser, *supra* note 18.
102. *See generally id.*
103. Posner, *supra* note 19 at 94.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

small and that "it is doubtful that nontrivial cases would be abandoned because of the expense of appealing from an adverse judgment at trial."[108]

Moreover, Posner assumes that the costs of litigating in the trial court were small.[109] "Nor does it appear that the cost of trying a serious accident case could have been prohibitive during our period,"[110] he states. Throughout his analysis, Posner minimizes the costs of moving from one level to another.[111] For him, "[t]he motive force of the system is supplied by the economic self-interest of the participants in accidents."[112] In Posner's view, the self-propelled economic force supplies the energy that maintains the regulatory effectiveness of the negligence system.[113] "By creating economic incentives for private individuals and firms to investigate accidents and bring them to the attention of the courts," Posner writes, "the system enables society to dispense with the elaborate governmental apparatus that would be necessary for gathering information about the extent and causes of accidents had the parties no incentive to report and investigate them exhaustively."[114]

There are two important historical points about this aspect of Posner's generally sanguine view of tort law.[115] First, Posner, like Schwartz, does not recognize the social, economic, and legal hurdles that impeded injury victims from becoming claimants, litigants, and then appellants.[116] As noted above, few people moved from one level to the next.[117] Like salmon that encounter dams in their native streams, injury victims often found themselves unable to surmount obstacles that impeded their already long and challenging journey against the current.[118]

The second historical point concerning Posner's frictionless, private regulatory scheme is that during the same period that he investigates—the late nineteenth and early twentieth centuries—there came into being a great many private and state-supported institutions "for gathering information about the extent and causes of accidents," to use his words.[119] A central feature of the Progressive Era was that experts used the social science methods of the day to gather evidence regarding such social problems as

108. Posner, *supra* note 19 at 94.
109. *Id.*
110. *Id.*
111. *Id.* at 48.
112. *Id.*
113. Posner, *supra* note 19 at 48.
114. *Id.*
115. *Id.*
116. Thomas D. Russell, *Historical Study of Personal Injury Litigation,* GA. J. S. LEGAL HIST. 109 (Spring/Summer 1991); Felstiner, Abel, & Sarat, *supra* note 17.
117. *See generally id.*
118. *See generally id.*
119. Posner, *supra* note 19 at 48.

injuries.[120] The best example is Crystal Eastman's research regarding the social costs of industrial injuries in Pittsburgh.[121] She published her findings in a 1910 book, *Work-Accidents and the Law*,[122] one volume in the Russell Sage Foundation-sponsored *Pittsburgh Survey*.[123] Eastman's research led to New York's Governor Charles Evan Hughes's appointment of her to the Employer's Liability Commission.[124] While secretary to the commission, she wrote New York's first worker's compensation law.[125]

There was a similar trajectory from fact-gathering reform to state action in many states at the turn of the century.[126] In Illinois, for example, Dr. Alice Hamilton studied health epidemics while working with Jane Addams at Hull House, shifted to the study of work-related injuries, and, by 1908, the governor appointed her to the state's Commission on Occupational Diseases.[127] In Los Angeles, where Schwartz later gathered trial-court data regarding tort litigation against rail companies, Progressive-Era activists pursued like-minded activities.[128] In the late 1890s, Los Angeles newspaper editors, following the example of William Randolph Hearst's *San Francisco Examiner*, featured stories about streetcar injuries and began to demand the installation of safety appliances, such as fenders, on streetcars.[129] State and municipal legislation regarding fenders followed, but streetcars continued to be dangerous.[130] In 1904, Los Angeles Mayor John McAleer sought the help of John Randolph Haynes, a Progressive reformer.[131] McAleer distributed surveys to seventy cities around the globe and, according to his biographer, Tom Sitton, determined "that Los Angeles had the highest per capita mortality rate for street railway accidents of any major U.S. or European city.[132] In fact," reports Sitton, "the rate in Los Angeles in 1904 was over three times that of Boston, Philadelphia, or Baltimore."[133] Propelled by the results of his social scientific studies and his zeal as a reformer, Haynes united private determination with the government apparatus to attempt to protect Angelenos from streetcars.[134] Haynes continued to work on the issue of

120. *Id.*
121. See generally Crystal Eastman, *Work-Accidents and the Law* (1910).
122. *See generally id.*
123. THE PITTSBURGH SURVEY; FINDINGS IN SIX VOLUMES (Paul Underwood Kellogg ed., 1910-16) [hereinafter THE PITTSBURGH SURVEY].
124. *See generally* Eastman, *supra* note 121.
125. THE PITTSBURGH SURVEY*, supra* note 123 at 7.
126. ROBERT A. DIVINE, ET AL., AMERICA: PAST AND PRESENT 678-79 (3d ed. 1991).
127. *Id.*
128. *See generally* Schwartz, *supra* note 98.
129. TOM SITTON, JOHN RANDOLPH HAYNES: CALIFORNIA PROGRESSIVE 56 (1992).
130. *See generally id.*
131. *See generally id.*
132. *See generally id.*
133. *See generally id.* at 57.
134. Sitton, *supra* note 130.

streetcar safety throughout his life, and when he died in 1937, his final reform fight involved Los Angeles's streetcar fender law.[135]

Suppose we accept Posner's description of how the tort system might operate as a form of private, self-sustaining regulation.[136] In that case, the efflorescence of fact-gathering and legislative reform regarding industrial and street railway safety is indirect evidence that the system of negligence was failing to achieve the efficient level of expenditure on safety during the final years of the nineteenth century and the early years of the twentieth century.[137] Just as Roscoe Pound doubted that "liberty of contract" characterized bargaining in early twentieth-century industrial America, reformers understood that the existing tort law system failed adequately to redress the injuries Americans experienced.[138] Reformers also understood that when youngsters like Bennie Fife whom I will discuss below, tangled with streetcars, conceptual schemes that presupposed equally empowered legal actors had little relevance.[139] The failure of the relatively pure regime of tort law that existed at the time to adequately compensate the injury victims of industrial America spawned searches for alternative compensatory schemes.[140] In *A Theory of Negligence*, Posner is oblivious to evidence suggesting that the negligence system during his study did not operate as he presumed.[141] Schwartz was similarly blind.[142] Neither scholar has the Progressive reformer's eye for social costs. [143]

This Article explores additional problems with Posner's theoretical outlook.[144] First, I show that the streetcar company simply did not operate within the regulatory strictures that Posner thinks existed.[145] Using the example of headlights on streetcars, I will show that Oakland Traction ignored the negligence rules of the California Supreme Court regarding the relationship between the speed at which a streetcar might travel and the distance that the streetcar's headlights illuminated.[146] Neither the illuminated distance nor Learned Hand's formula for negligence confined the behavior of the street railway company.[147] The most important reason Hand's formula had no application was that from the company's point of view, the relevant

135. *Id.* at 58-59, 73-75, 175, 251-52.
136. Posner, *supra* note 19 at 48.
137. *Id.*
138. *See generally* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 7 (1909).
139. *Id.*
140. *Id.*
141. Posner, *supra* note 19 at 48.
142. *Id. See generally* Schwartz, *supra* note 19; Schwartz, *supra* note 98.
143. *See generally* Schwartz, *supra* note 19; Schwartz, *supra* note 98.
144. Posner, *supra* note 19 at 48.
145. *Id*.
146. *See generally* SITTON, *supra* note 129.
147. *Id.*

amount of money against which to measure the cost of precautions would be the average amount the claims department paid for injuries.[148] The aggregate of the small amounts the company paid to individual claimants was the more relevant figure that company officials would use to regulate their own behavior.[149] The very high awards that Posner finds in the appellate cases were largely irrelevant to the company because the companies were rarely subject to such high judgments, and they certainly did not pay out such large amounts through the claims department.[150]

Another weakness of Posner's theory is that he presumes that the idea of negligence is exogenous to the injurer.[151] Using the specific example of boarding or alighting injuries, I will show that street railway companies created social norms about the proper way to get on and off streetcars.[152] As they instructed passengers, especially women, regarding how they should get on and off cars, the companies also constructed norms of negligence.[153] As the companies taught passengers how to ride more safely, they also put ideas regarding negligence into the heads of their passengers (and jurors).[154] These ideas might keep the passengers from ever making claims at all.[155] I will show the dramatic winnowing from the number of boarding/alighting injuries to the payment of claims for those injury categories.[156]

For five years, 1902 through 1906, I uncovered complete data for the total amount of money the claims department paid to claimants.[157] For these five years, the sum of Superior Court judgments and costs was 8.4% of the total amount that Oakland Traction paid out concerning the claims of injured persons.[158] Superior Court judgments for cases that arose from injuries that occurred these years cost the company a total of just over $9,000, but the claims department paid out $107,000 for 1902-06 injuries.[159] Oakland Traction made payments to or on behalf of at least 801 persons injured during these five years—the number would be higher if my data for claims were as complete as my data for lawsuits.[160] Only forty-six injured persons filed

148. *Id.*
149. *Id.*
150. Posner, *supra* note 19 at 48.
151. *Id.*
152. *Id.*
153. *Id*.
154. *Id.*
155. Posner, *supra* note 19 at 48.
156. *Id.*
157. *See supra* "Table 1" at 6. (For three of those years, I found complete data for all individual claims).
158. *See supra* "Table 1" at 6.
159. *Id.*
160. *Id.*

Superior Court lawsuits against Oakland Traction during these years.[161] Of these forty-six cases, three plaintiffs won their cases—a success rate of under ten percent of filings, as one might expect.[162] The number of claims on which the company made payments outnumbered the number of lawsuits lost by more than 233 to 1.[163]

Ferrin and Bell kept track of the total amount of money the claims department paid and accounted for payments according to when the injury occurred.[164] The 801 injured claimants about whom I have data were injured over the decade from 1896 to 1906, and the data that I report are for payments that Oakland Traction made from 1902 to 1906.[165] That is, not all payments took place in the year of injury.[166] Injuries and the payments on claims or suits regarding those injuries did not always happen in the same year.[167] The case of Rosie James, whom I discuss below, is an example.[168] Though injured in 1900, she received no money until 1909.[169] Thus, although the injuries that *occurred* from 1902 to 1906 eventually led to a total of $107,000 in payments, the figure for the payments made *during* those years was different and lower.[170] The total amount that Oakland Traction paid on the 801 claims that the claims agents paid from 1902 to 1906 was $59,501.67.[171]

161. Russell, *supra* note 3 at 214-17 (referencing *Dickerson*, ACSC# 18839; *Avery*, ACSC# 19373; *Kennedy*, ACSC# 19229; *Kennedy*, ACSC# 19322; *Kennedy*, ACSC# 19942; *Kennedy*, ACSC# 20310; *Gilmore*, ACSC# 19704; *Halladay*, ACSC# 20275; *Wolgamot*, ACSC# 19868; *Walliser*, ACSC# 20087; Huff, ACSC# 20110; *Jones*, ACSC# 20311; *Hickey*, ACSC# 20539; *Bowley*, ACSC# 20610; *Claresy*, ACSC# 20876; *Gerrie*, ACSC# 21222; *Assalena*, ACSC# 20832; *McNaughton*, ACSC# 21491; *Izetti*, ACSC# 21395; *Arthur*, ACSC# 21625; *Tarlson*, ACSC# 22282; *Geary*, ACSC# 22581; *Hammond*, ACSC# 21960; *Henderson*, ACSC# 22624; *Nilson*, ACSC# 22640; *Campbell*, ACSC# 22838; *Bowers*, ACSC# 23104; *Kneier*, ACSC# 22862; *Grunwald*, ACSC# 22650; *Hanson*, ACSC# 23025; *Hayward*, ACSC# 24004; *Burke*, ACSC# 23901; *Cardinet*, ACSC# 25020; *Yallop*, ACSC# 24095; *Midgley*, ACSC# 24388; *Dillon*, ACSC# 23810; *Brower*, ACSC# 24892; *Lyons*, ACSC# 24613; *Grantham*, ACSC# 25833; *Payne*, ACSC# 24318; Howe, ACSC# 25159; Dean, ACSC# 26050; *Gilligan*, ACSC# 25102; *Gilligan*, ACSC# 25448; *Lynch*, ACSC# 24567; *Yori*, ACSC# 25469).

162. *Id.* (referencing *Arthur*, ACSC# 21625; *Nilson*, ACSC# 22640; *Payne*, ACSC# 24318).

163. *Id.*

164. *Id.*

165. *Id.*

166. Russell, *supra* note 3 at 214-17.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Russell, *supra* note 3 at 214-17.

TABLE 2[172]
OAKLAND TRACTION CLAIMS DEPARTMENT PAYMENTS, 1902-1906

Claim amount ($)	Number paid	Percentage of all claims	Cumulative percentage
less than 0	3	0.4	0.4
0	2	0.2	0.6
.01 - 5	119	14.9	15.5
5.01 - 10	111	13.9	29.4
10.01 - 25	202	25.2	54.6
25.01 - 50	172	21.5	76.1
50.01 - 100	69	8.6	84.7
100.01 - 300	90	11.2	95.9
300.01 - 500	14	1.7	97.6
500.01 - 1,000	12	1.5	99.1
1,000.01 - 2,000	4	0.5	99.6
2,000.01 - 3,000	2	0.2	99.8
3,000.01 - 3,500	1	0.1	100.0
Total	801		

Table 2 breaks down the claims department's payments to or on behalf of the claimants.[173] The figures displayed represent the total cost for each injury claim.[174] For example, if Oakland Traction paid for a hack to take an injured person home or paid money to a pharmacy for medication and then obtained a release from liability from the passenger in exchange for a payment, then the Table presents the sum of those three payments, not each individual payment.[175] The average cost per claimant was just over seventy-four dollars. [176] One-quarter of all the payments were in the ten to twenty-five dollar range; fourteen percent were in the five to ten dollar range, and fifteen percent were under five dollars.[177] The median cost was one-third of the average: under twenty-five dollars.[178] As the Table indicates, 54.6% of all claims cost less than twenty-five dollars.[179] Small amounts settled most

172. Ferrin, *supra* note 36.
173. Russell, *supra* note 3 at 214-17.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. Russell, *supra* note 3 at 214-17.
179. *Id.*

claims.[180] More than three-quarters of the claims cost less than fifty dollars.[181]

The claims department records do not always clarify the nature of the injury.[182] Of the 500 claims for which I can identify the nature of the injury, ninety are for property damage.[183] The rest are for personal injury, some for injury to person and property.[184] For the property-only claims, the average amount the company paid was under twenty dollars.[185] As one would expect, many small payments were for minor injuries or damage.[186]

Quite a few property claims were for damaged clothing, mainly women's clothing.[187] When people suffered personal injuries, their clothing was often damaged as well, of course.[188] However, there were also some pure clothing claims.[189] For example, on April 8, 1905, Gladys A. Downs got up from her seat at 12th and Union Streets and, according to the release, "her dress skirt was torn after being caught in the crack of the seat."[190] For this damage, the claims agent paid her ten dollars.[191]

The overhead lights within the cars also tended to explode when they blew out.[192] On April 7, 1906, an overhead light blew out, damaging Val Artzen's hat and silk dress.[193] Nine days later, Ms. Artzen settled with the company for thirty dollars.[194] A month before, a man named H. W. Pulcifer had encountered a similar experience when a fuse blew and burned his coat and neck.[195] Pulcifer did a great deal of typing for the claims department, so he was undoubtedly familiar with its operation.[196] He settled five days after the injury for twenty-five dollars.[197]

For the claims known to have included personal injury, the average payment was more than four times the amount for property cases – $88.70.[198]

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180. *Id.*
181. *Id.*
182. *Id.*
183. Russell, *supra* note 3 at 214-17.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. Russell, *supra* note 3 at 214-17.
189. *Id.*
190. Damage Report of Apr. 1, 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id*.
195. Damage Report of Apr. 1, 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).
196. *Id.*
197. *Id*.
198. *Id*.

The payments for personal injury seem to have been for out-of-pocket costs plus, perhaps, a few dollars more.[199] In legal jargon, the claims paid tended to cover some special damages, with little or nothing for general damages, such as pain and suffering.[200] The property-only cases, in which the claims agent would pay the repair cost of the damaged property, established the paradigm.[201] Compensation appears to have meant that Oakland Traction would reimburse claimants for the money they had spent, plus, perhaps, a bit of rounding up for the aggravation.[202] In the trial court, plaintiffs might ask for and occasionally receive substantial amounts for the pain and suffering they experienced following an injury, but this was not the operative definition of compensation in the claims department.[203] Instead, compensation in the claims department meant enough money to repair the damage—usually only physical damage.[204]

Only 122 of 801 claims (15.2%) were over $100.[205] Less than five percent of the claims cost more than $300, and only seven claims exceeded $1,000.[206]

The lowest costs were payments to the company; there were three of these.[207] The largest dollar amount that the company received on a claim was nearly $260, paid by a firm of some sort, Meisberger & Galbraith.[208] The records do not specify the reason for this payment nor indicate what business Meisberger & Galbraith conducted.[209] One guess would be that Meisberger & Galbraith were partners in a company that operated horse-drawn carts on the street, one of which damaged an Oakland Traction streetcar.[210]

One situation in which someone would end up paying Oakland Traction was when a losing litigant had to pay costs to the company.[211] For example,

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199. *Id.*

200. Damage Report of Apr. 1, 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).

201. *Id.*

202. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 107-08 (1970) (Ross found that claims agents in the late 1960s often used a formula of three times the medical bills to figure the amount they would pay on a claim. If such a formula had existed in the Oakland Traction claims department, then the factor by which medical bills were multiplied would be at most a fraction slightly above one).

203. Damage Report of Apr. 1, 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Net Cost of Damages Cases, April 1, 1903 to December 31, 1905 (Carton 14, Papers of Harmon Bell).

209. Damage Report of Apr. 1, 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).

210. *Id.*

211. Russell, *supra* note 3 at 214

Frank Brinse sought $10,000 for an injury in April 1907 at Twelfth and Broadway in downtown Oakland.[212] Brinse had boarded a streetcar, and as he rode standing on the car's running board—ordinary practice at the time—a passing streetcar brushed him from the running board.[213] He fell to the pavement, broke two ribs, sprained his ankle, dislocated his left arm, and was severely bruised.[214] Bell produced a witness during the trial who said Brinse was drunk when he boarded the car.[215] Even so, Brinse won the suit. However, the jury awarded him damages of only one dollar, and Judge Ellsworth ordered him to pay costs.[216] The total costs included jury fees of $156.55, reporter's fees of seventy dollars, and other incidental expenses of thirty dollars.[217] An Oakland Enquirer story reported sassily: "If you brought a damage suit for $10,000 damages against a railroad company and the jury awarded you only $1 and you were compelled to pay costs of suits totalling more than $250, plus an unknown amount for attorney's fees, wouldn't it jar you?"[218]

A third situation in which the claims department received payments was when Ferrin made a payment and then pursued someone to reimburse the company.[219] For example, when an employee caused damage, the company's officials sometimes demanded the employee compensate the company for payments made to the injured claimant.[220] On January 20, 1898, William Tillison was a motorman driving car number seven down Franklin Street in downtown Oakland.[221] Ferrin reported to Bell that Tillison was "going faster than the regular rate of speed, and ran into Miles Doody's wagon, breaking it to the extent of eight dollars. I settled the claim," Ferrin wrote, "and collected the same from Motorman Tillison."[222] Three months later, motorman C. Jenkins crashed a streetcar into Rowland Petty's cart and did five dollars' worth of damage.[223] Ferrin paid this amount to Petty and then collected it from the employee.[224]

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212. *Id.* (referencing *Brinse*, ACSC# 26609).
213. *Suit is Begun for $10,365 Damages*, OAKLAND TRIBUNE, Feb. 15, 1909, at 3.
214. *Id.*
215. *Asks $10,000; Gets $1*, S.F. EXAMINER, Feb. 26, 1909, at 1.
216. *Sues for $10,000 Damages; Gets $1*, OAKLAND TRIBUNE, Feb. 26, 1909, at 1; *Awards Nominal Damages*, S.F. CALL, Feb. 27, 1909.
217. *Id.*
218. *Sues For $10,000; Jury Awards $1; His Loss Is Over $249*, OAKLAND ENQUIRER, Feb. 27, 1909.
219. Ferrin, *supra* note 36 at 5.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. Ferrin, *supra* note 36 at 8.

At the other end of the scale, the largest payment that Oakland Traction made for a claim during these years was regarding Rosie James.[225] James was a young woman who received a skin graft following her injury and who successfully sued Oakland Traction for $15,000.[226] By the end of 1905, when Bell had her case rattling around in the state's appellate courts, the defense of the suit had cost the company $3,367.25.[227] James had not yet received a cent from the company and would not for almost another four years.[228] Mary Kennedy's case—which Bell twice won with a non-suit—cost the company $1,537.80 to defend.[229]

The Kennedy and James trials were the most expensive of the trials for which the claims department made payments during the years for which I found data.[230] A flying timber shattered employee James Fought's leg; defending against the lawsuit he filed cost the company $751.85.[231] This amount included some payments that the company made directly to Fought and the judgments and costs, but the total would have been a bit higher had some witnesses not given back their witness fees to the company.[232]

Apart from the Kennedy, James, and Fought trials, there is claims department information regarding only two other completed trials.[233] This lack of information is not surprising, given the small number of cases litigated. One case in which the plaintiff named Oakland Traction and another company as co-defendants cost the company $133.75 to defend.[234] Claude Assalena was a minor riding on Webster Street from Oakland into Alameda on March 23, 1904.[235] The streetcar collided with a wagon the Peoples Express Company owned, throwing young Claude from the streetcar to the ground.[236] He suffered a fractured skull, a severely lacerated right leg, and bruises.[237] In a suit filed at the beginning of May 1904, Assalena sought $20,000 in damages.[238] Bell won a non-suit for Oakland Traction a few days into the trial.[239] Assalena went on to win a judgment against Peoples Express Company for $10,000.[240] People Express kept the case alive on post-trial

225. Russell, *supra* note 3 at 183-87.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*; Ferrin, *supra* note 36.
230. Russell, *supra* note 3 at 183-87; Ferrin, *supra* note 36.
231. *Id.*
232. Russell, *supra* note 3 at 214 (referencing *Fought*, ACSC# 19027).
233. *Id.*
234. *Id.* (referencing *Assalena*, ACSC# 20832).
235. *Id.*
236. *Id.*
237. Russell, *supra* note 3 at 214 (referencing *Assalena*, ACSC# 20832).
238. *Id.*
239. *Id.*
240. *Id.*

motions, and two and one-half years after the jury delivered its verdict, Assalena settled for $3,000.[241]

A more complicated, fully litigated case that Bell lost cost Oakland Traction just over $800 to defend.[242] Charlotte Arthur sought $10,000 for injuries she suffered while alighting at 14th and Broadway in Downtown Oakland.[243] Mrs. Arthur alleged that she boarded the wrong car by mistake and that as she tried to get off, the car started with a jerk, throwing her to the ground, breaking her arm, nose, and, she alleged, causing internal injuries.[244] Bell and Ferrin spent a considerable effort investigating her case.[245] Bell played the gender card in his defense of Mrs. Arthur's suit, and he body-shamed the plaintiff. The trial record reflects Bell's introduction of evidence that Mrs. Arthur weighed more than 200 pounds.[246] They successfully requested that the judge order Arthur to allow two physicians to examine her.[247] They turned up a San Francisco hack driver, Edward Dolle, who testified that he had taken Mrs. Arthur back to her home on Post Street in San Francisco the night of the injury and that Mrs. Arthur had said to him: "[i]t is funny that a woman cannot go to Oakland and take a few drinks without falling off a car."[248]

Bell spent most of the trial arguing about Charlotte Arthur's marital status.[249] He attempted to non-suit her by showing that she was not properly divorced. If the plaintiff were still married to the man she claimed was her ex-husband, her failure to name him as a co-plaintiff would have been fatal to her suit.[250] Newspaper stories about the case emphasized the technical nature of Bell's defense.[251] The *Oakland Enquirer* ran a story with the headline, "TECHNICAL FIGHT MADE BY DEFENSE," and a deck (or sub-head) that read: "Traction Company Claims Woman Tried for Damages Under a False Name."[252] Arthur claimed to have secured a divorce from Peter Railton while she was in Blackburn, in England's Lancashire County.[253] Bell introduced telegrams from Railton, who said that he knew nothing of the

241. *Id.*
242. Russell, *supra* note 3 at 214.
243. *Id.* (referencing *Arthur*, ACSC# 21625).
244. *Id.*; *Woman Asks Big Damages for Injuries*, OAKLAND ENQUIRER, May 23, 1905, at 5.
245. Russell, *supra* note 3 at 214.
246. *Id.* (referencing *Arthur*, ACSC# 21625).
247. *Evidence of Doctors Vary*, OAKLAND HERALD, May 23, 1905, at 2.
248. *Thought Her Fall 'Funny'*, OAKLAND HERALD, May 31, 1905, at 1.
249. *Denies Divorce*, OAKLAND TRIBUNE, May 24, 1905, at 2.
250. *Id.*
251. *Id.*
252. *Technical Fight Made by Defense*, OAKLAND ENQUIRER, May 24, 1905, at 2; *English Divorce Laws Put in Evidence*, S.F. BULLETIN, May 29, 1905, folder "Newspaper Clippings" (Carton 9, Papers of Harmon Bell).
253. *Is This Woman Divorced?* OAKLAND HERALD, May 25, 1905, at 3; *Claim Made That Woman Was Never Divorced*, SAN FRANCISCO EXAMINER, May 30, 1905, at 8.

divorce, and he also produced an English barrister, A.W. Postlethwaite, as a witness.[254] Barrister Postlethwaite testified that there was not then nor had there ever been a court in Blackburn that could grant a divorce decree.[255] Bell failed in getting the judge to non-suit her,[256] and on June 1, 1905, the jury overcame cultural prejudices that they might have harbored against heavy, divorced women who drank and awarded her $3,000 plus costs.[257] Mrs. Arthur collected from Oakland Traction nearly four years later, in April 1909.[258] Defending the suit cost Oakland Traction $814.10.[259]

Putting a precise figure on the cost to Oakland Traction of defending against a fully tried personal injury suit is difficult.[260] Rosie James's lawsuit was the biggest that Bell handled, the largest he lost, and the costliest at just under $3,400.[261] Bell won both of Kennedy's suits at a total cost of around $1,500.[262] Although Arthur's suit costs more than $800, Fought's cost only around $100-200.[263] Getting to the non-suit in Assalena's case cost less than $140.[264]

Regarding other lawsuits during the period, no precise figures are available.[265] My general sense from reading the trial-court papers and newspaper stories about the trials is that Bell spent less effort defending most cases than he did with Arthur's case.[266] Fought's case was probably more typical, and I would assume that the average cost of defending a fully litigated suit was $200 to $400.[267]

Including Mary Kennedy and Rosie James's lawsuits, seven claims cost Oakland Traction more than $1,000.[268] There was also one claim that cost the company an even $1,000.[269] Apart from Kennedy and James's cases, the files contain information regarding the claimant's injuries for only two of the seven most expensive cases.[270] As one might imagine, these were serious

254. *Id.*
255. *To Contradict Woman*, OAKLAND TRIBUNE, May 29, 1905, at 3; *Says Decree Is Illegal*, OAKLAND ENQUIRER, May 19, 1905, at 2.
256. *Case Will Be Given To Jurymen*, OAKLAND ENQUIRER, Jun. 1, 1905, at 8; *Woman Scores a Victory*, OAKLAND TRIBUNE, Jun. 1, 1905, at 6.
257. *Must Pay Damages*, OAKLAND ENQUIRER, Jun. 2, 1905, at 8.
258. Russell, *supra* note 3 at 214 (referencing *Arthur*, ACSC# 21625).
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. Russell, *supra* note 3 at 214.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. Ferrin, *supra* note 36.
269. *Id.*
270. *Id.*

cases.[271] However, presuming an absolute correlation between the severity of a claimant's injury or Oakland Traction's negligence and the total cost to the company is a mistake.[272] Certainly, these factors were related: the more severe the plaintiff's injury and the better her case, the more money she probably could get in the claims department.[273] However, the averages included many cases of severe injury and seemingly acute negligence in which the company escaped paying very little.[274] Of course, the system's imperfections did not always favor Oakland Traction; there must have been claimants who got more than they deserved, and perhaps some among the few plaintiffs who beat Bell at trial were also undeserving.[275]

The $2,500 settlement that Oakland Traction made with Benjamin Fife was the largest amount the company paid to a claimant between 1902 and 1906. Fife was a 15-year-old boy who nearly died on June 1, 1903, when a streetcar ran him over on Bancroft Way in Berkeley.[276] A reporter for the *San Francisco Examiner* wrote that the streetcar's "wheels passed over the right leg just below the knee, mangled the left foot and lacerated the right hand and arm."[277] One newspaper story reported that Fife's mother "was sitting at the window when the car struck her son. . . . She heard the lad's screams[,]" the story noted, "and saw the car strike him and carry him down the avenue, mangling and crushing him as it went."[278] Her son had not heard the approaching streetcar because of the din created by the "compressed air house-cleaning engine" at work on the house across the street from his own.[279] The *Examiner* reporter noted it "would probably prove to be a fatal accident."[280] The *Oakland Herald* ran a story headlined "Young Fife Will Die," in which the reporter commented that "the doctors who have attended him declared that his spine is broken and he cannot live."[281] However, two days after the injury, young Fife's prognosis had improved, and his doctors reported "some hope of his recovery."[282] Fife did live, and thirteen months after his injury, without filing a suit, Fife's father released any claim he might have against Oakland Traction in exchange for $2,500. Fife's case cost the

271. *Id.*
272. *Id.*
273. Ferrin, *supra* note 36.
274. *Id.*
275. *Id.*
276. *Lad is Run Over by Electric Car*, S.F. EXAMINER, June 2, 1903, at 9.
277. *Id*.
278. *Will Not Lose His Legs*, OAKLAND HEROLD, June 3, 1903, at 5.
279. *Lad is Run Over by Electric Car*, *supra* note 276 at 9.
280. *Id.*
281. *Young Fife Will Die*, OAKLAND HEROLD, June 2, 1903, at 2. *See also But Little Hope*, OAKLAND ENQUIRER, June 2, 1903, at 8.
282. *Will Not Lose His Legs*, *supra* note 279.

company $2,551, with fifty dollars of that total being a medical payment that Oakland Traction made in connection with Fife's injury.[283]

The claims data include thirty-five deaths.[284] Twenty-five people died on Oakland Traction's tracks between 1902 and 1905, the years for which I have complete claims, injury, and litigation data. Costs associated with twenty-four of these fatalities appear in the claims department records. Of the remaining death claims in the Oakland records, one was an old claim from a death that occurred in 1896; the other ten were from 1906, a year for which I do not complete claims department data.

The average cost to Oakland Traction of each body on the tracks was $127.32, and the thirty-five deaths cost Oakland Traction a total of $ 5,920.55. The amount that Oakland Traction paid in these thirty-five deaths is just $900 greater than the $5,000 average amount *per death* that Posner derived from the appellate reports.[285] For twenty of the deaths, there was no record of a payment to anyone in the decedents' families. In these cases, the costs were mainly for expenses that the company paid to doctors, nurses, ambulance companies, pharmacies, and, of course, undertakers following unsuccessful attempts to save the injured persons' lives.[286] Deaths usually included a five-dollar charge paid to John Ferrin after he attended the coroner's inquest.[287] Whether the five dollars was for a transcript or whether Ferrin received a separate fee for attending is unclear. In all, fifty percent of the total that Oakland Traction paid out in connection with deaths went to the families of the decedents.[288] The remainder was the transaction costs of blood on the tracks.

For fifteen of the thirty-five deaths, the company settled with the decedent's family and obtained a release.[289] On average, the settling families received $151.73. Two claimants settled for $300, the highest amount the company paid to compromise a death claim.[290] The most expensive of the deaths was that of young Stella Oglio, an Italian girl who lost both legs and

283. *Lad is Run Over by Electric Car*, *supra* note 276 at 9.

284. Sources: Papers of Harmon Bell, Bancroft Library, University of California, Berkeley; Civil litigation case files, Superior Court, Alameda County, California; California Reports, 1902-1920 (appellate cases); 11 American Street Railway Investments 12 (1904); 12 American Street Railway Investments, at 12 (1905); 14 American Street Railway Investments, at 15 (1907).

285. Posner, *supra* note 19 at 79 (For 1905 cases, which numbered 60 in all, Posner reports an average damage amount in all death cases of $5,004, with an average in employee death cases (n=26) of $5,019).

286. *Lad is Run Over by Electric Car*, *supra* note 276 at 9.

287. *Id*.

288. *Id*.

289. *Id*.

290. *Id*.

died.[291] Her family received a $300 payment in exchange for releasing the company from liability.[292] Ferrin made this settlement with the Oglio family on Christmas Eve in 1905, a little more than fourteen months after her death.[293] The Oakland Traction claims department paid $554.75 because of Oglio's death.[294] Some portion of this amount seems to have been used to ship Stella's body back to Italy.

The average of about $150 each decedent's family received was fifty to seventy-five dollars more than the average funeral cost. B.C. Shusmi's undertaker charged seventy-four dollars to manage his corpse; the company paid another ten dollars in fees linked with the coroner's inquest for a total cost of eighty-four dollars associated with his death.[295] Some funerals were less expensive than Shusmi's. The cost of the funeral of one Mrs. Mayo, killed on the 4th of July 1904, was only $61.50.[296] The company paid for the funeral; another $150 in ambulance, hospital, and doctor's fees; and an additional fifteen dollars in miscellaneous expenses for a total of $226.50.[297] No one received compensation for Mrs. Mayo's death.[298]

Other deaths were less expensive. Fuji Tokuzo, a Japanese man on a bicycle, died on October 2, 1903. Tokuzo's death cost the company only the five-dollar inquest charge.[299] The claims records indicate the same cost for L. Tayreton, a young boy who died in a steam-roller mishap.[300] Similarly, the death of Hans Larsen, a drunk reported to have lain down on the tracks, cost the company five dollars.[301]

None of the thirty-five deaths yielded a lawsuit, but this does not mean that there were no wrongful death suits against Oakland Traction. Between 1898 and 1910, there were sixteen wrongful death suits against Oakland

291. Damage Report of December 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. DAMAGE REPORT OF OCTOBER 1904, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry" (Carton 14, Papers of Harmon Bell).

297. *Id*.

298. *Id*.

299. TOKUZU ACCIDENT REPORT FOR 1903, folder "Account Damage Payments" (Carton 14, Papers of Harmon Bell).

300. TAYRETON ACCIDENT REPORT FOR 1904, folder "Account Damage Payments" (Carton 14, Papers of Harmon Bell).

301. LARSEN ACCIDENT REPORT FOR 1903, folder "Account Damage Payments" (Carton 14, Papers of Harmon Bell).

Traction.[302] Only two of these wrongful death suits were tried.[303] The others were dismissed as, presumably, the parties settled, or they disappeared. Of the two wrongful death suits that were tried, both went to juries.[304] Bell won one[305] and lost one.[306] In the case he lost, he was able to settle with the decedent's family for an unknown amount rather than pay the $13,000 judgment that the jury initially awarded.[307]

Bell's success in defending against wrongful death suits fits the general pattern in Alameda County between 1901 and 1910. During these years, there were fifty-two wrongful death lawsuits, including those against Oakland Traction.[308] Only seven of these cases went to trial;[309] a little more than half dropped away with some suggestion of settlement, and the others disappeared. Of the seven wrongful death cases that were tried, defendants

302. *Johnson*, ACSC# 25747; *Hansen*, ACSC# 25858; *Karecski*, ACSC# 26022; *Young*, ACSC# 26542; *Johnson*, ACSC# 26586; *Gard*, ACSC# 27777; *Conlon*, ACSC# 28032; *Profumo*, ACSC# 28480; *Davis*, ACSC# 28965; *Taylor*, ACSC# 29660; *Calley*, ACSC# 29935; *Keys*, ACSC# 30097; *Merrill*, ACSC# 30641; *Purdy*, ACSC# 32232; *Brasher*, ACSC# 32380; *Waters*, ACSC# 33730.

303. *Davis*, ACSC# 28965; *Purdy*, ACSC# 32232.

304. *Id.*

305. *Purdy*, ACSC# 32232.

306. *Davis*, ACSC# 28965.

307. *Id.*

308. Hughes v. Southern Pacific Co., ACSC# 18090 (June, 17, 1901); Schmidt v. Southern Pacific Co., ACSC# 18163 (July 16, 1901); Schraut v. Southern Pacific Co., ACSC# 19875 (Apr. 24, 1903); Ambrose v. Pacific Coast Co., ACSC# 20296, (Oct. 17, 1903); Beaufils v. Southern Pacific Co., ACSC# 20471, (Dec. 2, 1903); Crosby v. Scott, ACSC# 20701, (Feb. 24, 1904); Thorn v. Anspacher Bros., ACSC# 21072, (Jul. 6, 1904); Soracco v. S.F. Construction Co., ACSC# 21127, (Aug. 1, 1904); Sessions v. Southern Pacific Co., (Sep. 29, 1904); Horton v. Sunset Telephone & Telegraph Co., ACSC# 21293, (Oct. 1, 1904); Anderson v. E. J. Dodge Co, ACSC# 22085, (Jul. 15, 1905); McFarland v. Southern Pacific Co., ACSC# 22451, (Nov. 8, 1905); Fieldhouse v. Southern Pacific Co., ACSC# 25243, (May 22, 1907); *Johnson*, ACSC# 25747,; *Hansen*, ACSC# 25858; Murray v. Cotton Et Al.., ACSC# 25926, (Sep. 14, 1907); Rathlie v. SF., O & SJ. Ry., ACSC# 25934, (Sep. 16, 1907); *Karecski*, ACSC# 26022; Gallagher v. MacCauky Foundry Co., ACSC# 26023, (Sep. 27, 1907); Cook v. Walker, ACSC# 26027, (Sep. 28, 1907); Van Gelder v. SF., O. & SJ Ry., ACSC# 26161, (Oct. 15, 1907); Cunningham v. SF., *O. & SJ Ry*., ACSC# 26188, (Oct. 18, 1907); *Young*, ACSC# 26542; Vierra v. CA Cotton Mills Co., ACSC# 26556, (Jan. 3, 1908); *Johnson*, ACSC# 26586; *Murray v. Adams*, ACSC# 27646, (June 18, 1908); *Gard*, ACSC# 27777, *supra*); *Gorzelanczyk v. Southern Pacific Co*., ACSC# 28024, (Aug. 28, 1908); *Conlon*, ACSC# 28032; *Profumo*, ACSC# 28480; Marcoux v. Southern Pacific, ACSC# 28752, (Dec. 21, 1908); *Davis*, ACSC# 28965; Marcoux v. Southern Pacific, ACSC# 29553, (May 3, 1909); Dutton v. Southern Pacific, ACSC # 29654, (May 18, 1909); *Taylor*, ACSC# 29660; *Calley*, ACSC# 29935; *Keys*, ACSC# 30097; *Tanguy* v *Johnson*, ACSC# 30146, (Aug. 6, 1909); *Gould v. Southern Pacific*, ACSC# 30355, (Sep. 10, 1909); *Merrill*, ACSC# 30641; Miller v. Bronson, ACSC# 30805, (Nov. 18, 1909); Stephens v. Maxwell, ACSC# 30844, (Nov. 14, 1909); Perez v. Southern Pacific Co., ACSC# 31070, (Dec. 29, 1909); Sarres v. Southern Pacific Co, ACSC# 31176, (Jan. 17, 1909); Raible v. Oakland Brewing & Malting, ACSC# 32005, (Mar. 29, 1910); *Purdy*, ACSC# 32232; *Brasher*, ACSC# 32380; *Waters*, ACSC# 33730; Loveland v. Model Creamery Co., ACSC# 33811, (Oct. 3, 1910); Wallis v. Southern Pacific Co., ACSC# 33895, (Oct. 15, 1910); Greeley v. Southern Pacific Co., ACSC# 33897, (Nov. 17, 1910); Fry v. Ohe, ACSC# 34225, (Dec. 7, 1910).

309. *Hughes*, ACSC# 18090; *Sessions*, ACSC# 21283; *Horton*, ACSC# 21293; *Davis*, ACSC# 28965; *Tanguy*, ACSC# 30146; *Purdy*, ACSC# 32232; *Wallis*, ACSC# 33895.

initially won four.[310] Of the three plaintiffs who initially won,[311] one was the plaintiff in the wrongful death suit that Bell lost.[312] As noted, Bell settled that case. In one of the other cases that the plaintiff initially won, the losing defendant, The Southern Pacific Company, succeeded in getting a reversal and eventually taxed the plaintiffs with costs.[313] In the third case, the defendants eventually settled for a significant amount of $10,000.[314] Thus, between 1901 and 1910, no plaintiff in a fully tried wrongful death suit retained a judgment in the final tally.

There was, however, one plaintiff's judgment that did remain final.[315] In that case, the parties agreed to a plaintiff's verdict by stipulation without trying the case.[316] As a condition of settlement, the plaintiff insisted on the entry of a judgment against the defendant as a symbolic marker of the wrong done.[317] The plaintiffs in that case walked away with the judgment and $100.[318] Of all the wrongful death suits filed in Alameda County between 1901 and 1910, only this stipulated plaintiff's verdict remained intact.

Because only one plaintiff's judgment in a 1901-1910 Alameda County wrongful death case remained intact through post-trial motions and appeals, determining the average amount ($100) that plaintiffs actually won in wrongful death cases is easy but not especially compelling. The three other wrongful death cases in which plaintiffs won initial verdicts show what the jurors felt was an appropriate amount for compensation: $3,500,[319] $12,500,[320] and $13,000.[321] These three initial judgments totaled $29,000, for an average of $9,666 or $7,252.50 including the $100 judgment. But, of course, these are not the amounts the plaintiffs received in these cases. Apart from the $100 plaintiff, the $12,500 judgment ultimately yielded a huge settlement of $10,000,[322] and the winners of the $13,000 judgment lost on appeal, as did the plaintiffs with the $3,500 judgment. The latter plaintiffs ended up paying $251.80 in court costs.[323]

310. *Hughes*, ACSC# 18090; *Sessions*, ACSC# 21283; *Tanguy*, ACSC# 30146; *Purdy*, ACSC# 32232.
311. *Horton*, ACSC# 21293; *Davis*, ACSC# 28965; *Purdy*, ACSC# 32232.
312. *Davis*, ACSC# 28965.
313. *Wallis*, ACSC# 33895.
314. *Horton*, ACSC# 21293. For more on *Horton*, *see* Friedman & Russell, *supra* note 3 at 305.
315. *Loveland*, ACSC# 33811.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Wallis*, ACSC# 33895.
320. *Horton*, ACSC# 21293.
321. *Davis*, ACSC# 28965.
322. Friedman & Russell, *supra* note 3 at 305.
323. *Wallis*, ACSC# 33895, *supra* note 313.

I believe that if there were an adequate number of plaintiffs' wins in wrongful death cases to determine a meaningful judgment amount, this figure would lie somewhere between Posner's figure of about $5,000 for the wrongful death suits that defendant took to appellate courts and the average of just over $150 for which decedents' families compromised their claims with Oakland Traction. Posner determines that the average compensation figure about equaled the dollar value of what remained in a worker's life. Posner's figure comports with tort doctrine and his ideas regarding economic efficiency. However, in the claims department, the more relevant measure seems to have been the cost of burial. The usual measure of damages was the cost of simple repair. With death, repair was impossible, so the claims agents instead awarded the cost of burial plus a few dollars more. The disparity between these appellate and claims-department figures for death cases suggests that to understand the regulatory impact of tort law, the important figures become the relatively low payouts of the claims department rather than the exceptional cases contained in appellate reports. More accurately, the best figures would be the average costs of the amounts paid out on all deaths, using claims department and trial-court data. However, the relative infrequency of trial-court awards in wrongful death cases means that the average figure would not rise substantially above the claims average.

The litigation behavior of the families of decedents in wrongful death cases involving Oakland Traction provides further evidence of the importance of the average claims department payment as a measure of the cost to the company of fatalities. For the thirty-five deaths in the claims data, not one of the decedents' families filed suits against the company to bolster their bargaining position with John Ferrin and Harmon Bell. That none of these deaths yielded a wrongful death lawsuit is remarkable, especially during the years from 1902 through 1905. As I noted, the company reported twenty-five deaths in its streetcar operations for these years, and the claims department data included payments connected with twenty-four of these deaths.[324] For none of those twenty-four deaths—one short of the total number for those years—did anyone file a wrongful death action against the company[325]. In fifteen cases, as discussed, the decedent's families settled with the company. These are the cases in which one would most expect that one of these families might have filed a claim as well, but none did. No doubt some of the decedents were simply so negligent that their contribution to their deaths would have made it impossible for their families to win a lawsuit against the company. For example, if he truly did lie down on the tracks

324. *Id*.
325. *Id*.

while drunk, Hans Larsen reduced the chances that his heirs might successfully pursue a suit against the street railway company.[326]

The absence of lawsuits among the death cases that the claims department settled shows that claimants did not readily transform themselves into litigants. Movement from one level of compensation to another was difficult, not costless and easy, as Posner, for example, presumes. By not becoming litigants, the claimants who settled with Oakland Traction demonstrated the existence of barriers to filing litigation. One of those barriers, of course, might have been the near-certain knowledge that, as plaintiffs, they would not win their suits. Even so, those who have lost their loved ones have powerful emotional incentives to seek compensation. At the same time, they also have powerful incentives to avoid engaging in litigation that would stir up memories of their loss. In the early part of the twentieth century, those who lost their loved ones in Alameda County streetcar deaths accepted small sums as compensation for immediate expenses associated with their deaths, and they appear, for the most part, to have searched for explanation and recompense outside the legal system.

Despite the odds, it is hard not to wonder whether the heirs of some decedents might have successfully sued Oakland Traction. The best example is Mr. Paulson, who died in the early evening of December 8, 1904, on Grove Street, near Berkeley's old City Hall.[327] Paulson died a startling death that one suspects a transit company today would be willing to settle in a hurry. Mr. Ebelin was the motorman—that is, the driver—of car #204; he left 7th and Broadway in downtown Oakland at 5:52 p.m.[328] Ebelin proceeded north into Berkeley and arrived at Grove and Allston Streets thirty minutes later, by which time it would have been already dark. In a statement to J.P. Potter, Oakland Traction's Secretary, Ebelin explained, "[o]n account of it being a very dark place and headlights poor I shut off [the] current letting my car coast along at about eight miles an hour."[329] As his many-ton electric streetcar coasted along with its lights off, Ebelin told Potter, "I stood very close to the window and my face close to the glass so as to enable me to see as far as possible."[330] He claimed that he rang his gong. Clang! Clang! Clang! went the trolley. Ten to fifteen feet in front of the car, Ebelin said he saw a man walking with his back to the unlit car.[331] The motorman noted that

326. ACCIDENT REPORT FOR 1903, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.

327. Letter from J.P. Potter to Harmon Bell (Dec. 14, 1904), folder "Account Damage Payments," Carton 14, Papers of Harmon Bell.

328. *Id.*

329. *Id.*

330. *Id.*

331. Bailey v. Market St. Cable Railway Co., 42 P. 914, 915 (1895) (doctrinally, the man walking on the tracks was *not* a trespasser simply because he was walking on the tracks, although he would have

the pedestrian seemed "unconcerned." Ebelin shouted and pulled the brake, and, he remembered, the "[c]ar struck him in the back, right at the headlight, and his head seemed to throw back towards the car falling to the ground."[332] The darkened streetcar killed the man.[333] A coroner's jury investigated on December 10, 1904, less than 48 hours after Paulson's death, and "exonerated" Oakland Traction, according to the notation made in the company's accident report for 1904.[334] That year, coroner's juries "exonerated" Oakland Traction in each of the ten deaths in which the company was involved.[335]

The release of liability that Annie Paulson signed five months later in exchange for $300 indicated that Mr. Paulson was "an old man [who] attempted to cross track in front of an approaching car and was struck and knocked down."[336] There is no hint that she ever learned that Ebelin had been coasting a darkened streetcar through downtown Berkeley. Secretary Potter reported this information to Bell in a letter on which he had written: "Kindly treat as confidential."[337]

In late January of 1905—the month after Paulson's death—Potter again wrote to Bell.[338] Bell had apparently requested an explanation as to why the number of accidents had grown by more than twenty-five percent in a year, from 1,321 accidents in 1903 to 1,666 in 1904, the year of Paulson's death. Potter felt that there were reasonable explanations. One was the increase of more than three million passengers from the 23.3 million who paid fares in 1903.[339] Another reason for the rise in accidents was the skill level of the men newly hired to operate cars. Potter explained, "On account of the labor troubles for the past year, it has not been considered advisable to employ experienced men who have had trouble elsewhere, causing us to employ a

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been had he been walking on the tracks of a steam railroad. As Justice Searls put it: "In the case of ordinary steam railroads the companies are usually the exclusive owners of their rights of way, and have, except at their crossings, the exclusive right to the use of their tracks at all times and all places. He who without permission, express or implied, intrudes thereon is a trespasser, to whom they owe no duty beyond refraining from doing him a willful injury. Not so with the citizen who enters upon the track of a street railway. These last are used in common by their cars and the traveling public").

332. Letter from J. P. Potter to Harmon Bell (Dec. 14, 1904), folder "Account Damage Payments," Carton 14, Papers of Harmon Bell.

333. *Id*.

334. ACCIDENT REPORT FOR 1904, folder "Account Damage Payments," Carton 14, Papers of Harmon Bell.

335. *Id.*

336. DAMAGE REPORT FOR APRIL 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.

337. Letter from J. P. Potter to Harmon Bell (Jan. 23, 1905), folder "Account Damage Payments," Carton 14, Papers of Harmon Bell.

338. *Id.*

339. *Id.*

large number of men who have never had any experience at street railroading."[340]

The headlights on the streetcars also contributed to the increase in accidents. Potter explained that the lights were "not sufficiently strong to enable motormen to see objects in time to avoid accidents. . . ."[341] Today, the answer to this difficulty would be for the streetcars to move more slowly so that they could stop within the distance illuminated by their headlights. The California Supreme Court had recognized the same principle as early as 1895, when Justice Temple wrote, concerning streetcars, that "if an obstruction cannot be seen by its light in time to stop the car, it should move at less velocity."[342] Within Posner's scheme, Oakland Traction had an incentive to move at a slower speed because moving more quickly would result in injuries and deaths for which they would have to pay out substantial sums of money. Oakland Traction was the least-cost avoider. Again, the company's handling of Paulson's death underscores the flaws in Posner's sanguine theory about torts as a regulatory system. Absent a sufficiently large cash incentive in the form of damages that the company would pay in claims to persons injured by darkened or speeding streetcars, Posner's regulatory theory breaks down.

The regulatory incentives of Posner's scheme did not occur to Potter, the superintendent, as he announced, in the paragraph following his discussion of how the streetcars could not stop within the distance illuminated by the weak headlights, that the running times for the streetcars on Telegraph Avenue and on Grove Street—the street where Paulson died—had been shortened. Potter sped up the cars despite their weak headlights. He remarked that he did "not consider the time too fast for safety."[343] Bell, too, appears not to have suggested that streetcars slow down, although a letter from Potter to Bell less than three weeks after Potter's January letter suggests that Bell had suggested the replacement of the weaker incandescent headlights with stronger carbon arc lamps.[344] Potter assured Bell that the new lights would "make a marked change in the number of accidents at night."[345]

IV. CATEGORIES OF INJURIES

The street scene in 1905 was chaotic and frenetic. A great variety of vehicles operated together. There were streetcars, horses, horse-drawn carts and wagons, automobiles—both steam and internal combustion—bicycles,

340. *Id.*
341. *Id*.
342. Mahoney v. San Francisco Ry. Co., 110 Cal. 471, 475 (1895).
343. Letter from J. P. Potter to Harmon Bell (Feb. 9, 1905), folder "Damage Accounts," Carton 14, Bell Papers.
344. *Id.*
345. *Id.*

and pedestrians. The vehicles, persons, and animals combined in varying patterns of events that led to injuries.

If I started with appellate reports of street railway tort suits and worked backward to generalize about the frequency of different events that led to injuries, I would end up with an entirely distorted view of street railway operations. This distorted view would reverse the ratio of the two most important events leading to injuries. In *A Theory of Negligence*, Posner divides the appellate cases into "Collisions with vehicle or pedestrian" and "Passenger injured boarding or alighting."[346] For all the appellate cases that Posner read, the ratio of collisions to boarding/alighting was two to one. Table 3 displays Posner's figures for boarding/alighting and collision cases and the residual category of "other" cases. Posner found forty-five boarding/alighting cases, which comprised 22.6% of all the appellate opinions. There were twice as many collision cases, ninety in all, which amounted to 45.2% of all the cases. Other cases amounted to about one-third of the appellate total (32.2%).[347]

TABLE 3[348]
DIFFERING PROPORTIONS OF CATEGORIES OF INJURIES:
APPELLATE, TRIAL-COURT, CLAIMS, AND OPERATIONS

	Boarding/Alighting	**Collisions**	**Other**
Posner: Appellate	22.6 %	45.2 %	32.2 %
OTC Suits Filed	36.7 %	54.0 %	9.4 %
OTC Claims Paid	27.2 %	51.6 %	21.1 %
OTC Operations	59.5 %	27.8 %	12.7 %

Regarding the appellate cases as representative of the pre-litigation world below should seem silly. However, Posner explicitly regards the appellate cases as representative in this way. He writes, "[a] sample limited to appellate cases turns out to be more varied and apparently representative than one might have expected."[349] Posner also supplies an example of the representativeness of appellate reports in describing the universe of injuries that preceded the filing of litigation. Concerning suits against railroads by injured non-employees, Posner notes that "[t]he ratio of railroad nonemployee death cases to all railroad nonemployee bodily-injury cases in the [appellate] sample (26 percent) is roughly the same as the ratio of

346. Posner, *supra* note 19 at 54, tbl.3.
347. *Id.*
348. *Id.* at 42.
349. *Id. at* 36.

nonemployee deaths to total nonemployee bodily injuries in railroad accidents of the period."[350] Posner uses this correspondence to bolster his claim that his appellate sample represents the world outside the appeals tribunal.

Schwartz, too, used his appellate data to represent the world of trial-court litigation and claims, although he hedged more than Posner. Schwartz notes that "[i]t can be argued that common-law rulings, in comparison to legislative enactments administrative promulgations, have no more than a minor impact on the allocation of resources and the distribution of society's wealth."[351] He also commented that "[f]rom another perspective, it can be argued that appellate rulings can, for various reasons, create misleading impressions as to how the legal system actually responds to large numbers of accidents and claims."[352] Schwartz stated that he "wish[ed] to remain agnostic about most arguments of this sort."[353] In a footnote, Schwartz responded to some of Friedman's earlier work on the history of torts in Alameda County.[354] Schwartz noted that "[i]n his . . . study of trial data in one California county between 1880 and 1900, Professor Friedman attempts to reach conclusions about the performance of the entire legal system."[355] Schwartz commented, "[i]n fact, what his study unwittingly reveals is the extreme difficulty of such a research project."[356] Schwartz accurately reported that Friedman based the 1880-1900 study on 340 personal injury cases filed in Alameda County and the results of those cases. Schwartz complained that "Friedman has no data on the number of railroad (or other) accidents in the County during this period; nor does he have any information on the number of potential claims that may have led to settlements before the filing of suit."[357] Schwartz then continued to describe other elements of what he termed "the inadequacy of Friedman's evidence."[358] This Article supplies the systematic data that Schwartz complained was missing from Friedman's earlier study and confirms Friedman's characterization of the court system as a system of non-compensation.[359]

Schwartz professed agnosticism but wrote as a true believer in the virtues of his appellate history. He emphasized that "[o]ne important advantage of

350. *Id.* at 84-85 (Posner does not report the figure for the fraction of nonemployee railroad death and injury that were death cases. Between 1891 and 1905, this fraction for railroads is 31%).

351. Schwartz, *supra* note 98 at 645 (citations omitted).

352. *Id.*

353. *Id.*

354. Posner, *supra* note 19 at 54, tbl.3.

355. *Id.* at 645-46 n.14.

356. *Id.*

357. Schwartz, *supra* note 98 at 646 n.14.

358. *Id.*

359. Friedman & Russell, *supra* note 3 at 310 (I joined with Friedman in this characterization of the legal system in our co-authored work).

the study of doctrine is its feasibility."[360] He also defended his choice of materials by noting that "[i]t seems sufficient to say, first, that nineteenth-century appellate judges were persons who exercised important powers of government, both in deciding individual cases and in laying down rules that at least had a considerable bearing on how subsequent disputes were resolved."[361] Finally, he argued that "[c]ommon law history thus provides a fascinating combination of political history and intellectual history; it hence is well worth pursuing, even if in doing so certain questions remain unsettled."[362] More so than Posner, Schwartz cautioned regarding the representative character of his appellate source materials.

Returning to Table 3, which shows the relationship of appellate materials to other levels in the system of street railway operation, injury, claims, and litigation, and looking to the bottom line of the chart, labeled "OTC operations," according to Oakland Traction Company's records, boarding/alighting injuries comprised 59.5% of all injuries, with collisions accounting for just under one-half that fraction, 27.8%. The category of "other" cases comprised just 12.7% of all the cases, a substantially smaller fraction than in Posner's appellate sample, where "other" cases amounted to nearly one-third of the total. More important, though, is that Oakland Traction's tally reflects a ratio slightly greater than two to one in favor of boarding/alighting injuries. Posner's appellate reports reflected precisely the opposite, a two-to-one ratio in favor of collisions.[363] Concerning the categories of activity that led to injury: collisions versus boarding/alighting, Posner's appellate world is an inversion of the empirical world.

Schwartz identified data missing from Friedman's study of Alameda County tort litigation between 1880 and 1900. The missing data that justified Schwartz's agnosticism are no longer absent because I am supplying the unresearched data for the numbers of injury incidents and potential claims. As with Posner, the data for streetcar operations, injuries, claims, and trial-court litigation demonstrated that Schwartz's appellate data do not accurately represent the injuries that preceded claims and litigation.

There are substantial differences between Posner's appellate data and the distribution of the types of suits filed against Oakland Traction. More than ninety percent of the suits against Oakland Traction fall into the boarding/alighting or collisions categories. That proportion is much smaller in the appellate sample, where only 67.8% of the suits fit into those two categories. For the appellate cases, nearly one-third fit into the "other"

360. Schwartz, *supra* note 98 at 645 n.14.

361. *Id.* at 646.

362. *Id.*

363. Posner, *supra* note 19 at 54 (looking just at the thirty-nine western appellate cases that Posner considered, then the ratio of boarding/alighting to collision cases is one to one).

category; for the trial-court suits against Oakland Traction, fewer than ten percent fit into this category. Among the lawsuits against Oakland Traction, the collision to boarding/alighting cases ratio is about 1.5 to 1, less than the 2 to 1 proportion of the appellate cases. The appellate cases correspond with the trial-court suits in that each group skews in favor of the collision cases, but both groups misrepresent the actual operations data.

As to whether Posner's appellate cases might be taken as representative of the trial court cases, I must remain agnostic, to use Schwartz's word. I doubt that whatever correspondence there appears to be is anything other than chance. Before becoming appellate opinions, the trial court suits must first pass through a filter of adjudication that eliminates about eighty percent of the cases, yielding adjudicated cases split roughly evenly between plaintiffs and defendants. These cases then go through another filter to become appellate opinions, as defendants appeal nine or ten times more often than plaintiffs. If, as a general matter across different types of litigation, appellate opinions that resulted from this filtering process were representative, in meaningful ways, of the kinds of events that led to the originally filed trial-court opinions, then this would strike me as something close to miraculous.

Table 3 shows that the fraction of collisions and boarding/alighting claims paid did not reflect the proportions of injuries at the operations level. First, at the level of railway operations, 87.3% of the injuries fell into either the boarding/alighting or collisions categories. Among claims paid, a somewhat smaller fraction, 78.8%, were of these two types. More important, though, is that as with the appellate cases and trial-court filings, collisions were preponderant over boarding/alighting claims in almost a two-to-one ratio. This suggests that those with claims that stemmed from collisions were more likely to come into the claims department seeking compensation, although it remains possible that they simply had greater success with their claims than those who claimed injury while getting on or off the streetcar.

As noted, the claims paid overrepresented collisions between streetcars and vehicles or people compared with their relative rate of occurrence on the streets. The company's annual reports of accidents indicated that vehicle collisions amounted to 27.8% of all incidents. However, for the 213 claims for which I can identify the type of incident that led to the injury, 51.6% involved collisions of streetcars with another vehicle, usually a horse-drawn wagon.

There are good reasons that collision cases would be overrepresented. First, though, there was also a good reason that such cases would be underrepresented, namely the difficulty of assessing liability after collisions occurred on crowded streets. However, counterbalancing this difficulty of proof was the relative ease of determining the exact amount of damage when the injury was merely to a vehicle such as a horse-drawn cart. Repair costs

did not include increments of emotional damage to the vehicles in question. As repair costs were easily determined and agreed upon, collision cases involving vehicles were easy to compromise.

Another reason for the relative overrepresentation of vehicle collision cases was that the circumstance that led to the most significant number of injuries—boarding or alighting—was underrepresented in the claims paid. Thus, while boarding/alighting injuries constituted just under sixty percent of all injuries, they were just 27.2% of all claims paid. Of course, the inversion of the ratio of claims to injuries among claims paid compared to the number of actual injuries also suggests that among those injured boarding or alighting, a higher fraction may have been either negligent themselves or contributorily negligent when compared with those injured during collisions. Those who claimed boarding/alighting injuries were, I can assume, one or more of the following: negligent themselves, less likely to come forward and make a claim than others who were injured, or less successful when they did go in and ask Mr. Ferrin for compensation.

Boarding/alighting injuries are an excellent category of cases to investigate the participation of street railway companies in the construction of norms of negligence—a constitutive approach. As the largest category of streetcar injuries, boarding/alighting cases were of particular concern to street railway companies. Barbara Welke, a historian at the University of Minnesota, examined boarding/alighting injuries as she worked on gender-related doctrinal issues. In her splendid Law & Social Inquiry piece titled *Unreasonable Woman: Gender and the Law of Accidental Injury, 1870-1920*, Professor Welke shows the gendered character of negligence doctrine around the turn of the century.[364] Welke criticizes those who have been too single-minded in analyzing tort law as a matter of economic subsidy. Where disputes about the character of the history of torts have centered on whether solicitude, efficiency, or subsidy characterized tort law, Welke has her own single word with which she characterizes tort history: gender.[365] Welke tries to displace the economic emphasis of Posner, Schwartz, and Friedman with her concern for gender. She believes judges and justices instantiated gender norms in private law through gendered doctrines. Welke ends up with what one might call a gender subsidy thesis, although she might disagree with that characterization. Her argument is compelling but subject to the same criticism she leveled against those interested in economy, namely that her interest is too single-minded.

364. Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 L. & SOC. INQUIRY 369 (1994).

365. *Id.* at 371 ("Gender suffused the air, filled the senses").

My analysis of the relationship between gender, negligence, and streetcars carries a different emphasis than Welke's. Although Welke never says so explicitly, her work suggests more generative importance to legal doctrine than is warranted. Like her fellow constitutive theorist Christopher Tomlins, Welke regards legal doctrine as having a significant formative influence on how Americans view the world. Tomlins, for example, writes that "[b]etween the Revolution and the beginning of the nineteenth century, law became *the* paradigmatic discourse explaining life in America, the principal source of life's 'facts.'"[366] While I agree with Welke and Tomlins that doctrine can shape ideology, I believe that they overstate the role of the courts regarding ideology. Tomlins takes the extreme position that law was the master narrative in the nineteenth century.[367]

Given that I have characterized the trial courts as fleas in relation to the flesh of corporate net revenues, I also believe that the impact upon ideology of the doctrinal pronouncements of appellate justices in their opinions was also relatively slight.[368] At the same time, I acknowledge that there was at least some recursive relationship between law and ideology; however, I will leave the theorists the job of analyzing the ideological impact of appellate doctrine. I will narrow my focus to how legal ideas reflected social practice.

Concerning boarding/alighting, the gendered social practice was simple: streetcars and cable cars stopped for women getting on or off; for men, the cars did not stop because men were supposed to be mobile and manly enough to get off while in motion.[369] To be sure, courts' pronouncements reinforced this gendered social practice in a mutually constitutive fashion, as Welke argues, but frankly, I find more power to construct social norms in the daily stops and starts of streetcars than in judicial language.[370]

The Oakland Traction claims department materials offer a perfect example of gendered social practice. On June 9, 1904, G.T. Forsyth and his wife rode the streetcar together in downtown Oakland.[371] Although they were exiting the car at the same stop, the spouses used separate doors, perhaps because they could not find seats together.[372] The motorman slowed the car

366. CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 21 (1993).

367. *Id.* at 21.

368. Russell, *supra* note 3 at 198.

369. Welke, *supra* note 364 at 393-94; BARBARA Y. WELKE, GENDERED JOURNEYS: A HISTORY OF INJURY, PUBLIC TRANSPORT, AND AMERICAN LAW, 1865-1920 88-101 (1995) (Ph.D. dissertation, University of Chicago).

370. Russell, *supra* note 3 at 183-92 (I also believe that the frank gender bias of attorneys in trials of tort suits was more influential than appellate opinions in shaping gender norms, the conduct of the trials involving Rosie James, Mary Kennedy, and Charlotte Arthur are but a few of the possible examples).

371. Ferrin, *supra* note 36.

372. *Id.*

but did not stop.[373] Though he saw Mr. Forsyth preparing to alight, the motorman slowed rather than stopped because Mr. Forsyth was a man.[374] The motorman did not see Mrs. Forsyth preparing to alight, and she did not ask him to stop, so he slowed in preparation for a masculine alighting rather than stopping for a feminine one.[375] Mr. Forsyth stepped off while the car was in motion without incident, and Mrs. Forsyth attempted to do so as well, but she fell, and her injuries required medical treatment.[376] At the request of Harmon Bell, the claims agent paid Mr. Forsyth for his wife's injuries.[377]

Boarding and alighting were gendered social practices, and there were also right and wrong ways to get on and off streetcars.[378] In 1892, Scientific American reprinted a New York Sun story that described how to get on and off a horse-drawn trolley.[379] The article started by declaring that

> [t]housands of women ride in horse cars in New York every day, of whom ninety-nine hundredths, or nine hundred and ninety-nine in a thousand, are in a state of next to complete ignorance of the scientific laws which dictate the methods of mounting and descending in safety, and threaten disaster upon those who violate them.[380]

The author indicated that when the cars stopped and started properly, "a woman can step on or off as though she were on her own staircase."[381] Occasionally, though, "the horses will start a moment too soon or the impatient female will attempt to step into the street while the car is still moving. . . ."[382] By following the author's suggestions—which came with seven helpful illustrations—the author promised that "there will be an end to a certain class of accidents to life and limb which has accompanied the use of street cars from the beginning."[383] Also, the author noted regarding alighting women, "skirts that would otherwise be soiled or torn will live to die of old age, and bundles that would have been scattered over the streets by the overthrow of their fair bearers will reach home intact and clean."[384]

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373. *Id.*
374. *Id.*
375. *Id.*
376. Ferrin, *supra* note 36.
377. DAMAGE REPORT OF OCTOBER 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.
378. *See* WELKE, *supra* note 369.
379. *See* generally N.Y. Sun, *How to Get On and Off a Car*, 33 SCIENTIFIC AMERICAN SUPPLEMENT 1892, at 13556.
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. Sun, *supra* note 379 at 13556.

The drawings showed a handle on both sides of the stairway leading into the trolley car. The author instructed that the key to getting on safely was for the boarding passenger to grasp the handle closest to the front of the car while facing slightly toward the front.[385] With a hand on the front handle, the boarding passenger was "like a ship with an anchor to windward.[386] Even if the car starts suddenly out of time," the writer predicted, "your hold, being in the proper place, will sustain you in making a quick step forward, and so enable you to board safely and easily and laugh at the fault of the conductor."[387] The author illustrated the wrong way to get on with a drawing of a smartly dressed woman getting onto the rear platform of a car, holding the skirt of her dress with her left hand as she steps up while holding onto the *rear* handle with her right hand.[388] Another drawing illustrated that a quick trolley start would drag the rear-handle-grabbing woman along the tracks. Some few passengers might get away with taking "such liberties with horse cars," the author noted, "but they are citizens with whom the art of catching on is a necessary part of their profession."[389] "As a rule, they are of the male sex and under fifteen years of age," the author noted.[390] The accompanying drawing shows a newspaper carrier hopping onto the back of a horse car to make a sale.[391]

Getting off a car was nearly the reverse process. The author recommended grasping the forward handle while facing toward the front.[392] In this way, "even if the car starts," the author advised, "a quick step or two can easily be taken with it, and when once having gotten your footing on the ground you can let go of the handle and walk away."[393] The Sun article concluded by advising the reader: "Don't forget any of these maxims. Observe them always, and one danger incident to civilization will be removed."[394]

Street railway companies across the county organized campaigns to teach riders how to board and alight from streetcars.[395] The New York Sun material that Scientific American reprinted was an early example of such safety campaigns, dealing as it did with boarding and alighting from horse cars. As horse cars gave way to electric cars, and the number of passengers and the

385. *Id.*
386. *Id.*
387. *Id.*
388. Sun, *supra* note 379 at 13556.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
393. Sun, *supra* note 379 at 13556.
394. *Id.*
395. WELKE, *supra* note 369.

speed of streetcars increased, the problem of boarding/alighting injuries became more acute. Welke examines the "Safety First" campaigns as examples of what she terms "corporate Progressivism."[396] Like Crystal Eastman studying and trying to prevent industrial injuries, corporate tortfeasors sought to educate their riders. Welke describes a campaign by the Chicago Surface Lines in which the company distributed 10,000 copies of a "Safety First" pamphlet to Chicago schoolchildren.[397] Like public lectures the company claimed drew as many as 20,000 listeners, the pamphlet offered instructions on avoiding injury.[398]

By educating passengers regarding the discipline of streetcar riding, the streetcar companies reduced the number of injuries.[399] The campaigns protected the companies' riders. To understand the campaigns in this way means understanding them using what I have termed an instrumental analysis. But the campaigns also had other effects. Welke shows how the campaigns, the social practice of boarding/alighting, and law joined to construct social norms of female helplessness.[400]

Furthermore, the campaigns also helped build norms of negligence. For example, the New York Sun story instructed women—some of them "impatient women"—on the science of boarding/alighting.[401] If the car jerked suddenly to a start, the article's author promised that those women who had learned their lesson would be able "to board safely and easily and laugh at the fault of the conductor."[402] The lesson thus made the woman's journey safer by allowing the passenger to convert an action of the conductor's that was perhaps negligent—the article used the term *fault*—into a laughing matter.[403] Absent the lesson and the laugh the lesson enabled, a woman injured boarding or alighting might file a claim or even a lawsuit if she were injured. With the lesson, though, a laugh instead followed.

But what of the women and other passengers who heard but did not learn their lessons? By constructing a norm of negligence that these women transgressed by not behaving as companies instructed them in "Safety First" campaigns, street railway company officials implanted ideas into the heads of passengers that would have kept persons injured in boarding/alighting incidents from making claims.[404] "I should have been more careful," they

396. *Id.* at 65.
397. *Id.* at 66.
398. *Id*.
399. *Id.*
400. WELKE, *supra* note 369 at 66.
401. Sun, *supra* note 379 at 13556.
402. *Id.*
403. *Id.*
404. WELKE, *supra note* 369 at 66.

would say to themselves when contemplating whether to make a claim.[405] Although the proposition admits no easy empirical proof, I believe that some fraction of the very large drop-off in the proportion of claims that were boarding/alighting injuries was a consequence of the internalization by injured passengers of company-sponsored norms of negligence. In Posner's scheme, the companies regulated themselves according to external standards that courts would impose.[406] On the tracks, though, companies also constructed and regulated the social norms that would influence whether an injury became a claim or a lawsuit.[407] These same norms were the standards by which such claims and suits could later be judged.

V. RELEASES

At the turn of the century, street railway companies must have been the leading producers of the literary form known as the "release from liability." Among the 801 claims, there is information regarding 457 releases.[408] The releases were documents that the claimants signed in which they released any claims of liability they might make against the company in exchange for a payment of money.[409] The releases usually made explicit that the company officials admitted no liability for the injury or claim.[410]

405. *Id*.
406. Posner, *supra* note 19 at 94.
407. WELKE, *supra* note 369 at 66.
408. Ferrin, *supra* note 36.
409. *Id*.
410. *Id*.

TABLE 4[411]
TIME FROM INJURY TO SIGNING OF RELEASE

	Number	Percent	Cumulative
days 0	12	2.6 %	2.6 %
1	23	5.0 %	7.6 %
2	24	5.3 %	12.9 %
3 - 7	77	16.8 %	29.7 %
8 - 14	71	15.5 %	45.2 %
15 - 30	99	21.7 %	66.9 %
31 - 60	71	15.5 %	82.4 %
61 - 180	58	12.7 %	95.1 %
181 - 365	9	2.0 %	97.1 %
years 1 - 2	9	2.0 %	99.1 %
3 - 7	3	0.7 %	99.8 %
7 - 8	1	0.2 %	100.0 %
total	457		

John Ferrin worked hard to get liability releases and often obtained such releases very quickly.[412] Table 4 presents the time from the injury to when claimants signed releases. In all, 2.6% of the claims were settled on the day of the injury. He settled another five percent on the day following the injury.

Not all these quick settlements were for minor injuries. For example, Ferrin settled with W. J. Clark for $225 on April 16, 1904.[413] The settlement took place within one day of the injury.[414] The night before, Clark's daughter, Vesta, had died from an injury she had sustained earlier that day.[415] Vesta had ridden her bicycle in front of car #160 at 58th Street and San Pablo Avenue.[416] According to the summary of her death in the company's accident report for 1904, she fell off her bike, and the streetcar hit her.[417] A physician examined her that evening and concluded that she was uninjured, but after she died during the night, "it was subsequently discovered that she sustained a fractured skull from the fall."[418] There is no record of Ferrin's words as he

411. *Id*.
412. *Id*.
413. ACCIDENT REPORT OF 1904, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. ACCIDENT REPORT OF 1904, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.

negotiated the release the day after the girl's death. The total cost to the company was $255.80, the amount of the release, plus five dollars for the inquest and an additional eighty cents, perhaps to pay a typist.[419]

Within a week of an injury, Ferrin was able to settle nearly thirty percent of the potential claims, and by two weeks, he had settled 45.2%. The median number of days to release was eighteen; the average was a good bit longer at fifty-six. Ninety-five percent of the claims settled within six months of the injury. Among all the cases for which the company obtained releases, 97.1% settled within one year of the injury. The statute of limitations was four years, two in wrongful death suits.[420] The longest took 2,794 days, or more than seven and one-half years.

Ferrin's hard work enabled the company to settle claims quickly. Ferrin and his staff got to the injured person quickly to facilitate the speedy settlement of claims.[421] For this purpose, Ferrin began to use an automobile sometime near the end of 1909.[422] That was also the year the Oakland Police Department acquired its first automobile.[423]

The automobile was important to Ferrin, although its upkeep was costly, especially since the men who worked for him in the claims department kept wrecking the car.[424] In 1912, he wrote to Bell seeking his approval to purchase a new car and a service contract for that car.[425] In May of 1910, Ferrin recounted that "Mr. Rushmer collided with an iron pole while on his way to the Leona accident and wrecked the machine."[426] A few days before, Ferrin wrote to Bell, "one of the men in the garage ran into another pole and nearly made a complete wreck of the car."[427] He noted that the repair cost would be about $200, but even with this repair, this particular car could "never be of any use except for a short time."[428]

Before actually asking for a new car, he explained the utility of having a car.[429] Ferrin explained to Bell that "[t]he gentleman who has been running the car does twice the amount of work done by the other men in this

419. *Id.*
420. *See* CAL. CODE CIV. PROC. §339 (Amended Mar. 18, 1905).
421. Ferrin, *supra* note 36.
422. Letter from John Ferrin to Harmon Bell (Jan. 24, 1912), folder "San Francisco, Oakland, and San Jose Matters," Carton 16, Papers of Harmon Bell.
423. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910 74 (1981).
424. Letter from John Ferrin to Harmon Bell (Jan. 24, 1912), folder "San Francisco, Oakland, and San Jose Matters," Carton 16, Papers of Harmon Bell.
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.*
429. Letter from John Ferrin to Harmon Bell (Jan. 24, 1912), folder "San Francisco, Oakland, and San Jose Matters," Carton 16, Papers of Harmon Bell.

department. . . ."[430] He reported that he "had the auto on the street at our telephone box every night until ten o'clock, so that in case of accident we can get to it as soon as possible, and it is very inconvenient not to have a machine."[431]

Ferrin had spoken with an agent selling Maxwell cars.[432] The agent offered to "take the wrecked auto, and for the sum of $750.00, will furnish a new one and give a written guarantee that they will keep in repair for one year without cost to the Company. . . ."[433] Ferrin sought to impress Bell with his thrift by noting that the Maxwell agent had first suggested $850.[434] Still, Ferrin had successfully negotiated a $100 reduction in that price.[435] There is no record of Bell's response.

Ferrin's keeping of a car near a telephone to get quickly to injury scenes smacks of ambulance-chasing, of course, except that the claims agents often *preceded* the ambulances. However, not all claims agents beat lawyers to the sites of injuries. Ambulance-chasing by lawyers was a problem that claims agents addressed and one that American Street and Interurban Railway Claim Agent's Association members considered in their journal.[436] As with lessons in boarding/alighting, getting to injury scenes quickly, and fast settlement, stopping ambulance chasing was another way street railway companies tried to control costs.[437] In a section of the Claim Agent's Association's journal entitled "Question Box," claim agents from around the country would write with answers to open-ended, survey-type queries.[438] In 1906, one of the questions was: "What is the best way to break up ambulance chasing?"[439] The answers published in the Association's journal included several strategies.[440] Several agents suggested that railway companies should fight the cases of ambulance-chasing attorneys very aggressively in court and refuse to settle; "[f]ight them on every claim, whether liable or not," was the advice of R. E. McDougall, claim agent for the Utica & Mohawk Valley

430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.*
434. Letter from John Ferrin to Harmon Bell (Jan. 24, 1912), folder "San Francisco, Oakland, and San Jose Matters," Carton 16, Papers of Harmon Bell.
435. *Id.*
436. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY: CLAIM AGENT'S ASSOCIATION 94 (1906) [hereinafter PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY.
437. Letter from John Ferrin to Harmon Bell (Jan. 24, 1912), folder "San Francisco, Oakland, and San Jose Matters," Carton 16, Papers of Harmon Bell.
438. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY, *supra* note 431 at 75.
439. *Id.* at 94.
440. *Id.*

Railway Company of Utica, New York.[441] Other agents suggested legislation or publicity against the practice.[442]

A sizable group also suggested that the solution to the problem of ambulance-chasing was for the railway company to settle directly with the claimant, even when an attorney represented the claimant.[443] Keeping claimants away from lawyers was another way companies tried to control costs.[444] Claim agents from Boston, Cleveland, Denver, Philadelphia, and Newark wrote in to suggest, as the Denver agent put it, that they should: "[I]gnore the attorneys and settle behind their backs, even if it costs the company more to dispose of the case."[445]

John Ferrin tried to determine whether lawyers had encouraged claimants to seek compensation for the injuries.[446] In releases, Ferrin sometimes referred to whether a lawyer represented the claimant.[447] In December of 1905, for example, Alvin Grosh signed a release following an injury to his son in September of that year.[448] For $200, the father released the company from liability for injuries his son received when, in the words of the release, "by his own carelessness in leaning out [of] the car he was on, #176, Piedmont Avenue line, he was struck and knocked off by a apssing [sic] car and injured."[449] At the end of the release, just before the signature, the release indicated that "we have not employed any attorney or signed any contract in the case of the accident. . . ."[450] Some years later, Frank Shay wrote to Bell asking him to assist his sister-in-law, Florence Bell.[451] Shay reported that she had been "thrown" from a train and "somewhat injured."[452] Shay, a street railway attorney himself,[453] wrote to Bell that he had "advised the family that if there is any liability your company will do what is right, and to make a direct settlement without the intervention of attorneys. Will you kindly look into the matter and help it along?" Shay asked.[454] Although there is no record

441. *Id.* at 95.
442. *Id.* at 97.
443. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY, *supra* note 431 at 98.
444. *Id.* at 94.
445. *Id.* at 94, 97.
446. DAMAGE REPORT OF DECEMBER 1905, folder "Oakland Traction Consolidated and SF, Oakland, and SJ Ry., Carton 14, Papers of Harmon Bell.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. Letter from Frank Shay to Harmon Bell (Jan. 15, 1912), Carton 16, Papers of Harmon Bell.
452. *Id.*
453. Shay represented the defendant in *Bailey*, 42 P. 914. See also, HISTORY OF THE BENCH AND BAR OF CALIFORNIA 500 (J. C. Bates, ed., 1912).
454. Letter from Frank Shay to Harmon Bell (Jan. 15, 1912), Carton 16, Papers of Harmon Bell.

of the outcome of the matter, a pencil notation at the bottom of the letter reads, "Closed, Feb 27, 1912."[455]

Another suggested solution to the problem of ambulance-chasing was to beat the attorneys or their runners to the injury victim. F.E. Rankin, claim agent for the Detroit United Railway, suggested that "there is no best way [to break up ambulance chasing], although a good deal may be accomplished by getting in ahead of ambulance chasers. . . ."[456] H.K. Bennett of the Fitchburg & Leominster Street Railway Company in Fitchburg, Massachusetts agreed; the solution was "[t]o have the Claim Agent the first man on the spot, and with the proper authorities to settle claim if possible. . . ."[457] C.W. Hare, of Philadelphia, wrote that "[t]he best method for breaking up ambulance chasing is: First, to see that your adjusters reach the injured before the runners from the attorneys' offices. . . ."[458] He also suggested prosecution "to the last ditch" of attorneys who tried to "defraud the company."[459] Ferrin seems to have adopted the first of these strategies by using an automobile.

A.H. Moore, the claim agent for Newark's Public Service Corporation, suggested an even more aggressive strategy to combat ambulance chasers.[460] He revealed that "[w]e concentrate our energies on them one at a time. . . ."[461] Moore singled out miscreant attorneys and then gave them "fake cases," which Moore then "let go to trial. . . ."[462] At the trial, Moore would have the fake client not show up, and the company would then "non-suit them because of the non-appearance of client, thus taxing them with all the costs."[463] The strategy was to wipe out the ambulance chasers by singling them out for fake suits on which they would have to pay the court costs.[464] In this way, Moore indicated that "[w]e have successfully defeated all our worst 'chasers' and have little difficulty with them now."[465] With some pride, he reported that "[o]ur fight has been particularly aggressive, even to the extent of hounding them day and night, getting clients and witnesses away from them, and when they did win a case, making check payable to client."[466]

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455. *Id.*
456. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY, *supra* note 436 at 94-95.
457. *Id.* at 95.
458. *Id.*
459. *Id.*
460. *Id.*
461. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY, *supra* note 436 at 97.
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.*
466. PROCEEDINGS OF THE AMERICAN STREET AND INTERURBAN RAILWAY, *supra note* 436 at 97.

VI. CONCLUSION

Judge Posner and Professor Schwartz have developed and presented largely erroneous characterizations of tort law in the late nineteenth and early twentieth centuries. They developed their theories and arguments after reading published appellate opinions from various states. Appellate cases are suited to doctrinal studies and analysis of the behavior of appellate tribunals, but both Posner and Schwartz reached conclusions for which they did not have relevant data. Posner derived a general theory about the relationship between law and economics in which the rules and operation of the common law served a regulatory function that optimized the level of injuries.[467] However, as Schwartz suggested, Posner's theory pushed beyond his data.[468] Posner had no data concerning claims and their settlement and nothing regarding the operation of rail companies and the number of injuries, claims, or settlements.

Schwartz's view of the history of personal injury law differed from Posner's. Schwartz saw tort as generous to late-nineteenth-century injury victims — which it was not.

Posner supported his theory about efficiency, and Schwartz supported his notion of solicitude using seemingly empirical generalizations derived from the appellate reports. Both scholars reported figures for the relative success rates the parties to the appellate cases had experienced in the trial courts.[469] As I showed in *Blood on the Tracks*, these figures misstated plaintiffs' successes.[470] Empirical data from trial courts support neither Posner's theory of efficiency nor Schwartz's theory of solicitude.[471] Plaintiffs lost more often than they won.

As I have shown in this Article, the appellate cases also misrepresent the types of cases.[472] For example, Posner's appellate sample inverted the ratio of boarding/alighting and collision cases.[473] Presuming the appellate cases represent the trial courts, claims, injuries, or the underlying economic activity is always an error.

The trial courts were not the only level at which injured persons might have sought compensation from their injurers. Those injured by railway companies might also seek compensation directly from the company. To evaluate the amount and frequency of this compensation and compare it to

467. Russell, *supra* note 3 at 210.
468. *Id.*
469. *Id.* at 171.
470. *Id.*
471. *Id.* at 210-13.
472. *See supra* at 33.
473. *Id.*

successful plaintiffs' compensation, I consulted the records of Oakland Traction's claims department.

The claims department records offer a new perspective on the role of the courts in compensating those who suffered injury. The claims records show that formal legal institutions are neither the only nor necessarily the first place people seek compensation for injury. This is an important reminder of an obvious point supporting two of my arguments. First, and quite simply, I argue that the claims department was more important than the courts in awarding compensation.[474] Second, and less straightforward, I also believe that the claims department played a strong role in fixing or constituting what it meant to receive compensation.[475] As I noted above, I think that legal historians, including Lawrence Friedman and me, have overemphasized the results of litigation as the measure of compensation.[476]

The claims department records showed that in terms of the number of people who received compensation and the total number of dollars that Oakland Traction paid as compensation, the company's internal mechanisms were more important than formal legal institutions. Put differently, between the level of the claims department and the trial court, there was a large gulf, one that few injured persons crossed. From the total pool of injured persons not satisfied at the claims level, under one percent filed lawsuits.[477] Among the obstacles that kept injured persons and claimants from becoming litigants was the likelihood that they would fail in their quests for redress. The behavior of the families of those whom Oakland Traction streetcars killed most clearly delineated the distance between the claims and litigation levels, as not one of the claimants in a death case during the years from 1903 to 1906 also filed a lawsuit.[478]

Although scholars use the pyramid metaphor to describe the trajectory from injury through compensation and litigation, I argue that this metaphor misleadingly implies a smoothness from one level to the next.[479] The entire assembly of data for the number of passengers, injuries, claims paid, lawsuits filed, lawsuits won, and appellate opinions published showed that the drop-off from one level to the next was much greater than the "smooth pyramid" metaphor implied. The small dollar amount of the annual Superior Court toll showed that personal injury litigation took but a small bite from the street railway company, and the dispute run showed that very few injuries yielded lawsuits, much less appellate reports. I propose thinking instead of a "salmon

474. *See supra* at 10.
475. *See supra* at 50.
476. *See supra* at 11.
477. *See supra* at 8.
478. *See supra* at 29.
479. *See supra* at 9.

run," with very few eggs reaching adulthood and even fewer adult fish overcoming the obstacles of their native streams to spawn.

To evaluate properly the compensation that injured persons received, scholars must consider levels below or outside the courts. In Oakland Traction's claims department, the claims agents paid many small amounts to or on behalf of claimants.[480] The amounts that claimants received for their injuries, including deaths, were small fractions of the amounts that Posner found reflected in the appellate reports.[481] Also, even the most successful claims department settlements amounted to less than the average trial court judgment.[482] The solicitude that Schwartz found in the appellate reports did not prevail in the claims department. The average dollar amounts at stake declined sharply from the appellate court to the trial courts to the claims department.[483] The small payments of the claims department are a better measure of the regulatory bite than the appellate awards. Their smallness suggests that Oakland Traction need not have regulated its behavior with an eye toward the results the company would face in the state's Court of Appeal or Supreme Court.

The claims agents worked hard to control costs. They did so by seeking to get to injury sites before the ambulances and before any lawyers who might have followed those ambulances.[484] They also managed costs by instructing passengers how to board and alight from streetcars.[485] I can understand this instruction regarding boarding/alighting in two ways. First, the instruction aimed to educate passengers—especially women—on how to ride more safely, thereby reducing the number of injuries and the costs of claims and litigation that might arise from these injuries. However, the education regarding boarding/alighting also erected another barrier between an injured person and that person's decision to seek compensation. By putting new ideas into the passenger's head about her possible contributory negligence, instruction regarding boarding/alighting must have played some part in the dramatic winnowing between the fraction of all boarding/alighting injuries and the number of payments for boarding/alighting claims.

As the lower dollar amounts that the claim agents paid on claims suggest, the character—and meaning—of compensation at this level was very different than what plaintiffs sought with their lawsuits. This was another critical dimension to the distance between the claims department and the Superior Court. Very different meanings of compensation separated the two

480. *See supra* at 15.
481. *See supra* at 18.
482. *See supra* at 18-19.
483. *Id.*
484. *See supra* at 44.
485. *See supra* at 15.

venues. To understand the prevailing idea of compensation at any point in the history of the United States, one should look at the practice of compensation. As I have suggested, many scholars have overemphasized the courts as the place where the practice of compensation took place. Iterations of the practice of compensation formed the practice's meaning. In Oakland, California, during the first decade of the twentieth century, compensation consisted of payment for out-of-pocket expenses associated with an injury, plus, perhaps, a small markup.[486] In death cases, compensation did not mean the value of the life lost; instead, compensation meant enough for a funeral with a bit more left over for the family.[487] For example, in the claims department, there was no endorsement of the idea that pain and suffering were worthy of compensation in the form of general damages.

Concerning claims against it, the streetcar company had the strongest hand in forming this conception of compensation. The legal system was a small competitor. Put most crudely, my argument is that the street railway's agents played a more important role in fixing the meaning of compensation than the courts simply because they engaged in the practice of compensation more often than did judges and juries. Of course, even the rare successes of plaintiffs might have generated aspirations of greater compensation, but such suits were too rare, I think, to have dominated the meaning of compensation. Oakland Traction and other street railroads retained their formative conceptual power most effectively by being the ones who paid claims. However, they also retained the power to shape the meaning of compensation by keeping people from the courts, as they sought to shut off those claimants who had engaged lawyers to represent them in their claims. By doing so, they kept claimants from developing aspirations for greater compensation.

486. *See supra* at 18-19.
487. *See supra* at 28.