

# Liability Insurance, Moral Luck, and Auto Accidents

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## *Abstract*

*Beginning with the seminal work by Williams and Nagel, moral philosophers have used auto accident hypotheticals to illustrate the phenomenon of moral luck. Moral luck occurs in the hypotheticals because (and to the extent that) two equally careless drivers are assessed differently because only one of them caused an accident. This article considers whether these philosophical discussions might contribute to the public policy debate over compensation for auto accidents. Using liability and insurance practices in the United States as an illustrative example, the article explains that auto liability insurance substantially mitigates moral luck and argues that, as a result, the moral luck literature is unlikely to make a significant contribution to this public policy debate. That debate would benefit more from philosophical analysis of victims' luck, which is not as substantially mitigated by liability insurance.*

## **INTRODUCTION**

This Article examines auto liability and insurance in the light of philosophical work on moral luck. Torts and insurance scholars are accustomed to considering the impact of luck on people injured in auto accidents. In a fault-based system, only the people who are “lucky” enough to be injured by a careless driver are eligible to receive tort compensation.<sup>1</sup> People who are injured by someone who was not careless, or who are injured because of their own carelessness, are left to their own devices, which one hopes include health insurance, sick leave, and a supportive family.<sup>2</sup> This is the familiar problem of victims' luck in the auto liability context.

The moral luck literature highlights a different aspect of luck in tort law, one that affects potential defendants. For example, careless drivers who are unlucky and injure someone are liable for tort damages, while careless drivers who are lucky suffer no consequences for conduct that, ex

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<sup>1</sup> See PATRICK ATIYAH, *THE DAMAGES LOTTERY* (1997).

<sup>2</sup> Cf. CAROL WEISBROD, *GROUNDING SECURITY* (2006).

ante, is equally blameworthy. This is the implication for automobile accidents of what is considered a broader moral luck phenomenon in tort law.

In this Article, I describe the moral luck problem and evaluate whether liability insurance mitigates luck in tort law in the auto accident context. I then evaluate the claim that concerns about moral luck provide a basis for preferring no-fault over the fault-based approach to auto liability and compensation currently prevailing in the U.S. There are a variety of combinations of fault and no-fault liability adopted in other countries; although this Article does not address these other approaches directly, the conclusions should apply to any liability regime accompanied by mandatory liability insurance.

After taking auto liability insurance into account, the impact of liability on unlucky drivers is small in the vast majority of cases. Auto insurance very nearly eliminates the serious financial consequences of liability for defendants. And auto insurance mitigates whatever additional blame might be thought to follow from labeling some drivers who cause accidents as tortfeasors. Thus, although it may be desirable to eliminate fault from the auto liability and compensation equation (an important question that is beyond the scope of this Article), concerns about the impact of luck on defendants do not provide much support for that conclusion.

As demonstrated by the questions not addressed, the scope of this Article is modest. There exists a debate in and in reaction to corrective justice literature regarding the moral justification of existing tort doctrine. Moral luck and related arguments about luck in liability form the basis for one line of attack on the corrective justice defense of negligence liability.<sup>3</sup> My goal here is neither to defend nor attack fault, but rather to suggest that liability insurance provides a sufficient practical answer to the moral luck arguments against fault in the auto accident context, so that tort theorists can set this debate aside and return to the more difficult problem of luck as it relates to the victims of accidents.<sup>4</sup>

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<sup>3</sup> See Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995); Christopher H. Schroeder, *Causation, Compensation and Moral Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra*, at 347; Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOC. PHIL. 1 (2006); see also John C.P. Goldberg & Benjamin P. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. (forthcoming 2007) (responding to Waldron and Schroeder).

<sup>4</sup> See, e.g., JULES COLEMAN, RISKS AND WRONGS 220-26 (1992). It is worth noting that health and other forms of first party insurance can mitigate the impact of luck on victims. Focusing on the luck of the injured would bring the discussion closer to the discussion of luck in distributive justice, as exemplified by the Articles in this volume by Elizabeth Anderson, David Enoch, and Daniel Markovits. Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. XXX (2008); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. XXX (2008).

## I. MORAL LUCK IN THE AUTO ACCIDENT CONTEXT

The moral luck problem follows from the role that luck plays in assessments of moral standing. Of course, luck plays a major role in life (absent an understanding of Divine Providence that I do not lightly reject but will for present purposes completely ignore). Matters subject to luck include much of the life paths that made us into who and what we are: who our parents are, where we went to school, whether our teenage escapades produced lasting harm, which potential life partners we met, where they were in their lives at that moment, what social connections we made, what job opportunities we encountered, and so on. The moral luck *problem* is that the outcomes that depend on chance include not only the three units of measurement in the Game of Life (money, fame, and happiness), but also moral worth.

To illustrate the idea of moral luck, Bernard Williams and Thomas Nagel famously used the example of a painter, an imaginary version of Gauguin, who abandons his wife and children to run off to the South Pacific to paint.<sup>5</sup> Surely a bad thing to do (in my view at least), but just how bad depends on whether Gauguin's paintings turn out to be Great. Does he survive the journey? Do vandals destroy the paintings? Do the critics recognize their greatness?<sup>6</sup> Most importantly for Gauguin's own moral assessment of his decision, does he really have the necessary vision, and the talent and commitment to realize that vision on the canvas? Does he really need to leave his family to achieve that?<sup>7</sup> He does not know the answers in advance, and he has little control over the answers that life supplies him. So much depends on chance, including moral worth. This presents a paradox for moral philosophy because it conflicts with the intuition that moral worth should depend on conduct that is in our control.

Moral luck may also arise in the more quotidian field of auto accidents. Everyone who drives surely is careless at some point. Thankfully, not all carelessness injures someone else. But, when it does, liability follows. The problem this situation presents for moral philosophy is not that the law assigns responsibility on the basis of outcomes, but rather that the law may be in line with moral intuition.<sup>8</sup> Indeed, it was both Williams' and Nagel's intuition that both observers and the drivers themselves will draw a moral distinction between the driver who runs over a

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<sup>5</sup> Bernard Williams, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC'Y (SUPP.) 115 (1976), reprinted in MORAL LUCK 35 (Daniel Statman ed., 1993); Thomas Nagel, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC'Y (SUPP.) 137 (1976), reprinted in MORAL LUCK, *supra*, at 57.

<sup>6</sup> These first set of contingencies are necessary to set up the moral luck example, but they are not as morally significant as the following contingencies. See Williams, *supra* note 5, at 40 (distinguishing between external and intrinsic contingencies).

<sup>7</sup> These questions involve different aspects of moral luck according to the taxonomy employed, for example, in Goldberg & Zipursky, *supra* note 3. These differences among categories of moral luck are outside the scope of this Article.

<sup>8</sup> Cf. Bernard Williams, *What Has Philosophy to Learn from Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 3, at 487.

pedestrian and the driver who does not, even though their conduct was equally blameworthy (or not) the moment before the accident occurred, and the difference in outcomes is entirely due to luck.<sup>9</sup> This presents a paradox because it conflicts, not only with the intuition that moral worth should depend on things that are in an actor's control, but also with the intuition that like behaviors should be treated alike. After all, both drivers were equally careless. How can we at the same time think that (all other things being equal) the two drivers do and do not occupy the same moral position?

One answer is to say that one of these two conflicting intuitions is wrong and that the two equally careless drivers do not actually occupy a different moral position, despite the fact that only one of them caused an accident. Therefore, there is no moral luck problem in the auto accident situation. Recent work by David Enoch and Andre Marmor advances this argument. They argue that, properly understood, the morality of the drivers' conduct rests only on matters that are in the drivers' control and, thus, a moral assessment that places the lucky driver on a higher plane than the unlucky driver is mistaken.<sup>10</sup>

If we accept their assumption that moral assessments require fidelity to the control condition, then there is little to disagree with in Enoch and Marmor's account. If moral assessments depend entirely on matters that are in our control, then there is no moral luck in the auto accident situation (or anywhere else). Of course, their insistence on the control condition sets aside the relationship between morality, feelings of regret, and emotion that Williams sought to bring into philosophy. For this reason, and no doubt others, defenders of the idea of moral luck surely would resist Enoch's and Marmor's move.

Another answer is to say that Williams' and Nagels' intuition regarding the moral distinction between the two drivers is empirically rather than analytically wrong. In other words, there may be situations in which, all things considered, the moral assessments that people make depend on outcomes that are beyond an actor's control, but auto accidents are not one of those situations.<sup>11</sup> The argument here is that the unlucky driver who causes an accident does not regard the fact of the accident as affecting the moral evaluation of his actions. Driving too fast, talking on the cell phone, or whatever other careless act caused the accident was negligent and regrettable, but it was simply bad luck that brought this act together with all the other contingencies that were necessary to produce the accident. By the same token, the careless but

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<sup>9</sup> Williams, *supra* note 5; Nagel, *supra* note 5.

<sup>10</sup> David Enoch & Andre Marmor, *The Case Against Moral Luck*, 26 LAW & PHIL. 405 (2006).

<sup>11</sup> Thank you to Thomas Morawetz for clarifying this point. In conversation, David Enoch points out that, in his view, this empirical line of inquiry is part of psychology or sociology, not ethics. My sense is that might be some debate about that, but as an outsider to philosophy I do not wish to engage that debate.

lucky driver who sees or hears about the accident thinks to himself, “There but for the grace of God go I,” and blames himself for driving carelessly as much (or as little) as the unlucky driver.

I have some affinity for this middle ground, but I am not ready to give up on Williams’ and Nagel’s intuition. I can easily imagine cases in which an auto accident presents the opportunity for a driver to reflect on the morality of his actions and to judge them more harshly than he would have if the accident had never occurred, particularly when the harm to the victim is severe. Yes, it was bad luck that brought the driver’s careless act together with all the other contingencies, but the fact of the accident heightens his awareness of the risks he ran and the opportunity he had to avoid those risks. In Enoch’s and Marmor’s account, this driver is mistaken about the significance of the accident to his moral standing, but nevertheless he assesses the morality of his driving differently than he would have had his luck been better that day.<sup>12</sup>

For present purposes, it is not necessary to decide whether this assessment should be regarded as mistaken. Whatever the moral significance, tort liability clearly depends on luck. We can choose whether to drive too fast around a blind bend in the road, but we cannot choose whether someone is crossing the road on the other side of the bend. And we cannot choose the age, income, or health of that person, or most of the other circumstances that affect the tort law measure of the damages owed for driving too fast. “Moments of carelessness” can lead to “massive loss,” in Jeremy Waldron’s memorable words.<sup>13</sup>

This luck in liability — what I will call “liability luck” — poses a challenge to the fairness of tort law whether liability luck matters to moral assessments or not. If there is no moral distinction between lucky and unlucky careless drivers, then the challenge is obvious: why should tort law blame the unlucky driver when the lucky driver is equally blameworthy? Even if there is a defensible moral distinction between them, why should the unlucky driver pay *so much* and the lucky driver *nothing* when they both drove with the same lack of care? Why should tort liability and damages leave so much to chance?

## II. AUTO LIABILITY INSURANCE AND THE TAMING OF LIABILITY LUCK

The prospect of taming chance figures prominently in the history of insurance.<sup>14</sup> The potential for insurance to tame chance posed an important challenge to Divine Providence (an ancient solution for the moral problems posed by chance), creating real problems for the development of the

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<sup>12</sup> It is important to be clear that I am not arguing that this is a justification for moral luck. Rather, I am arguing that people may experience moral luck in some situations, and that philosophical arguments about the mistaken nature of their reasoning seem unlikely to change that experience.

<sup>13</sup> See Waldron, *supra* note 3.

<sup>14</sup> IAN HACKING, *THE TAMING OF CHANCE* (1990); see also Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237 (1996).

insurance market well into the 19th century.<sup>15</sup> The potential for insurance to tame chance presents an obvious reason to consider whether liability insurance might do so in the tort law context.

### **A. Liability Insurance and Liability Luck in Tort Law**

As legal philosophers have observed, liability insurance does have the potential to tame some aspects of luck in tort law.<sup>16</sup> In theory, liability insurance can address both of the financial aspects of the liability luck problem just described. First, by providing a fund for the payment of massive losses, liability insurance can prevent a moment of carelessness from leading to massive loss for a careless person. Second, because nearly everyone contributes to this liability loss fund, the lucky careless drivers also pay for the injuries caused by the unlucky.

For liability insurance to completely address these aspects of liability luck in practice, however, two requirements would have to be met. The liability insurance would need to be coextensive with the liability in question, so there would be no occasion for a momentary lapse to lead to a significant uninsured liability. And the price of the liability insurance would need to be based on the individual's propensity to engage in risk-creating behavior, not on outcomes. The next Section assesses in very general terms whether the pattern of automobile liability insurance in the U.S. meets these requirements.

### **B. Automobile Liability and Insurance in the United States**

Auto insurance arrangements and requirements in the U.S. vary from state to state largely in detail rather than in fundamental respect. The core insurance aspects of the insurance business are regulated exclusively at the state level, but auto insurance is to a significant extent advertised and sold in a national market. Moreover, there are national organizations that actively promote their auto liability and insurance agendas in legislatures and insurance departments across the country. As a result, there is a national pattern to auto liability and insurance, the following features of which are most relevant to liability luck concerns.

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<sup>15</sup> VIVIANA A. ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* (1979). Cf. Carol Weisbrod, *Insurance and the Utopian Idea*, 6 *CONN. INS. L.J.* 381 (2000) (reviewing contemporary moral objections to insurance).

<sup>16</sup> Keating, *supra* note 3, at 29 ("Negligence mitigated by the institution of liability insurance is fairer than negligence detached from that institution. . . . Luck and luck alone separates the negligent who cause injury from the negligent who do not. It is fairer to neutralize the arbitrary effects of luck than to let it wreak havoc with people's lives."); see also Waldron, *supra* note 3, at 388, 397 n.21; Gary Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 *CORNELL L. REV.* 313, 323 (1989).

*First*, auto insurance is mandatory in all but a very few states.<sup>17</sup> In the vast majority of states, the relevant auto accident and insurance system involves traditional negligence liability and liability insurance combined with uninsured motorists' insurance.<sup>18</sup> It is this traditional negligence regime that I will consider, because it is the regime that is most likely to pose the moral luck problem that philosophers have considered.

*Second*, the scope of the required auto insurance policy is very broad. Auto insurance covers essentially all bodily injuries that an at-fault driver causes to other people, as long as any one of the following participants in the accident has an insurance policy: the at-fault driver, the owner of that driver's car, the injured person, or the owner of the car that the injured person occupied.<sup>19</sup> The standard auto insurance policy provides liability protection for an insured person when he or she drives any car, and it provides liability protection for any authorized driver of an insured car. In addition, it provides uninsured motorists protection for an at-fault injury whenever there is no other insurance covering the defendant.<sup>20</sup> In that case, the uninsured motorists' protection of the injured person (or the owner of the car in which that person was riding) functions like the missing liability insurance of the driver who caused the accident.

*Third*, notwithstanding the very broad *scope* of the required auto insurance policy, the legally mandated *amount* of insurance is quite low relative to the losses that can result from a serious auto accident. A typical "mandatory minimum" amount of auto bodily injury liability coverage is \$25,000 per person injured in an accident and \$50,000 maximum per accident, and some states permit even lower amounts of insurance.<sup>21</sup> The practical effect of these low limits is exacerbated in many states by the "collateral source rule" (which allows plaintiffs to include in their damages losses covered by first party insurance such as health insurance and workers compensation), in combination with subrogation by insurers who provided any collateral benefits.

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<sup>17</sup> See Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 362 tbl.1 (2004).

<sup>18</sup> See *id.* at 363 (noting that, as of 1997, fourteen states have no fault systems, but reporting that all these states "provide thresholds beyond which parties to an accident have recourse to lawsuits").

<sup>19</sup> There are some exceptions to coverage, none of which seem likely to leave defendants without insurance in a large numbers of cases. See generally, Irvin E. Schermer and William J. Schermer, *Automobile Liability Insurance* at §§ 6:1-6:24 (4<sup>th</sup> Ed. 2004) (reviewing and collecting cases regarding standard exclusions in auto insurance policies).

<sup>20</sup> Also, if the amount of insurance provided by the plaintiff's uninsured motorists coverage is greater than the amount of insurance provided by the defendant's bodily injury liability coverage, then the victim's insurance is available to pay the difference between those two policy amounts (if the damages reach that amount).

<sup>21</sup> See Robert H. Joost, *Automobile Insurance and No Fault Law* Table 4-3 at 4-92 (2d Ed. 2002) (listing mandatory liability insurance limits in U.S. jurisdictions without no-fault laws).

As a result, the injured plaintiff sometimes has to share the inadequate liability insurance money with a workers' compensation or health insurance company.<sup>22</sup>

*Fourth*, much higher amounts of auto liability insurance coverage are available on the market, and many people buy additional coverage. Bodily injury liability limits of \$100,000 per person and \$300,000 per accident have become a middle class norm, in part because auto-leasing companies require their clients to purchase at least that amount of coverage.<sup>23</sup> Additional, "umbrella" bodily injury limits of \$1 million or more are increasingly common among upper-income drivers.

*Fifth*, notwithstanding the fact that the auto insurance limits often are less than the nominal damages in a serious auto injury case, automobile accident lawyers report that individual defendants almost never have to pay any of their own money to settle a claim or satisfy a judgment.<sup>24</sup> As a result, auto accident cases are, in practice, about collecting insurance.<sup>25</sup> (I address below three exceptions.)

*Sixth*, notwithstanding the fact that individual defendants almost never have to pay their own money, auto liability insurance claims handling and litigation practices routinely lead defendants to believe that they face a real risk of having to do so. Field research shows that the threat of holding an individual defendant personally liable plays an important role in the settlement of many cases.<sup>26</sup> Individual auto accident defendants almost never are repeat players in the auto litigation game, so they are unlikely to appreciate the (usually) empty nature of this

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<sup>22</sup> See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

<sup>23</sup> Public information on the distribution of insurance policy limits is very difficult to obtain. The Insurance Information Institute recommends that individuals purchase auto liability limits of at least 100/300. See Insurance Information Institute, *How Much Coverage Do I Need?*, <http://www.iii.org/individuals/auto/b/howmuchcoverage/> (last visited Mar. 8, 2007).

<sup>24</sup> Baker, *supra* note 21; see also Stephen G. Gilles, *The Judgment Proof Society*, 63 WASH. & LEE L. REV. 603 (2006).

<sup>25</sup> This "no blood money" conclusion is drawn from my field research in Florida and Connecticut; it has been tested by quantitative research only in the medical malpractice context, where it was confirmed. See Kathryn Zeiler et al., *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990-2003*, J. LEGAL STUD. (forthcoming 2007). However, the medical malpractice context differs from the auto accident context in ways that make it more likely that a doctor would have to pay his or her own money than a driver. Doctors have a far greater than average ability to pay (because they are the most highly paid profession in the U.S.), and there is no equivalent of uninsured motorists insurance in the medical malpractice context.

<sup>26</sup> Baker, *supra* note 21, at 314 ("[A]lthough very little blood money is paid, this does not mean that blood money is unimportant in personal injury litigation. A credible claim that a trial could result in a legal obligation to pay blood money provides a significant inducement to settle. It motivates the defendant and the defense lawyer to place pressure on the insurance company to offer the policy limits."); see also *Campbell v. State Farm Mutual Automobile Ins. Co.*, 2001 UT 89, 65 P.3d 1134 (describing a pattern and practice of resisting the payment of legitimate auto insurance claims, with the result that the defendants' assets are exposed).



threat.<sup>27</sup> Thus, they very likely will fear that an auto lawsuit involving a serious injury in fact could force them to pay real money.

*Seventh*, the bureaucratization of the automobile insurance claims adjustment process means that the vast majority of automobile liability claims are settled, typically without formal admission of fault (although the insurance company's record of the settlement will be treated as an admission of fault for purposes of future liability insurance purchases), and many of those claims are settled without a lawsuit or other public record of the claim. Except in serious injury cases in which there is a large insurance policy available to pay the damages, adjusters and plaintiffs' lawyers settle these cases according to "rules of thumb" — simplified approximations of what they believe would be the result on average were the cases actually to go to trial.<sup>28</sup> In many cases the driver who caused the accident may not even find out whether a claim was filed or paid.

*Finally*, the individual driver's propensity to be careless matters very little in the pricing of auto insurance. There are some pricing factors that seem likely to correlate in the aggregate with the propensity to be careless. For example, the additional premiums traditionally charged for teenage drivers reflect the fact that on average they are less careful than older drivers. More recently, some auto insurance companies have begun using predictive pricing models based on credit scores or other non-obvious factors (e.g. smoking) that are correlated with the propensity to file or be subject to an auto insurance claim. In addition, auto insurance pricing contains a modest experience-rating component that primarily reflects outcomes — i.e. the number of accidents — and in some cases traffic violations such as speeding tickets. In the aggregate, these outcomes are likely to correlate with the propensity to be careless. Nevertheless, the pricing that results is at most only loosely connected with an individual driver's propensity to be careless — because of

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<sup>27</sup> Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

<sup>28</sup> Ross put it this way:

Adjustment of insurance claims compromises the legal mandate for individualized treatment with the need of a bureaucratic system for efficient processing of cases. This compromise can be observed at many points in the processes of investigation and evaluation. Investigation is vastly simplified, for instance, by presumptions as to liability based on the physical facts of the accident. Accidents are thus seldom individualized to an insurance adjuster or a claims attorney. Rather, they are rear-enders, red-light cases, stop sign cases, and the like, and the placement of an accident into one of these categories ordinarily satisfies the requirements for investigation of liability. . . .

H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 135 (1970). He also observed that "An injury situation that can qualify a claim as a 'big case' may receive something of the individualized treatment envisaged by the appellate courts." *Id.*

the difficulty of observing that propensity and because of the dominant effect of other variables such as the location of the residence where the car is garaged.<sup>29</sup>

### **C. Auto Insurance and Liability Luck**

As this brief description suggests, auto insurance in the U.S. substantially mitigates the financial consequences of liability luck in the auto accident context. Moments of carelessness do not actually produce massive loss for defendants in auto cases, because almost all auto liability payments come from insurance companies. Moreover, both the lucky and the unlucky pay for the injuries caused by the unlucky, through liability insurance premiums.

In addition, the auto insurance claims adjustment process reduces whatever additional blame an ordinary tort lawsuit might be thought to impose on a careless driver. The routine, confidential settlement means that there is no public expression of blame. Even if a lawsuit is filed, the expression of blame is “public” only in a formal sense. Only in the rare case that proceeds to trial is there any official determination of fault. Settlements do not explicitly blame the driver, and, because the settlement “rules of thumb” do not perfectly map on to tort doctrine, there is room for a driver to argue that the fact of the payment does not mean that the accident was in fact his fault. For these reasons, an auto accident claim or settlement seems quite unlikely to add to whatever private or self-inflicted blame has already followed from the careless conduct, the accident, or the injury itself. After all, obviously the driver does not need the lawsuit itself to learn that accident occurred, or to reflect on the morality of his driving.<sup>30</sup>

On the other hand, the unlucky drivers who face liability for serious auto accidents are likely to fear that they face significant financial loss, even if the repeat players in the tort game know that defendants almost never have to pay their own money.<sup>31</sup> Moreover, even a driver with

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<sup>29</sup> John B. Connors & Sholom Feldblum, *Personal Automobile Cost Drivers, Pricing, and Public Policy*, 85 PROC. CASUALTY ACTUARIAL SOC’Y 370, 387-98 (1998) (explaining that location is a proxy variable for a variety of factors such as the compensation system in effect, the physical and economic environment, and other institutional factors that have a, largely *ex post*, effect on the costs of accidents). *Cf.* Patrick Butler, *Driver Negligence vs. Odometer Miles: Rival Theories to Explain 12 Predictors of Auto Insurance Claims* (Am. Risk & Ins. Ass’n Working Paper No. 755, 2006) (arguing that activity level as measured in odometer miles is a better unifying theory for auto risk classification than driver negligence and that the predictors actually used by auto insurance companies better correlate with odometer miles than negligence); Aaron S. Edlin, *Per-Mile Premiums for Auto Insurance*, in *ECONOMICS OF AN IMPERFECT WORLD: ESSAYS IN HONOR OF JOSEPH E. STIGLITZ* 53 (Richard Arnott et al. eds., 2003) (arguing that odometer miles would be a better risk-based pricing system and explaining that insurers do not price on that basis because monitoring is costly and the benefits would accrue to consumers rather than insurers).

<sup>30</sup> Although clearly outside the scope of this Article, some medical malpractice lawsuits may be different in this regard. I can imagine a lawsuit teaching a doctor that his practice standards had not kept pace with developments in the field and, thus, were morally compromised in a way that he had not appreciated.

<sup>31</sup> Indeed, fear and emotional distress are significant enough that courts across the U.S. award damages against insurance companies that unreasonably refuse to settle a liability insurance claim notwithstanding

adequate liability insurance is singled out and required to cooperate with the insurance company, with at least some resulting aggravation and inconvenience. Finally, the unlucky pay somewhat more for their auto insurance than the lucky because of experience rating.

So outcomes do matter to some degree, even taking auto insurance into account, though far less than is suggested by tort doctrine.<sup>32</sup> Moments of carelessness do not lead to massive loss for defendants, but they can lead to moderate loss, some of which comes in the form of injured feelings, aggravation and, possibly, diminished self-assessment (but the latter seems likely to follow, if at all, from the fact of the accident, not the resulting liability). In addition, auto liability insurance premiums depend in part on outcomes. Thus, auto insurance softens but does not entirely mitigate auto liability luck in the U.S.

#### **D. Special Cases: Drunk Driving, Underinsurance, and Some Severe Injuries**

Three exceptions to the usual pattern are drunk drivers, drivers with substantial assets who do not purchase adequate insurance, and, less commonly, ordinary drivers who cause a death or very severe injuries. Qualitative research suggests that these drivers are more likely to be made to pay out of their own pockets for injuries they cause to others, though typically much less than needed to cover the shortfall between the cost of the injuries and the amount of available insurance.<sup>33</sup> Thus, tort law subjects these drivers to more substantial liability luck.

In one sense, all three of these special cases can be understood as underinsurance cases: all these drivers could have purchased enough auto liability insurance to cover the full damages in even a very serious case (and in some jurisdictions even punitive damages).<sup>34</sup> For this reason, these cases involve what philosophers have called “option luck” (luck in outcomes that follow from a choice made under conditions of known risk) and are therefore less morally troubling than cases that implicate brute luck (luck in outcomes that do not involve such choices).<sup>35</sup> Indeed,

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the fact that the insurance companies did not cause any financial harm. *See Campbell*, 2001 UT 89, 65 P.3d 1134. Higher insurance policy limits can in at least some circumstances reduce the emotional distress that accompanies being the defendant in a tort action, but liability insurance cannot completely eliminate it.

<sup>32</sup> Cf. Tony Honoré, *The Morality of Tort Law: Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 3, at 73 (discussing the outcome responsibility aspect of tort law).

<sup>33</sup> Baker, *supra* note 21; *see also* Zeiler et al., *supra* note 25 (noting that, in cases in which doctors contributed to the payment of the damages, the amount of those payments was small relative to the amount paid by the insurance company).

<sup>34</sup> Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101; Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005).

<sup>35</sup> *See* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 293 (1981).

once liability insurance is widely available, any liability for which liability insurance could have been purchased is an example of option luck.<sup>36</sup>

As this generalization reveals, however, the concept of option luck does not help explain these three special cases. In every case in which the damages exceed the available insurance, the distinction between brute luck and option luck would provide justification for demanding full damages — not just the insurance money — from the defendant. The fact that accident occurred represents brute luck, while the gap between the damages and the defendant’s liability insurance represents option luck.<sup>37</sup> Yet plaintiffs rarely demand that defendants fill this gap, except in the three special cases. This pattern requires further explanation.

*Drunk drivers.* In the U.S., drunk-driving cases are different from ordinary auto accident cases at least in part because of the salience of drunk driving as a subject of public concern.<sup>38</sup> A longstanding grassroots advertising and public education effort has transformed drinking and driving from a peccadillo into a serious wrong.<sup>39</sup> Seen in this way, tort law in action treats drunk drivers differently because drunk drivers deserve to be punished more severely under prevailing social norms. When drunk drivers are required to pay blood money, that money is best understood as punishment, not compensation. When it comes to punishment, it seems we are more prepared to leave “something to chance.”<sup>40</sup> Indeed, the exposure to chance can be understood to be part of the punishment.<sup>41</sup>

*Underinsurance.* While the qualitative research on underinsurance and blood money is anything but precise, that research suggests that the social obligation to purchase liability insurance extends beyond the mandatory minimum coverage specified in automobile insurance

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<sup>36</sup> Thank you to David Enoch for this observation.

<sup>37</sup> It could be argued that in deciding to drive a person accepts a risk of injury and, thus, the injury represents option luck from the plaintiff’s perspective as well. The plaintiff’s and the defendant’s situation can be distinguished on at least two grounds, however. First, no amount of insurance can indemnify the plaintiff for bodily injury (think about pain as a deductible or coinsurance), while insurance can easily indemnify the defendant’s potential financial loss. Second, at least in negligence regimes, the plaintiff is less blameworthy than the defendant. If the plaintiff is a pedestrian, there are additional reasons for distinguishing between the plaintiff’s and the defendant’s situation.

<sup>38</sup> See generally H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* (1992); JOSEPH GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER* (1984).

<sup>39</sup> See, e.g., *SOCIAL CONTROL OF THE DRINKING DRIVER* (Michael D. Laurence et al. eds., 1988).

<sup>40</sup> See David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL & PUB. AFF. 53 (1980). Whether punishment should be subject to chance is an important question that is beyond the scope of this Article. See NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* (1999).

<sup>41</sup> Cf. Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law*, 89 IOWA L. REV. 443 (2004) (reporting experimental research concluding that uncertainty increases the deterrent impact of sanctions). Although I am avoiding consequentialist arguments in this Article, there are deterrence arguments in favor of punishing drunk drivers more severely than other drivers.

statutes.<sup>42</sup> This social obligation is not unlimited — otherwise pursuing at least some amount of money beyond the insurance policy limits would be the norm, not the exception. Field research suggests that the obligation to insure is tied to the wealth of the defendant and the kinds of risks that the defendant knew she was imposing on others. The wealthy have an obligation to purchase more liability insurance than the middle class, and an obstetrician has an obligation to purchase more insurance than an internist.<sup>43</sup> When defendants have not lived up to this obligation, the blood money that they are required to pay is best understood as a consequence for their violation of the social norm. Absent explicit legal requirements for purchasing insurance to satisfy this social obligation to insure, there is no other way to enforce that obligation.

*Severe injuries.* This last category is even more difficult to identify with precision. Sometimes defendants who have purchased an amount of insurance that would seem to satisfy the social obligation to insure are nevertheless required to pay blood money when the victim died or the injuries were very severe. The explanation supplied by field research is that the plaintiffs or the plaintiffs' surviving family members want to make these defendants suffer.<sup>44</sup> This reflects a desire for retribution that is similar to that in the drunk driving case, but without the criminal law enforcement overtones. Whether tort law in action should play this retributive role in these auto accident cases is an interesting and important question.<sup>45</sup> Whatever the correct answer to this question, however, the logic of demanding blood money in these cases is different from demanding the liability insurance money in an ordinary tort case.

*Summary.* In all three of these special cases, defendants are exposed to luck beyond that in the ordinary auto accident case, but the extent of this luck is less than suggested by reference to tort doctrine alone. Moreover, these cases are easily distinguishable from the mass of auto accident cases. The blood money payments in the drunk driving and serious injury cases represent an explicit demand for punishment. And the blood money payments in the underinsurance cases constitute the enforcement mechanism for the social obligation to insure. Accordingly, these exceptions do not undercut the general claim that liability insurance substantially mitigates liability luck in the auto accident context.

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<sup>42</sup> Baker, *supra* note 21, at 296-97.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., Kenneth Simons, *Corrective Justice and Liability for Risk Creation: A Comment*, 38 UCLA L. REV. 113 (1990) (discussing retributive justice).

### III. LIABILITY LUCK AND THE LIABILITY/NO-FAULT DEBATE

As noted earlier, some legal philosophers have used liability luck arguments to question the fairness of fault in existing tort doctrine and to argue for replacing fault-based auto liability with a no fault auto insurance system. In light of my conclusion that insurance substantially mitigates liability luck in the auto accident context, it will come as no surprise that I also conclude that concerns about liability luck do not provide a substantial basis for eliminating fault from the auto liability equation.

I will focus here on liability luck arguments made by Jeremy Waldron and Gregory Keating. Waldron uses arguments about liability luck to argue in favor of replacing fault with no fault in “Moments of Carelessness and Massive Loss.” In that essay, he begins by setting liability insurance aside in order to examine tort liability on its own, reasoning that if tort liability “needed the practice of third party insurance to *make* it just — then we would have to consider whether there are better ways of achieving that outcome than by combining tort liability and third party insurance in this fashion.”<sup>46</sup>

Using a variation on Williams’ auto accident, Waldron shows that there are two distinct aspects to liability luck: (a) a lack of proportion between blameworthiness and the amount of liability in many cases, and (b) fact that the lucky careless driver gets off free despite being equally blameworthy. He argues that these liability luck problems pose a serious challenge to the fairness of tort liability. Then, borrowing from David Lewis’s idea of a punishment lottery, he identifies a technical answer to this perceived unfairness in liability luck: tort law treats the lucky and unlucky drivers equally in the sense that both are exposed to the identical liability lottery. This answer barely works for him; it seems clear that it would not be satisfactory for ordinary drivers.<sup>47</sup>

There is little to disagree with in Waldron’s analysis so far. Were he to put liability insurance back into the equation at this point, he could hardly fail to agree that liability insurance reduces whatever injustice of the tort system is attributable to liability luck. But he does not put liability insurance back into the equation. Instead, he moves on to consider the justice of a no fault auto accident compensation system in which the people injured in accidents apply directly for payment to a compensation fund.<sup>48</sup> Then he compares this no fault alternative to an imaginary tort law system without liability insurance. Not surprisingly, he believes that drivers should prefer

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<sup>46</sup> Waldron, *supra* note 3, at 389.

<sup>47</sup> *Id.* at 401-07.

<sup>48</sup> *Id.* at 406.

no fault because a no fault compensation scheme does not expose them to liability luck. He concludes on this basis that tort liability is “unattractive as an alternative to [no fault] schemes.”<sup>49</sup>

With respect, I don’t believe that this reasoning adequately supports the conclusion, at least not if that conclusion is met to apply to actual practices. A persuasive argument in favor of shifting actual practices to a no fault compensation approach requires engaging the fact of widespread liability insurance, not a comparison with a hypothetical world in which there is no liability insurance. No functioning liability approach to automobile accidents has ever existed independent of liability insurance.<sup>50</sup> As insightful as Waldron’s exploration of liability luck clearly is, the no fault argument that he constructs from liability luck does not inform the public policy debate because it neglects to take liability insurance into account.

In a very recent article, Gregory Keating does make the requisite direct comparison.<sup>51</sup> Keating examines what he calls “enterprise liability” (a form of strict liability) as his preferred alternative to fault, so the relationship between his and Waldron’s analyses may not be immediately clear. Yet, strict liability and no-fault can be nearly equivalent in the ordinary auto accident situation.<sup>52</sup> Provided that drivers are equally likely to be victims and injurers, strict liability can be designed to function nearly identically to a no-fault insurance approach, as long as that liability is accompanied by mandatory liability insurance.<sup>53</sup> The main practical differences

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<sup>49</sup> *Id.* at 408:

The answer seems to me to be obvious: if there was ever a case for maxi-min, this is it. If people opt for the liability lottery, drivers face a non-trivial chance of complete ruin if they lose — all for the hope of a gain which consists simply of not losing anything if they win. . . . The insurance behavior of thousands of individuals who are in fact exposed to the liability lottery gives us a clear indication of drivers’ preferences in regard to these alternative arrays of payoffs.

In setting up this answer, he makes a point that is oddly mistaken: “the question seem to be one for the drivers, since the victims should receive the same (full) compensation, provided each scheme is perfectly administered on its own terms.” Fault-based schemes do not provide compensation to people who are injured without fault or by their own fault, so the victims do not “receive the same (full) compensation” in both schemes.

<sup>50</sup> See KENNETH ABRAHAM, *THE LIABILITY CENTURY* (forthcoming, Harvard University Press, 2008) (documenting the symbiotic relationship between liability and liability insurance in a variety of fields, including auto accidents).

<sup>51</sup> See Keating, *supra* note 3.

<sup>52</sup> See Gregory Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857 (2004) (explaining that enterprise liability within tort law and outside of it [in administrative no fault schemes that displace tort law] are of a piece and that enterprise liability can be implemented by first-party [loss] insurance as well as by third-party [liability] insurance). In the auto context, Keating’s approach would be conceptually similar to that urged for the U.S. in the Columbia Plan shortly before World War II (strict liability for drivers who cause accidents, together with mandatory liability insurance to make sure they have the resources to honor that liability). See Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance and the Challenge to Social Order in the Inter-War Years, 1919-1941*, 4 *CONN. INS. L.J.* 521 (1998).

<sup>53</sup> People are equally likely to be auto accident victims and injurers only if they are drivers. In that case the most obvious likely difference between no fault and strict liability with mandatory liability insurance

between no fault and strict liability in the auto accident context would be the following: (1) under no fault, the injured person's insurance company would pay the damages, while under strict liability the insurance company of the driver who caused the accident would pay the damages; and (2) under no fault, the driver in a single car accident would be eligible for insurance compensation, while under strict liability that driver would have no one else to hold liable and, thus, would not be able to recover.

As Keating recognizes, once we take liability insurance into account, the difference between fault and no-fault is not the possibility of massive loss for drivers who injure other people. Liability insurance easily eliminates that possibility. Instead, the difference for these drivers is expressive. Only a fault-based approach labels the behavior that led to the accident as a wrong. Absent a fault requirement, an auto accident claim provides no occasion to distinguish between careful and careless behavior, because nothing of importance to that claim turns on that distinction. For that reason, Keating concludes that no-fault "mitigates the effects of 'moral luck.'"<sup>54</sup>

Keating's concern about the expressive unfairness of the fault approach lies some distance from the specter of massive loss from moments of carelessness raised by Waldron. Taking auto liability insurance into account, the choice between fault and no fault matters comparatively little for drivers who cause accidents. In either case, it is an insurance company that pays the accident victims. And in either case the insurance premiums that all drivers pay are affected very little by liability luck.

Of course there is the expressive difference that Keating isolated. But, as previously described, the social process of insurance claims adjustment reduces this expressive difference between fault and no fault. Whatever expressive impact from a negligence claim survives the insurance adjustment process surely pales in moral significance in comparison to the impact of the negligence requirement on victims. The negligence requirement means that only those who are injured by an at-fault driver are eligible for auto insurance compensation. Negligence liability leaves out those who are injured without fault or through their own fault. A no fault approach includes them. Assessing the justice dimensions of the choice between fault and no fault requires considering this difference.

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concerns the treatment of single car accidents in which the only person injured is the person driving that car. Accidents involving commercial vehicles present a different situation that is outside the scope of this inquiry. Similarly, accidents involving victims who are not drivers (e.g., children, residents in some large cities) also present a different case.

<sup>54</sup> Keating, *supra* note 3, at 5 (arguing that strict liability "attributes accidents to the *activities* which are pervasively responsible for them rather than to individual actors who happen to occasion them").



If we believe that being injured through the fault of another increases the moral entitlement to compensation, then linking compensation and fault makes sense. In that case, the policy choice would be between the existing regime (negligence liability plus liability insurance) and an alternative, fault-based insurance regime in which victims make claims directly against an insurance fund rather than having to bring a claim against the at-fault person.<sup>55</sup> But if fault provides no greater moral entitlement to compensation, then the fairness case for the negligence liability and insurance approach weakens considerably. In that case, why should the victim's ability to recover turn on whether she was lucky enough to be injured by a careless driver? These are just some of the important and difficult questions that must be answered in order to determine whether moving to no fault would lead to a more just approach to auto liability and compensation.

### CONCLUSION

Auto liability insurance narrows the difference between fault and no-fault and substantially mitigates liability luck in auto accidents. Auto liability insurance goes a long way toward providing broad auto accident victim compensation.<sup>56</sup> Auto liability insurance largely eliminates the problem of "moments of carelessness and massive loss" for defendants (except in the special cases I addressed, and even in those cases, the problem is smaller than tort doctrine suggests). And the bureaucratization of the liability insurance claiming process makes transaction costs and social (blame) consequences significantly lower than what a typical torts student or observer might think.<sup>57</sup>

Of course, auto liability insurance does not eliminate all differences between fault and no fault. No fault would provide compensation to people injured without fault or through their own fault, and it may provide compensation with somewhat lower transaction costs. But unless no fault substantially reduces the level of benefits presently provided to people injured through fault, no fault would be more expensive because more people would recover. This means that moving to no fault would require either (a) taking money away from people injured at fault to give to people injured without fault (or through their own fault) or (b) devoting more resources to automobile accident compensation. In addition, some empirical research suggests that no fault may increase the number of automobile accidents, so that moving to no-fault may increase the

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<sup>55</sup> Cf. Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) (articulating an approach to tort liability that is analogous to such an insurance scheme).

<sup>56</sup> The fact that the legally mandated limits are so low relative to the potential damages obviously limits this claim, but the problem of making limits adequate for the potential damages would be present under a no fault system as well.

<sup>57</sup> ROSS, *supra* note 28.

number of people injured in accidents.<sup>58</sup> Concern about these potential new victims provides yet another possible justification for the existing negligence liability and insurance approach.

In short, considering whether to make the move from fault to no fault for auto accidents involves resource allocation questions that present difficult moral choices. Utilitarian reasoning and empirical research are unlikely to provide adequate answers on their own.<sup>59</sup> We can use all the help we can get from moral and legal philosophy. But we are not going to find that help in the moral luck literature. Once we take auto insurance into account, the moral questions that matter most concern the effect of the legal regime on people who are, or who might be, injured in auto accidents — not the effect on the drivers who injure them.

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<sup>58</sup> See Cohen & Dehejia, *supra* note 16.

<sup>59</sup> Cf. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 603 (1982) (“[T]he move to efficiency transposes a conflict between groups in civil society from the level of a dispute about justice and truth to a dispute about *facts* — about probably unknowable social science data that no one will ever actually try to collect but which provides ample room for fanciful hypotheses.”).