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WHAT IS CIVIL JUSTICE?

*Jason M. Solomon**

This Article first explores the meaning of the term “civil justice” as it is used in both academic and popular discourse. It then examines the idea of civil justice by looking at three key examples: (1) the U.S. tort system (specifically governing auto accidents); (2) the no-fault regimes of New Zealand, U.S. workers’ compensation, and the 9/11 Victim Compensation Fund; and (3) the phenomenon of apologies, instead of compensation, as remedies in medical malpractice cases. The Article concludes that an important component of civil justice is the ability of a person to hold accountable one who has wronged her.

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I. INTRODUCTION

The critical scene in the Booker Prize–winning novel *The White Tiger*—set in modern-day India—involves a driver, his master, his master’s wife, and a tragic automobile accident.¹ It takes place on a night when the master, Mr. Ashok, and his wife, referred to in the book as “Pinky Madam,” go out to dinner, driven by the protagonist, Balram. After dinner, drunk and ornery, Pinky Madam decides she wants to drive. She takes the wheel and drives so fast and out of control that she hits something in the road—something that does not make a sound.²

From the green fabric caught in the car’s tires, Mr. Ashok and Balram later determine that they must have hit a child.³ “Oh, she was one of *those* people,” Mr. Ashok says.⁴ “Who live under the flyovers and bridges, sir. That’s my guess too,” Balram replies, comforting his master. “In that case, will anyone miss her . . . ?” Mr. Ashok asks hopefully, and Balram reassures him.⁵

The next day, a lawyer comes to Mr. Ashok’s apartment and gets Balram to sign something taking responsibility for causing the accident. “The judge has been taken care of,” the lawyer assures the family. “If your man does what he is to do, we’ll have nothing to worry about.”⁶ As it turns out, even this measure is not necessary. As Mr. Ashok tells Balram several days later, the Ashoks had a “contact in the police,” and supposedly no one reported the accident.⁷

Pinky Madam is either the one with a conscience or—understandably—the one who carries the most guilt. As one of the men in her family observes, “She’s gone crazy, that woman. Wanting to find the family of the child and give them compensation—craziness.”⁸ But Pinky Madam loses the argument. There is no accountability—and no justice.

1. ARAVIND ADIGA, *THE WHITE TIGER* 134–45 (2008). This is very much a work of fiction, and I make no claim that this is an accurate description of any part of contemporary Indian society.

2. *Id.* at 137–39.

3. *Id.* at 140.

4. *Id.*

5. *Id.*

6. *Id.* at 142.

7. *Id.* at 153.

8. *Id.*

The RAND Corporation, established in Santa Monica, California, during the Cold War as a think tank primarily to research defense issues, also has its own Institute for Civil Justice (“the Institute”).⁹ RAND refers to the Institute as a forum for “dispute resolution and public policy formation.”¹⁰ The Institute’s research areas under “civil justice” cover such topics as asbestos litigation, insurance, jury verdicts, product liability, and workers compensation, amongst others.¹¹ The mission statement of the Institute proclaims that the goal of the organization is to help “make the civil justice system more efficient and more equitable.”¹² Not surprisingly, then, the Institute employs a number of economists.¹³

For a generation of tort scholars who want to make civil justice “more efficient and more equitable,” no-fault systems have been the holy grail—and auto accidents are the leading frontier.¹⁴ No-fault systems, as a replacement for existing tort law, promise bureaucratic efficiency: service delivery without the mess, the high transaction costs of litigating fault, and the like.¹⁵ Get the medical bills reimbursed and be done with it. The Institute’s vision of civil justice is thus fairly bureaucratic or administrative in nature.

The White Tiger’s foray into civil justice shows the lack of accountability where the poor family has no ability to challenge the wealthy family. This account, in contrast to the RAND model, presents a view of civil justice as a highly normative terrain.

9. *Civil Justice Research Agenda*, RAND INST. FOR CIVIL JUSTICE, <http://www.rand.org/icj/research/civiljustice.html> (last visited Oct. 3, 2010).

10. *Id.*

11. *Id.*

12. *About the ICJ*, RAND INST. FOR CIVIL JUSTICE, <http://www.rand.org/icj/about/> (last visited Feb. 5, 2010).

13. *Organization and Divisions of the RAND Corporation*, RAND INST. FOR CIVIL JUSTICE, <http://www.rand.org/about/organization/#units> (last visited Oct. 3, 2010).

14. *Auto Personal Injury Compensation*, RAND INST. FOR CIVIL JUSTICE, <http://www.rand.org/icj/pubs/auto.html> (last visited Oct. 3, 2010) (listing many publications regarding the costs and effects of excess automobile claims and no-fault systems in general).

15. James M. Anderson et al., *What Happened to No-Fault Automobile Insurance?*, RAND INST. FOR CIVIL JUSTICE (2010), http://www.rand.org/pubs/research_briefs/2010/RAND_RB9505.pdf.

This Article explores the meaning of the term “civil justice.” The idea is that in order to understand what constitutes the kinds of injuries that should be remedied in the civil justice system but currently are not, we need to understand what the contours of civil justice are in the first place.

Part II starts by examining the varied meanings of the term “civil justice” in both public discourse and academic literature. I then provide a thumbnail sketch of the difference between civil justice and criminal justice. Finally, I propose a set of characteristics of a civil justice system, at least as we use the term in the United States.

I then use that set of characteristics in Part III to examine different legal regimes to see if they meet the demands of civil justice. Part III looks at the U.S. tort system regarding auto-accident claims, no-fault systems like workers’ compensation, New Zealand’s accident-insurance scheme, the 9/11 Victim Compensation Fund, and the phenomenon of apologies in medical malpractice. It also evaluates the degrees to which each of these constitute civil justice. For example, in the no-fault systems, the fact that an individual has been physically injured and received some measure of compensation to pay for medical bills and lost wages would seem to indicate that justice has been achieved. The injuries have remedies.

On the other hand, I argue that a better view of civil justice has an inescapably moral quality that, at its core, is about individuals being able to confront those who have wronged them and demand some kind of answer. We might call this idea “equal accountability,” from the work of the moral philosopher Stephen Darwall.¹⁶

My premise is that once we have explored what we are after with civil justice, we can better consider the kinds of injuries that remain unremedied in our current system. This Article is exploratory, not conclusive.

II. AN EXPLORATION OF THE TERM “CIVIL JUSTICE”

A. *How It Is Used in Academic and Popular Discourse*

The term “civil justice” is used in different ways with overlapping meanings. Some authors use the term as a synonym for

16. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

the civil portion of the legal system, as opposed to the body of law that makes up the criminal justice system.¹⁷ Other scholars use the term more philosophically as some kind of ideal for how the non-criminal part of the legal system should function.¹⁸

A number of scholars, some with connections to the RAND Institute for Civil Justice, seem to use “civil justice” to simply refer to civil litigation more generally.¹⁹ These authors are concerned that some litigants may be barred from pursuing civil remedies because of various procedural roadblocks.²⁰ For example, Carolyn Lamm, president of the American Bar Association, recently described the civil justice system as facing a “justice gap” because indigent litigants lack legal assistance in civil cases “where basic human needs are at stake.”²¹ In this context, for example, “civil justice” means the ability to get—or have a shot at getting—redress in the

17. See MARIE GRYPHON, CTR. FOR LEGAL POLICY, GREATER JUSTICE, LOWER COST: HOW A “LOSER PAYS” RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM (2008), available at http://www.manhattan-institute.org/pdf/cjr_11.pdf.

18. See HAZEL GENN, JUDGING CIVIL JUSTICE (2009).

19. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 134–36 (1997) (analyzing several proposed changes to the civil litigation system); Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2075–77 (2002) (considering the economics of civil litigation); see also Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1303–04 (1994) (reviewing the Civil Justice Reform Act and the pertinent report of the RAND Institute for Civil Justice); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1410–15 (1994) (indicating reforms to civil discovery and rebutting the characterization of the civil justice system as an overly-litigious system).

20. See Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 701–10 (2006) (arguing that costs preclude litigation of claims for poor plaintiffs, limiting their access to justice); see also Barbara Billingsley, *Legislative Reform and Equal Access to the Justice System: An Examination of Alberta’s New Minor Injury Cap in the Context of Section 15 of the Canadian Charter of Rights and Freedoms*, 42 ALTA. L. REV. 711, 738–39 (2005) (questioning whether Canada’s damages caps may preclude tort victims from litigating their claims); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 643–47 (2006) (considering whether damage caps may block tort plaintiffs from pursuit of remedies).

21. Carolyn Lamm, *Finding New Ways to Help*, A.B.A. J., Oct. 2009, at 9 (advocating extension of *Gideon* representation requirements to civil cases); see also Talbot D’Alemberte, *Tributaries of Justice: The Search for Full Access*, 73 FLA. B.J. 12, 12–14 (1999) (arguing that representation in civil cases is crucial to provide full access to the civil justice system); Ronald H. Silverman, *Conceiving a Lawyer’s Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1109–11 (1991) (contending that representation in civil matters is required for full access to justice).

case of a bank foreclosing on a home, an HMO denying health coverage, or a credit card company charging excessive fees.²²

Some authors use the phrase “civil justice” simply to mean tort law.²³ Although these authors typically do not explicitly exclude contract claims from their terminology, they tend to use the term synonymously with torts or tort law.²⁴ This might include not only traditional common-law torts, but also legislatively created actions such as consumer-protection or securities-fraud claims.

Some scholars also use the term to refer simply to civil practice. When urging changes in the mechanics of civil litigation, these authors use “civil justice,” then, to mean civil procedure.²⁵

The term “civil justice,” however, is not only used to describe the civil litigation system. In academic writing regarding the philosophical foundations of legal systems, scholars sometimes use civil justice as a synonym for corrective justice.²⁶ Here, the term “concerns the ethical appropriateness of rectifying imbalances in benefits and burdens caused by a loss or a gain.”²⁷ Used in this manner, civil justice is distinct from retributive or distributive justice.²⁸ With the public and academic discourses offering no clear

22. See Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 962–63 (2009) (listing the most common civil justice needs in this category).

23. See, e.g., Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 2–9 (2002) (critiquing caps and other limitations on tort claims as counterproductive to the civil justice system); see also Daniel J. Capra, “An Accident and a Dream”: *Problems with the Latest Attack on the Civil Justice System*, 20 PACE L. REV. 339, 356–60 (2000) (challenging the claim that damages payouts undermine product innovation); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83–90 (1993) (rebutting the concern that tort cases are too costly).

24. See, e.g., Rustad & Koenig, *supra* note 23; see also Capra, *supra* note 23; Galanter, *supra* note 23.

25. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004) (conceptualizing civil justice as civil procedure); see also Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 221–23 (1997) (reviewing the report of the RAND Institute for Civil Justice on the Civil Justice Reform Act in the context of civil procedure); Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 106–07 (1997) (discussing empirical research by the RAND Institute for Civil Justice regarding civil justice reforms and civil practice).

26. See, e.g., Cesare P.R. Romano, *Can You Hear Me Now? The Case for Extending the International Judicial Network*, 10 CHI. J. INT’L L. 233, 240–41 (2009) (defining “justice” in various contexts).

27. *Id.* at 240.

28. *Id.*

definition of “civil justice,” let us now consider the meaning of civil justice alongside its counterpart, criminal justice.

B. Civil Justice Versus Criminal Justice

Let’s go back to the basics: we have a legal system in the United States, and two major components of it are something called the “civil justice” system and something called the “criminal justice” system. Several questions then arise, the two biggest being: (1) What do civil justice and criminal justice have in common? and (2) How do they differ? These are weighty questions, but I will very briefly explore each of them in turn in order to construct a tentative set of characteristics of a civil justice system.²⁹

There are extensive and overlapping literatures on the tort-crime distinction and on the difference between criminal and civil law. The literature on the tort-crime distinction focuses a bit more on differences in doctrine.³⁰ However, both literatures ask what the underlying purposes of each body of law are, and then why—and whether—there is a need for both bodies of law.³¹ My hunch is that simply changing the terminology used to make the comparison—comparing “civil justice” with “criminal justice”—might provide new insights generally and specifically provide a more systemic perspective.

From both literatures, we can glean a number of distinctions between these two bodies of law, with no apparent consensus as to the “proper” interpretation. The distinctions are drawn with reference to the function of the area of law;³² the effect of the area of law

29. To be sure, I am not claiming that these are somehow universal characteristics across time and space. I am simply looking at the United States, and the distinctions, at this high level of generality, also happen to be roughly similar to most countries today that have a legal system. See generally Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 201–02 (“Apparently every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle.”).

30. See, e.g., Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719–25 (2008) (synthesizing the tort-crime distinctions, including many of the doctrinal ones).

31. Some scholars, most notably Randy Barnett, think that there is only need for one. See generally RANDY BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2000) (arguing for the abolition of a criminal law system, and instead having all responses to wrongdoing be dealt within the tort system under a restitutionary principle).

32. See, e.g., John Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1882–87 (1992) (describing the functions as punishment for crime versus pricing for tort); Robert Cooter, *Prices and Sanctions*,

(expressing moral condemnation in crime);³³ the nature of the harm (broader class of harms sanctionable in crime);³⁴ the victim of the wrong (individuals in tort, the public in crime);³⁵ and the interest being vindicated. Each of these distinctions, though, has weathered serious criticism.

1. What Do Civil Justice and Criminal Justice Have in Common?

Let us start with what civil justice and criminal justice have in common. One glaringly obvious thing is that pesky word: “justice.” Libraries are filled with books on the topic, and I do not intend to canvass the “what is justice?” literature here. Suffice it to say that the kind of justice referred to in both civil and criminal contexts is not the kind of macro-distributive justice issues that societies face, but rather, the kind of justice that Hillel Steiner described as “the requirement that moral rights be respected.”³⁶ One can also think about this kind of justice using Aristotle’s idea of rectification—of making things right.³⁷ Used in this way, we see that the kind of justice deployed in both legal systems is conceived as “something that is *done*, a legal disposition meted out in light of what others have done in the past.”³⁸ Though we will eventually turn to differences between criminal and civil, justice in this sense is the common core of both areas of law.

84 COLUM. L. REV. 1523, 1523 (1984) (bridging differing views on the function of law by developing a theory about the difference between the effect of prices and sanctions upon behavior); Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 758–59 (1943) (discussing Bentham’s distinction between crime as prescribing sanctions, and tort as defining rights or duties).

33. See, e.g., Robinson, *supra* note 29, at 205–08.

34. See, e.g., Simons, *supra* note 30, at 720; see also Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CALIF. L. REV. 398, 413–18 (1980) (using Nozick to argue that what distinguishes crime is that the harm not only harms the victim, but creates fear among the greater community).

35. Blackstone appeared to have drawn such a distinction. See Hall, *supra* note 32, at 757–58 (discussing Blackstone and suggesting that such a distinction traces back to Roman law).

36. HILLEL STEINER, AN ESSAY ON RIGHTS 109 (1994).

37. See generally Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1460–61 (2000) (explaining Aristotle’s concept of rectificatory justice).

38. Benjamin C. Zipursky, *Integrity and the Incongruities of Justice*, 119 YALE L.J. 1948, 1987 (2010) (describing this kind of justice as “dynamic justice”).

And when we think about what the two systems are designed to address, we might think about *injustices*—circumstances where “moral rights” are not “respected”³⁹—which could also be called “moral injuries.” Another word for such injustices might be “wrongs.” And this too is consistent with our intuitions about both the civil justice and criminal justice systems—they both exist to respond to wrongs.

What kinds of injuries or wrongs, though? They are not only physical injuries. Crimes, of course, can be economic, and attempts to commit crimes can result in convictions where there are no physical injuries at all. In the world of civil justice, we see claims like false imprisonment to protect freedom of movement, or defamation for injury to reputation. These, too, lack the physical injury we might expect.

Consistent with the inescapable moral quality of the word justice in both systems, I would postulate that the injuries common to civil and criminal justice are moral injuries. They are moral injuries because they violate our terms of interaction and social bonds, our obligations to others. Specifically, though at a quite high level of generality, the wrongs in both civil and criminal justice constitute abuses of our own liberty at the expense of others’ security and well-being, or in Kantian terms, use others as means to our ends.⁴⁰

The wrongs are moral injuries, as defined by the philosopher Jean Hampton, because they operate as “an affront to the victim’s value or dignity.”⁴¹ Though Hampton is primarily discussing criminal law and retributive justice, other scholars (including me) have used this idea in discussing civil justice.⁴² Acting against wrongdoers is a means by which the victim can negate this affront, vindicate her own value and moral worth, and restore herself to the status of an equal.⁴³

39. STEINER, *supra* note 36, at 109.

40. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie tr. 1887).

41. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992).

42. See, e.g., Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1015–20 (2007); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1794–95 (2009).

43. See Hampton, *supra* note 41, at 1686.

The criminal and civil justice systems, then, are two legal systems for responding to wrongdoing in the form of moral injuries.⁴⁴ They each seek to achieve justice, which includes some measure of accountability.

2. How Do They Differ?

The question, then, is if criminal and civil justice are both mechanisms for responding to moral injuries, how do they differ? Why do they both exist? By stepping back and taking more of a structural or systemic view, I hope to illuminate some of the key features that differentiate the two systems.

First, the state responds to wrongdoing in the case of criminal justice, while individuals respond in the case of civil justice. Not only does this distinction apply to who prosecutes the claim itself, but it also holds for who decides whether or not to bring the claim in the first place.

Second, we might infer from this difference in who brings (and decides whether to bring) a claim that criminal justice primarily vindicates the state's interests with some combination of retribution and deterrence. Alternatively, we can infer from the victim's centrality in bringing the action (and decision to do so), that the civil justice system vindicates the victim's interests—perhaps by treating the victim as an equal or with respect or by empowering the victim to demand answers.⁴⁵

Finally, the inquiry in criminal justice is ultimately about what ought to be done to the defendant: imprisonment, fines, community service, or nothing at all. However, the inquiry in civil justice is about what, if anything, the plaintiff or victim gets. Our current system generally awards money damages, but it could also mandate an apology (court-ordered or not), an injunction, or another remedy.⁴⁶ To be sure, both civil and criminal justice reach their distinct inquiries through similar processes (if cases go to trial) of

44. To be sure, this is a claim that can be disputed, and I have not proven it with this necessarily brief discussion.

45. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 733–38 (2003).

46. See *id.* at 710–13 (explaining that tort law offers a “diversity of remedies”). For the unusual case of a court-ordered apology, see Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1271–93 (2006).

determining whether the conduct at issue constituted a wrong. But the inquiries end in very different places. If a criminal wrong is proved, the focus becomes what ought to be done to the defendant; in civil justice, the question is what the plaintiff is entitled to.

Thus, although both systems exist in part to achieve accountability, the form of accountability differs. In criminal justice, the wrongdoer is held accountable to the state.⁴⁷ The state is the one that demands the accounting, and the accounting is generally “paid” in the form of imprisonment or fines to the state.⁴⁸ For civil justice, the one wronged is the agent of accountability, and the wrongdoer must provide accountability through answers during litigation and a remedy (generally money) to the one wronged.⁴⁹

3. Other Issues on the Contours of Civil Justice

Other questions arise when we think about a legal system with two major components. First, do civil and criminal justice constitute the entirety of the legal system? Probably not. For example, questions about child custody, property titles, insurance contracts, and corporate-entity organization are civil cases and not criminal cases. But they lack the moral quality associated with the term “civil justice.” This quality is contained in cases where the posture of the claim is an individual pointing a finger at another and saying, “You have wronged me; now you must make amends.”

Also, are these only legal systems, or do they include non-state components? My instinct is that the legal systems are necessary components of any criminal justice or civil justice system, at least in the contemporary United States, but non-state orders play a role as well. There may be aspects of justice in the wake of wrongs that are wholly outside the legal system, and we might pause on whether or not we should consider these part of “civil justice.” But there are other aspects of justice in response to wrongs that are both interpersonal—on the civil side of the equation—and very much in the shadow of the legal system. The phenomenon of apologies given by doctors and hospitals—in part as a way to forestall medical

47. Simons, *supra* note 30, at 729.

48. *See id.*

49. Goldberg, *supra* note 44, at 946–47.

malpractice lawsuits—is a good example, and I will describe why I think such apologies ought to be considered part of civil justice.

While these questions are worthy of more thorough exploration, for now, let us summarize the characteristics of civil justice as follows:

- (1) the victim brings the action herself, and she has the discretion over whether to bring it;⁵⁰
- (2) the claim is brought against and addressed to the one who has allegedly caused the harm, and the victim gets to demand an answer from that person or entity;⁵¹
- (3) wrongdoing of some kind is the heart of the claim;
- (4) the form of the claim of wrongdoing is relational and second-personal (“you have wronged me”);⁵²
- (5) the remedy is generally something given to the victim (unlike in criminal justice) by the defendant; and
- (6) the resolution involves the wrongdoer taking responsibility in some fashion—if held liable.⁵³

Putting these characteristics together, civil justice is a legal regime that responds to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable. To be sure, I am talking

50. This is also highlighted as a critical component of the civil-recourse theory of tort law specifically. See Zipursky, *supra* note 45, at 733. For private law generally, see Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002). I discuss civil recourse theory at length in Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1784–87 (2007) and in Solomon, *supra* note 42, at 1775–79. See also Hall, *supra* note 32, at 760 (describing Austin’s view that the issue of who has discretion—the victim or the state—is a key distinction between tort and crime).

To be sure, it is not always true that the victim brings the claim. For example, sometimes government agencies such as the Federal Trade Commission or the Securities and Exchange Commission will bring civil actions on behalf of victims of wrongs.

51. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010) (discussing the importance of a plaintiff’s ability to demand an answer in tort law). *But see* R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 176–79 (2007) (explicating a similar concept as being central in criminal law, though with an emphasis on the wrongdoer’s obligation to provide the explanation rather than the ability to demand one).

52. See Solomon, *supra* note 42, at 1791–94 (discussing Stephen Darwall’s second-person standpoint); see also Hall, *supra* note 32, at 760 (describing Austin’s view that crimes are violations of “absolute” duties, but torts are violations of “relative” duties); Robin Kar, *Introduction to Symposium on the Second-Person Standpoint and the Law*, 40 LOY. L.A. L. REV. 881 (2007). *But see* DUFF, *supra* note 51, at 23–30 (arguing that criminal law is also relational).

53. See John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUD. 157, 159 (2003). *But see* DUFF, *supra* note 51 (arguing that this is the central concept in criminal law).

about an ideal type here, and I will examine how well the type fits in various settings below.

III. COMPATIBILITY WITH CIVIL JUSTICE: THREE ILLUSTRATIONS

In this part, I apply the idea of civil justice developed above to (1) the U.S. tort system (specifically governing auto accidents); (2) the no-fault regimes of New Zealand, U.S. workers' compensation, and the 9/11 Victim Compensation Fund; and (3) the phenomenon of apologies, instead of compensation, as remedies in medical malpractice cases.

I hope to have demonstrated that a plausible definition of civil justice is a legal system to respond to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable. If civil justice can plausibly be seen that way in whole or in part,⁵⁴ then how do various regimes, either legal or in the shadow of the law, fare in meeting the characteristics of civil justice?

A. *The U.S. Tort System: Auto Accidents*

Most auto accidents result in transactions conducted in the shadow of the tort system. Although auto accidents are the basis for the majority of negligence claims, most auto accidents never reach the courts.⁵⁵ Rather, each driver's insurance company usually settles with the other's.⁵⁶ However, insurance companies base the amount of money that changes hands and who pays whom on a rough prediction of what would happen if the case went to trial, even if a lawsuit is never filed.⁵⁷ In the aftermath of the accident, assuming the

54. For an argument that pluralistic accounts of civil justice are preferable and more accurate, see, for example, Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369 (2005), which answers "no" to the question in the title. See also Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1560 (2006) ("We can see what is distinctive about a tree, but we cannot reduce this to a unitary notion. Indeed, why would we want to do so?").

55. Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1495-97 (2009).

56. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 179 (1980) (reporting that only 4.2 percent of claims filed against insurance companies reached trial).

57. For an account of this system, see generally *id.*

drivers are not too badly hurt, they exchange insurance information. They may exchange words as well. One might even apologize.

But after the exchange of insurance information, they usually never see each other again. They usually do not know how the insurance companies resolve the whole affair. If there is a monetary settlement, it is frequently accompanied by a statement that the settlement does not constitute any acknowledgment of wrongdoing.

How well do such common scenarios meet the characteristics of civil justice described above? It is certainly at the discretion of the injured party whether to initiate legal action or the precursor to it—contacting the other party’s insurance company. Because of the now-routinized system of insurance claims, it may well be that the most common type of tort claim is quite far from the ideals of civil justice.

B. *No-Fault*

In this section, I consider how well no-fault regimes fit the conception of civil justice described above. The basic term “no-fault” refers to a standard where, in order to establish a right to compensation, a claimant need not prove negligence—or any kind of wrongdoing—by any other party.

I describe very briefly, and then consider together, three such regimes: (1) New Zealand’s comprehensive system of compensating accidents; (2) U.S. workers’ compensation; and (3) the 9/11 Victim Compensation Fund. I consider them all together to demonstrate that, depending on their precise institutional designs, no-fault regimes can comply in varying degrees with the demands of civil justice. To start, the following is a brief description of all three regimes.

First, in New Zealand, unlike anywhere else in the world, a government fund provides compensation for all accidental injuries.⁵⁸ In other words, if you get into an auto accident in New Zealand, you need not deal with the other party or his insurer to get compensation. You apply to the government fund, and need only show that you were in an accident to receive compensation.⁵⁹

58. Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 982–83 (1985) (describing that, in New Zealand, the Accident Compensation Act makes it mandatory for victims of automobile accidents, whether at fault or not, to seek redress from a government fund, as opposed to bringing a tort action for damages).

59. *Id.*

Second, workers' compensation exists in every state of the United States as a substitute for employees' tort claims against their employers for workplace injuries.⁶⁰ Employees must show that their injuries were work-related; then they are entitled to compensation. Although this is designed to be much more streamlined than the tort system, employers and their insurers frequently challenge—and discourage the filing of—such claims. Thus, workplace injuries end up in litigation more so than the architects of workers' compensation originally intended.⁶¹ Again, no negligence on the employer's part need be proven, and the defendant in these cases is generally the employer's insurer.⁶² The insurance rates are based on the level of injury; thus, employers certainly have an interest in keeping down claims and payouts.

Finally, after the tragedy of September 11, 2001, the U.S. Congress established the 9/11 Victim Compensation Fund.⁶³ The legislation limited the airlines' liability by allowing victims' families to apply for compensation through the fund for the losses they suffered from their loved ones' deaths.⁶⁴ In order to apply to the Fund, the victims' families had to waive any right to a legal claim against any entity arising from the tragedy.⁶⁵ As part of this process, Kenneth Feinberg, the Special Master chosen to oversee it, and others held hearings where the victims' families had the opportunity to articulate the magnitude of their losses.⁶⁶

In all of these no-fault regimes, the claimants decide whether to bring claims and do so themselves. But there is no real allegation of

60. See JOSEPH W. LITTLE ET AL., *CASES AND MATERIALS ON WORKERS' COMPENSATION* (5th ed. 2004).

61. See, e.g., Terence G. Ison, *The Significance of Experience Rating*, 24 OSGOODE HALL L.J. 723, 725–26 (1985) (describing how experience rating in Canada has led to objectionable practices by employers and insurers such as discouraging workers from reporting workers' compensation claims).

62. LITTLE ET AL., *supra* note 60, at 6.

63. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001).

64. *Id.*

65. See Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy"* 7–10 (Univ. of S. Cal. Legal Studies Working Paper Series, Working Paper No. 3, 2005), available at <http://law.bepress.com/usclwps/lss/art3> (providing a thorough overview of how the 9/11 Victim Compensation Fund was set up and worked).

66. For a description of these hearings, see KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

wrongdoing at the heart of these claims, and the victims are generally not empowered to demand answers. Moreover, with the possible exception of workers' compensation, whoever contributed to or caused the injuries does not accept responsibility.⁶⁷

With the 9/11 Victim Compensation Fund, for example, the fact that claimants were entitled to a hearing meant that they could give voice to how they were wronged in a way that a New Zealander who is rear-ended or a factory worker whose boss did not listen to his pleas to slow down the production line is not. But the 9/11 families could not demand answers or explanations.⁶⁸ As Gillian Hadfield put it, civil litigation would be

the only way that a housewife from New Jersey, for example, can make the President of American Airlines or the owner of the World Trade Center show up and answer questions about her husband's death, demanding information about what security screening procedures were followed or not and why, what fire safety measures were taken or not and why.⁶⁹

C. Apologies in Medicine

In the medical malpractice context, compelling evidence has emerged recently demonstrating that when hospitals and doctors apologize to patients in cases of medical error, it decreases the likelihood of patient lawsuits.⁷⁰ This phenomenon can be seen as a

67. As Martha McCluskey has pointed out, workers' compensation is sometimes explained "as a recognition of employer responsibility for work accidents." Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 730 n.277 (1998).

[R]ecent workers' compensation reform efforts typically claim to restore the "work" standard of liability that is central to the cost-internalizing theory of the workers' compensation bargain. But this "employment relationship" standard for allocating accident costs requires judgments about what is necessary and inevitable to the employment relationship. . . . Those judgments incorporate normative determinations about employees' and employers' respective burdens and duties of care in the employment relationship—in effect, returning to the original problem of determining worker versus employer fault.

Id. at 732–33 (citations omitted).

68. Hadfield, *supra* note 65, at 23.

69. *Id.* Hadfield describes this as the "normative procedural aspect of litigation: the capacity of a citizen to bring to bear the power of the state to demand an accounting for allegations of wrongdoing in open court." *Id.* at 15.

70. See Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes,* 21 GA. ST. U. L. REV. 1009, 1015–24 (reviewing

form of civil justice. Even though medical malpractice may never be litigated, they certainly occur in the shadow of the law and involve the kind of interpersonal accounting after someone is harmed that is at the core of civil justice.

Although there has been a spate of articles in recent years describing the phenomenon of apologies in medicine,⁷¹ few have grappled in any depth with whether this is a good development. Scholars who have taken a firm position have come down squarely on the “no” side.⁷² I take a more positive view, though a tentative one.

Critics of apology in this context argue that the shadow of the law(suit) drains the apology of any meaningful moral quality.⁷³ As a mere tool to escape a possible lawsuit, the apology cannot serve as a moral acceptance of responsibility. Indeed, one scholar argues forcefully that the instrumentalism involved serves to “commodify” the apology.⁷⁴

But even if the presence of mixed motives diminishes the moral strength of the apology, we should not underestimate the apology’s positive effect on the recipient. That is to say, to the extent that victims and their families want an explanation of what happened or an acceptance of responsibility, an apology has value and is desirable—even if the motive behind it is not wholly pure. Moreover, the fact that the victim receives an answer or explanation means that an apology in a case of medical error may better meet the demands of civil justice than some of the no-fault systems described above.

A recent episode from the popular television show *Grey’s Anatomy* highlights the phenomenon. In the show, Dr. Derek Shepherd, the new interim chief of surgery at the hospital, faces a

the survey, experimental, and case-study evidence, but cautioning that considerably more empirical research remains to be done); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 85–87 (2005) (reviewing the evidence, consisting largely of case studies); see also Aaron Lazare, *The Healing Forces of Apology in Medical Practice and Beyond*, 57 DEPAUL L. REV. 251 (2008) (discussing the potential positive consequences of medical professionals apologizing to victims of malpractice, while noting some risks of such apologies).

71. See, e.g., Lazare, *supra* note 70; Robbenolt, *supra* note 70; Taft, *supra* note 70.

72. See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1146–49 (2000) (arguing that apology in this context is not authentic, in that what should be a “moral process” is converted into a “market trade”).

73. *Id.*

74. *Id.*

crisis on one of his first days on the job.⁷⁵ A patient wakes up during surgery due to an anesthesia failure, and the hospital faces the prospect of a lawsuit.⁷⁶ Following the advice of Dr. Miranda Bailey, who acts as the conscience of the show, Dr. Shepherd apologizes to the patient and her husband, which is what the patient wanted.⁷⁷ Dr. Shepherd comes off as a stand-up guy who did the right thing by squarely facing the problem. But, of course, we know that the apology likely would not have happened if the specter of a lawsuit had not been present.

The anthropologist S. Lochlann Jain criticizes this kind of practice, arguing that apologizing in medicine perpetuates neo-liberal myths about individual fault, detracting attention from systemic problems that may have caused such medical errors, and also detracting from systemic efforts to fix them.⁷⁸ Jain's reaction to Dr. Shepherd as a stand-up-guy in *Grey's Anatomy* might be that his apology is precisely the problem.

Although Jain may well have identified an unfortunate effect of the apology practice that deserves attention and mitigation, she appears to assume that the purpose of civil justice in the medical malpractice context is to reduce the rate of medical errors. But, while medical malpractice may be about deterrence, it may also, or even primarily, be about accountability among individuals and organizations. Thus, when judged by the metric of accountability, apologies may serve a useful role and be preferable to either a no-fault system (as some have proposed for medical malpractice)⁷⁹ or litigation.

The apology has the unusual and quite powerful qualities of personally acknowledging and affirming the right of the person harmed to demand an explanation, and the obligation of the wrongdoer to provide one. This may be important in an area like

75. See *Grey's Anatomy: State of Love and Trust* (ABC television broadcast Feb. 5, 2010).

76. *Id.*

77. *Id.*

78. See S. Lochlann Jain, *How to Do Responsibility: Apology and Medical Error*, in *THE SUBJECT OF RESPONSIBILITY* (Austin Sarat et al. eds., 2010).

79. See generally PAUL WEILER, *MEDICAL MALPRACTICE ON TRIAL* 114–58 (1991) (providing an extensive analysis of the shift toward no-fault and how it compares to the current, fault-based system).

civil justice, which underscores “what we owe each other”⁸⁰ and makes us equally accountable to one another for the choices we make and the harms we may cause as we go about our lives, even if we are from very different walks of life. In a world where doctors are no longer all-knowing and consumers have a greater role in directing their own care,⁸¹ the apology may underscore the patient’s position of authority at least as much as the settlement of a lawsuit does.

In sum, a medical malpractice system where significant numbers of potential claimants receive apologies from doctors or hospitals—and do not end up filing lawsuits or receiving compensation—is more compatible with civil justice than no-fault regimes that provide compensation but do not provide for interpersonal accountability.

IV. CONCLUSION

When we think about civil justice, we should think less about the kind of social insurance schemes that RAND promotes, and more about the ability of a poor family like the one in *The White Tiger* to confront and receive answers from those whose carelessness killed their child. We should think similarly about the ability of a widow to make demands of Merck executives when their cover-up of the side effects of the drug Vioxx contributed to the death of her husband.⁸² This ability to confront one who has wronged you, regardless of your station in life, may be a fundamental part of a democratic society.⁸³

Taken together, then, the characteristics of civil justice might promote something called “equal accountability.”⁸⁴ When we evaluate how well the civil justice system works by looking at whether there are injuries that go unremedied, accountability (along with more familiar metrics like compensation and deterrence) ought

80. For the origin of this phrase, see T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1st ed. 1999).

81. See Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 643–45 (2008) (describing the phenomenon and noting the problems that consumers have in this market, particularly if uninsured).

82. See Solomon, *supra* note 42, at 1766 (briefly discussing the Ernst trial).

83. See Hadfield, *supra* note 65, at 13 (“The capacity to activate a claim with the state that an individual or an entity has transgressed the bounds imposed on their use of power or wealth or position to get what they want gives meaning to the very idea of the democratic social order.”).

84. I take this phrase from STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006), and discuss it further in Solomon, *supra* note 42, at 1805–11.

to be a primary metric that we use. Precisely how we should do so is a question for another day.