Loyola of Los Angeles Law Review

Volume 44
Number 1 *Fall 2010 - Symposium: Injuries without Remedies*

Article 4

9-22-2010

Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the Choice Architecture of Auto Insurance Pricing

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AUTOMOBILE INJURIES AS INJURIES WITH REMEDIES: DRIVING, INSURANCE, TORTS, AND CHANGING THE "CHOICE ARCHITECTURE" OF AUTO INSURANCE PRICING

*Jennifer B. Wriggins**

While mandatory auto insurance laws virtually guarantee the availability of remedies for auto injuries, other types of physical injuries, including those resulting from domestic violence, lack similar protections. By providing a broad array of compensation mechanisms to auto accident victims, the law encourages people to drive more. The rationale underlying that public policy has, however, eroded. Environmental degradation, public health problems, and other costs require overhauling the system. This Article recommends two changes to the auto insurance system aimed at encouraging people to drive less.

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INTRODUCTION

Justice Oliver Wendell Holmes famously wrote, "The general principle of our law is that loss from accident must lie where it falls. [The] cumbrous and expensive machinery [of the state] ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*."[1] Thus, while the common law promises that there is no right without a remedy, Holmes believed there needed to be a strong justification to allow remedies for accidents and other harms.

There is rarely any tort remedy without insurance.[2] For decades, the major mechanism in the United States for funding tort remedies has been liability insurance—which is, in theory, private—but actually is so infused with public policy that many consider it a governmental mechanism in some contexts. Over the last century, the "cumbrous and expensive machinery of the state" has been marshaled to ensure that victims of car accidents are compensated. The negligence regime, the dominant regime applied to car accidents in the United States, is designed to take activity levels as a given, and not to reduce them. Part I explains that mandatory auto insurance laws, uninsured and underinsured motorist coverage, laws requiring insurance be offered to risky drivers, and judicial constructions of "public policy" are among the mechanisms that enable compensation for auto accident victims. As cars have a most-favored transportation status, injuries to people caused by cars have a most-favored injury status. This phenomenon matches what Lawrence Friedman has called the "general expectation of compensation" in U.S. tort law and legal culture.[3] At the same time, the extensive array of insurance for auto injuries contrasts starkly with the lack of insurance for many other types of physical injuries, including domestic violence injuries. The norm of the "general expectation of compensation" in application, as Part I briefly shows and many of the papers in this

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 76–77 (Mark DeWolfe Howe ed., 1963).

2. *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 1 (2008); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2005); Kent Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629 (1994).

3. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 60 (1985).

symposium emphasize,[4] turns out to be inconsistent, incomplete, and limited.[5]

Part II views automobile insurance through a new lens. Automobile insurance has developed almost exclusively as a victim-compensation mechanism.[6] Its encouragement of driving has largely been ignored, until now. Because auto insurance provides a broad array of compensation mechanisms, it makes driving financially more secure and thus encourages driving.[7] Further, to use Richard Thaler and Cass Sunstein's phrase, the "choice architecture" of automobile insurance, typically selling policies in one-year increments at practically the same price whether a buyer drives a little or a lot, encourages driving.[8] This is because once one has purchased a policy, one can drive all one wants with no increased insurance price.[9] The sale of auto insurance has been aptly likened to an all-you-can-eat buffet, where consumers overfill their plates because of the way the meal is priced.[10] Driving has many negative externalities, including greenhouse gas emissions, risks of causing or suffering physical injury, highway costs, and negative public health consequences that were not considered when the current tort-and-

4. *See, e.g.*, David Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 LOY. L.A. L. REV. 33 (2010); Marc Galanter, *The Dialectics of Injury and Remedy*, 44 LOY. L.A. L. REV. 1 (2010); S. Lochlann Jain, *Fear of Cancer*, 44 LOY. L.A. L. REV. 233 (2010); Douglas L. Johnson & Neville L. Johnson, *What Happened to Unjust Enrichment in California? The Deterioration of Equity in the California Courts*, 44 LOY. L.A. L. REV. 277 (2010); George Lovell, *Imagined Rights Without Remedy: The Politics of Novel Legal Claims*, 44 LOY. L.A. L. REV. 91 (2010); Gowri Ramachandran, *Assault and Battery on Property*, 44 LOY. L.A. L. REV. 253 (2010); Dayna Nadine Scott, *Body Polluted: Questions of Scale, Gender, and Remedy*, 44 LOY. L.A. L. REV. 121 (2010).

5. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) for a discussion of this point in several contexts. See Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 129 (2001), for a discussion of this point specifically as it relates to domestic violence.

6. Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 CONN. INS. L.J. 521, 524 (1998).

7. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 1–14 (2008) (explaining the impact of design choices and how the arrangement of options can influence the choices people make).

8. *Id.* at 11.

9. *See generally id.* (describing how conscious arrangements of choices can influence humans' decisions, using the example of how food placement in a cafeteria can influence the type and amount of food that is chosen and consumed).

10. JASON E. BORDOFF & PASCAL J. NOEL, THE BROOKINGS INST., PAY-AS-YOU-DRIVE AUTO INSURANCE: A SIMPLE WAY TO REDUCE DRIVING-RELATED HARMS AND INCREASE EQUITY 5 (2008).

insurance framework was built.[11] I propose generally that legislatures and judges apply a broader concept of public policy—that includes public health and environmental issues—when regulating auto insurance. More concretely, I recommend two changes to the auto insurance system aimed at encouraging people to drive less.[12] The first is making the actual ongoing cost of insurance visible to people as they drive. The second is encouraging pay-as-you-drive, or usage-based, insurance, which uses data about mileage driven as a significant component of the price of insurance. These two reforms would reduce the amount of driving and the many costs associated with driving.

I. HOW COMPENSATION OF AUTOMOBILE INJURIES IS FAVORED BY INSURANCE AND TORT LAW (THUS ENCOURAGING DRIVING)

A. The Tort Regime of Negligence Takes Activity Levels as a Given

The negligence liability regime that is applied to car accidents, holding a driver liable only if her carelessness caused injury to another, is not designed to affect (and particularly not designed to reduce) activity levels.[13] The negligence theory takes the activity as a given and requires only that participants in that activity take cost-justified precautions.[14] This is not the only legal regime that could be applied to car accidents. In theory, strict liability could be applied. In fact, as autos and the injuries they caused became more widespread, scholars and commentators began to float the idea of strict liability

11. *See, e.g.*, James Woodcock et al., *Public Health Benefits of Strategies to Reduce Greenhouse Gas Emissions: Urban Land Transport*, 374 LANCET 1930 (2009).

12. With Robert Jerry and others, I regard judicial decisions about auto insurance as a form of regulation. *See* ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 141–58 (4th ed. 2007).

13. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980). As William Vickrey noted in 1968, "systems which require payments by the actors only in case of fault and only to the extent of the compensation received by others (even with expenses of adjudication and administration added) fail to give an adequate incentive for seeking out alternatives not involving the increased risk of vehicular accident." William Vickrey, *Automobile Accidents, Tort Law, Externalities and Insurance: An Economist's Critique*, 33 LAW & CONTEMP. PROBS 464, 467 (1968); *see also* Aaron S. Edlin, *Per-Mile Premiums for Auto Insurance*, 3 (Nat'l Bureau Econ. Research, Working Paper No. 6934, 1999) ("Every time a driver takes to the road, and with each mile she drives, she exposes herself and others to the risk of accident. Insurance premiums are only weakly linked to mileage, however, and have largely lump-sum characteristics. The result is too much driving and too many accidents.").

14. *See* Shavell, *supra* note 13, at 2; Vickrey, *supra* note 13, at 467; *see also* Edlin, *supra* note 13, at 3.

on the basis that cars are a dangerous instrumentality.[15] A strict liability regime raises the cost of an activity, thus encouraging actors to consider, and possibly lower, their activity levels in order to save costs.[16] But the "dangerous instrumentality" theory did not go far.[17] Also, comprehensive strict liability schemes have been proposed. Indeed, in the 1930s, the leading tort and insurance experts of the day put forth a detailed plan known as the Columbia Plan, which proposed a complete scheme of strict liability without fault for auto accidents coupled with limits on damages modeled on workers' compensation.[18] This failed for a variety of reasons in the United States, but the idea has become a reality in several parts of the world, including New Zealand and parts of Canada.[19] Despite these ideas for alternative liability regimes, the negligence regime is well entrenched in U.S. auto law and provides no traction for reducing activity levels.

B. Automobile Liability Insurance Is Mandatory in Almost All States

Requiring drivers to purchase liability insurance, as almost all states do, shows that legislatures believe that compensating injuries caused by negligent drivers is a compelling public policy.[20] Indeed, the spread of auto use in the 1920s and 1930s in the United States was accompanied by huge numbers of accidents, leading to calls for regulation.[21] Mandatory auto liability insurance began in 1927, with Massachusetts passing the first such law[22] and the vast majority of states currently requiring it.[23] In those few states where insurance is not mandatory, financial responsibility laws reflect the same goal, namely that there be a pool of money from which injured people can draw for compensation. The public policy of victim compensation,

15. Simon, *supra* note 6, at 562; S. Lochlann Jain, *"Dangerous Instrumentality": The Bystander as Subject in Automobility*, 19 CULTURAL ANTHROPOLOGY 61, 61–94 (2004).

16. Shavell, *supra* note 13, at 2–3.

17. Jain, *supra* note 15, at 61–94.

18. ABRAHAM, *supra* note 2, at 74–76; Simon, *supra* note 6, at 567–85.

19. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 39–40 (4th ed. 2009).

20. JERRY & RICHMOND, *supra* note 12, at 960.

21. ABRAHAM, *supra* note 2, at 70–74; ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 385–86 (1988); Simon, *supra* note 6, at 530–67.

22. Simon, *supra* note 6, at 527.

23. ABRAHAM, *supra* note 2, at 73.

particularly for negligently caused injuries, has been a driving force for legislation and judicial decision since the first standard auto policies were developed in the 1920s and 1930s.[24] Auto policies also now contain first-party elements from which injured people may collect medical expenses on an initially no-fault basis and may enjoy other types of coverage like towing and collision.[25] Kenneth Abraham, in his classic book *Distributing Risk*, gives the example of a straightforward car accident in which the "simple problem of tort liability is likely to be overwhelmed by the array of insurance available to the parties."[26]

It is worthwhile reflecting for a moment on what that means and contrasting it with other types of insurance and other types of losses. Everyone who drives is required by law to have liability insurance so that if the driver negligently injures someone, the injured person can sue the driver for damages and there will be a pool of money available to that injured person. Compensation for victims is an important part of this framework. There are other implications too. For instance, people can drive with minimal fear of personal liability should they be careless and cause harm.[27] Because drivers have minimal fear of personal liability, their attention to safety is reduced, according to classic moral hazard theory.[28] Their insurance rates may go up in the future, but this is far removed from day-to-day driving decisions that are closely tied to safety.

Decades ago, the decision was made that in this context, while mandatory liability insurance would create moral hazard that would increase risky behavior and injuries, this increase was "worth it" because driving and compensation were so important.[29] It is hard to

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24. KEETON & WIDISS, *supra* note 21, at 385–86.

25. KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY 133 (1986).

26. *Id.*

27. This is assuming that they have adequate insurance. However, even if a person does not have adequate liability insurance, plaintiffs' lawyers much prefer to seek money from insurance companies rather than from individuals. Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 276 (2001). In the above situation, it is more likely that an injured person will be undercompensated than that a wealthy person will lose assets.

28. *See* Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–90 (1994).

29. *See generally* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 108 (1998) (for compensatory purposes "insurance-deterrence tradeoff is widely tolerated"); Simon, *supra* note 6, at 566, 576–77 (explaining how proponents of loss-spreading

estimate the amount of increased risky driving caused by mandatory auto insurance, but economists Alma Cohen and Rajeev Dehejia conclude that mandatory auto insurance actually has resulted in a moral hazard cost in the form of increases in traffic fatalities.[30] This in itself is of serious concern. In addition, the presence of universal mandatory liability insurance surely encourages the activity of driving, since drivers do not need to take into account possible personal liability if they make a careless mistake and injure someone.

C. Uninsured and Underinsured Motorist Coverage Provides Additional Financial Protection

Uninsured and underinsured motorist coverage, which must either be purchased or offered in most states, also makes driving financially safer.[31] This allows (and in some states requires) a driver to purchase coverage to protect her in the event she is injured by another driver who is not insured or who is inadequately insured.[32] The coverage includes the equivalent of liability coverage for the other driver, so the injured insured can claim pain and suffering and other damages when injured by an uninsured driver's negligence.[33] Such coverage provides even more security for driving by providing liability compensation to a driver if she is injured by another driver who is uninsured or underinsured.[34] This typically inexpensive coverage provides a way for drivers to buy plenty of insurance to cover for someone else's failure to do the same. Whatever else this coverage does, it makes driving more attractive and costs more predictable by guaranteeing that more of the risks of driving are covered by insurance.[35]

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auto insurance saw a parallel with workers' compensation, where both automobile and workplace injuries at the time "involved horrific and largely unavoidable damage to individuals and to the network of dependents, creditors, and others that economically relied on the individual").

30. Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 357 (2004).

31. ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE §§ 2.5–2.6, at 29–34 (rev. 2d ed. 1999).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

D. Companies Are Required to Insure Risky Drivers That They Would Rather Not Insure

The policy of cradling auto accident victims with liability insurance pools is so strong that auto insurance companies are required to insure drivers that they do not want to insure—drivers that insurance companies think are too dangerous to insure.[36] In order to drive, drivers must have insurance, so a decision that someone is too risky to insure is a decision that the person cannot drive. There are several mechanisms for requiring this, such as assigned-risk plans and joint underwriting plans.[37] Regardless of the specific mechanism, the point is the same: driving is too important for the insurance market to decide who can drive or not. Driving is so important that the government must, and does, find a way to get really risky drivers insured and on the road.[38] This has the effect of making it less safe to drive because of the dangerous drivers on the road who have insurance, and at the same time somewhat mitigates that effect by requiring a pool of funds to be available for liability claims. As making coastal insurance available to homeowners who insurers do not want to insure leads to inopportune coastal development,[39] so mandating coverage of dangerous drivers likely leads both to more driving and to more bad driving.

E. Auto Insurance Pricing Is Not Sensitive to the Amount a Person Drives

Auto insurance is sold by the year, and the cost is roughly the same for drivers, regardless of their annual mileage.[40] The way

36. *Id.* § 2.8.

37. *See Residual Markets*, INS. INFO. INST., http://www.iii.org/media/hottopics/insurance/residual (last visited Jan. 24, 2011).

38. Another context of mandating insurance when the market fails is urban Fair Access to Insurance Requirement plans, which about half the states have. These were instituted after the urban riots of the 1960s to ensure that property insurance was available in inner cities. The public policy reasons for this market intervention are quite different from the requirements to insure risky drivers. *Id.*; *see* Joshua A. Randlett, *Fair Access to Insurance Requirements: Do "FAIR" Property Insurance Premiums for Individual Coastal Property Owners in Massachusetts Equate with Fairness to the Greater Market?*, 15 OCEAN & COASTAL L.J. 127, 134–35 (2010).

39. *Residual Markets*, *supra* note 37 ("One disadvantage of Beach and Windstorm Plans, and the National Flood Insurance Program, is that the availability of insurance encourages development of coastal areas where construction otherwise would not be feasible . . . ."). *See generally* Randlett, *supra* note 38, at 134–36 (citing growth in "coastal areas at risk of hurricane damage attributed to 'the rapid rise in coastal development and property values'").

40. BORDOFF & NOEL, *supra* note 10, at 5.

policies are sold, typically in one-year or six-month increments, makes day-to-day decisions whether to drive far removed from the cost of insurance.[41] The insurance cost is significant. "Americans pay an average of 6.6 cents in collision and liability insurance premiums for every mile they drive."[42] Because most cars get approximately twenty miles per gallon, this means that drivers pay approximately $1.32 per gallon in insurance costs.[43] Yet, drivers' mental calculations generally do not work that way. Drivers tend to forget the up-front insurance cost when deciding whether and how much to drive.[44]

Second, insurance policy pricing is not sensitive to the amount one drives. A driver who is the same age and gender as her neighbor, who has the same driving record as her neighbor, and who drives 5,000 miles per year, pays roughly the same for auto insurance as her neighbor who drives 50,000 miles per year.[45] Thus, once a driver purchases a policy, insurance does not provide an incentive to drive less. Economists have been making this point about auto insurance pricing for over forty years.[46] Technology now exists, as it did not

41. *See generally* THALER & SUNSTEIN, *supra* note 7, at 75–76, 97–100 (using situations where people get pleasure now and pay consequences later as examples of situations where choice architecture should be analyzed); *id.* at 98–99 (claiming that car buyers underweight the opportunity costs of buying a car as compared with the costs of taking cabs because the costs associated with cab use are more salient than those of car ownership); *id.* at 185–96 (discussing improving incentives for environmental protection, such as providing information to consumers on how much energy they use).

42. BORDOFF & NOEL, *supra* note 10, at 45.

43. *See id.*; Aaron S. Edlin, *Per-Mile Premiums for Auto Insurance, in* ECONOMICS FOR AN IMPERFECT WORLD: ESSAYS IN HONOR OF JOSEPH E. STIGLITZ 53, 53–54 (Richard Arnott et al., eds.).

44. Edlin, *supra* note 43, at 53. The related issue of driving behavior sensitivity to gas prices, known as price elasticity of demand for gasoline, is complex and thorny. *See, e.g.*, Jonathan E. Hughes et al., *Evidence of a Shift in the Short-Run Price Elasticity of Gasoline Demand*, 29 ENERGY J. 113 (2008); Clifford Krauss, *As Gas Prices Go Down, Driving Goes Up*, N.Y. TIMES, (Oct. 29, 2008), http://www.nytimes.com/2008/10/30/business/worldbusiness/30iht-30gasoline.17363533.html?pagewanted=1. *See generally* THALER & SUNSTEIN, *supra* note 7, at 98–99 (claiming car buyers underweight the opportunity costs of buying a car as compared with the costs of taking cabs because the costs associated with cab use are more salient than those of car ownership); *id.* at 134–36 (discussing the importance of clear disclosure of cost to consumers when making financial decisions).

45. BORDOFF & NOEL, *supra* note 10, at 5. Although some companies ask for mileage driven, this generally has little effect on premium amounts. In one recent instance, USAA's receipt of information that a car was driven only one-third of what the company had thought, and less than 5,000 miles per year, resulted in a decreased premium of only thirteen dollars. Interview with USAA Employee (Mar. 1, 2010) (on file with author).

46. *See* Vickrey, *supra* note 13, at 464 (noting in a 1968 article the lack of incentive to drive less).

when the issue was first raised in 1968, to accurately and inexpensively determine how many miles have been driven on an ongoing basis, and to price insurance accordingly.[47]

F. Courts Construe "Public Policy" in the Context of Auto Insurance as Narrowly Aimed at Victim Compensation

When judges construe exclusions in auto policies, they do so against a backdrop of state legislation that makes certain coverage mandatory.[48] Many courts have struck down certain exclusions such as family-member exclusions (which are contractual provisions precluding coverage for claims by one family member against another), because they violate "public policy."[49] The public policy, in the words of the Supreme Court of Texas, is simply that of "ensuring that every motor vehicle is covered by an automobile liability policy that will protect all claimants against losses which arise out of the operation of the vehicle."[50] This public policy is rooted in the legislature's decision to make auto liability coverage mandatory. By providing even broader coverage than arguably is contracted for, these decisions reduce driving-related financial risks to drivers, thus making driving yet more attractive.

G. People Injured by Autos More Frequently Claim and Receive Compensation Than People Injured in Other Ways

Given the prevalence of auto liability coverage, it is not surprising that automobile injuries are the type of injury for which people most frequently claim compensation (leaving aside workplace

47. *See infra* Part II.B.2.

48. *See, e.g.*, State Farm Mut. Ins. Co. v. Schwartz, 933 F.2d 848, 852 n.4 (10th Cir. 1991).

49. *See, e.g.*, *id.* at 848–49 (holding that auto policy provision excluding coverage for bodily injury to any insured or member of the insured's family residing in the household contradicts Oklahoma public policy); Bishop v. Allstate Ins. Co., 623 S.W.2d 865, 865 (Ky. 1981); State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co., 516 A.2d 586, 591–92 (Md. 1986); State Farm Mut. Auto. Ins. Co. v. Ballard, 54 P.3d 537, 541 (N.M. 2002); Estep v. State Farm Mut. Auto. Ins. Co., 703 P.2d 882, 884–88 (N.M. 1985); Nat'l Cnty. Mut. Fire Ins. Co. v. Johnson, 879 S.W.2d 1, n.6 (Tex. 1993); *see* 7 AM. JUR. 2D *Automobile Insurance* § 250 (2010); GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 19:4 (2d ed. 2009); Martin J. McMahan, Annotation, *Validity, Under Insurance Statutes, of Coverage Exclusion for Injury to or Death of Insured's Family or Household Members*, 52 A.L.R. 4TH 18 (1987); Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252–53 (2002).

50. *Nat'l Cnty. Mut. Fire Ins. Co.*, 879 S.W.2d at 2.

injuries) by a wide margin.[51] In an authoritative 1991 study, the claim rate for auto injuries in the United States was 44 percent, contrasted with 3 percent for non-workplace, non-motor vehicle injuries.[52]

A more recent study of paid auto claims using data through 1997 found that the claim rate for auto injuries rose somewhat between 1991 and 1997.[53] Regardless of the relatively small changes in claiming rates for auto injuries, it is undisputed that auto claims are by far the largest single category of tort cases.[54] There is a societal expectation that losses from car accidents should not lie where they fall but instead should be shifted and spread through liability and insurance.[55]

H. Other Types of Tortiously Caused Injury Are Likely to Be Uninsured and Uncompensated

Injuries from sources other than cars are not necessarily covered by liability insurance of any sort.[56] No governmental mandate requires a homeowner or landlord to purchase liability insurance. Banks require liability insurance as a condition for a mortgage, but if a person has paid off her mortgage, it is up to her whether to buy liability insurance.[57] Stated otherwise, there is no governmental public policy specifying that it is essential that victims of either

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51. *See* DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110–11 (1991) (noting exclusion of workplace injuries in analysis because workers compensation generally covers such injuries).

52. *Id.* at 121.

53. Mark J. Browne & Joan T. Schmit, *Litigation Patterns in Automobile Bodily Injury Claims 1977–1997: Effects of Time and Tort Reforms*, 75 J. RISK & INS. 1, 83–100 (2008) (finding attorney hiring and claim filing have risen over time but have been somewhat dampened by tort reform).

54. *Id.*

55. This neither asserts that the losses from car accidents are always clear, nor that they are adequately compensated. Discussion and debate about the adequacy of damages is perennial and beyond the scope of this Article. *See generally* ABRAHAM, *supra* note 2, at 91–92, 100–03 (2008); Symposium, *Who Feels Their Pain? The Challenge of Non-Economic Damages in Civil Litigation*, 55 DEPAUL L. REV. 1 (2006) (providing information and analysis regarding the topic of awarding damages for noneconomic injury, particularly pain-and-suffering damages in tort cases).

56. This discussion focuses on injuries generally recognized as tortious and does not explore issues surrounding the recognition of injuries as discussed by many other participants in the Injuries Without Remedies Symposium. *See supra* note 4.

57. *See* ABRAHAM, *supra* note 2, at 176–78 (describing the history of marketing homeowners liability insurance policies).

homeowner or landlord negligence must be compensated for their injuries.[58] Rather, such negligence victims are subject to the luck of the draw, when it comes to insurance and compensation. To take a concrete example, tenants injured by a landlord's negligence leading to injuries from a fire or from lead paint may well find that their landlord lacks insurance for their injuries.[59]

Even more starkly, victims of injuries from domestic violence are excluded from liability insurance compensation. Despite the serious and widespread problem of domestic violence, which almost by definition is tortious (as well as criminal), the number of tort cases filed for domestic violence injuries is miniscule.[60] Domestic violence injuries are injuries without remedies. Liability insurance exclusions, together with short statutes of limitations for intentional torts and other factors, almost guarantee that tort law will not provide a useful remedy to injured people in this context.[61]

The remedial arrangements that privilege auto injuries and disadvantage other injuries are both understandable and problematic. These remedial arrangements—the panoply of tort and insurance mechanisms surrounding auto insurance and driving—developed during periods when the public health and environmental

58. On a related note, no statute exists that requires the purchase of life insurance, should one decide against it. The taxation system includes incentives for people and employers to purchase life insurance, but does not require purchase. *See generally* Kyle Logue, *The Current Life Insurance Crisis: How the Law Should Respond*, 32 CUMB. L. REV. 1 (2001) (exploring issues raised by recent evidence of underinsurance). This implies that a person's decision to underinsure oneself and leave one's dependents with virtually nothing is his to make.

59. *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 605, 612 (2006).

60. *See* Jennifer Wriggins, *Domestic Violence in First Year Torts*, 54 J. LEGAL EDUC. 511, 512–13 (2006).

61. The two most significant liability exclusions are the intentional acts exclusion and the family-member exclusion. Homeowner and car insurance policies have exclusions that deny coverage for intentional acts of the insured. Since injuries from domestic violence are almost always intentional acts (battery, assault, false imprisonment, and intentional infliction of emotional distress, for example), it is inevitable that there is generally no liability coverage for domestic violence torts. *See* Wriggins, *supra* note 5, at 135–37. In addition, liability insurance companies have inserted family-member exclusions into their policies as standard features. These provide that the insurance policy will not cover the claim if a family member files suit against another family member for injury, applying to both negligence and intentional tort claims. *Id.* With no applicable liability insurance for the reasons stated above, potential plaintiffs are forced to seek recovery against assets of the defendant (if any). This is never a lawyer's preference since few people have unprotected assets for recovery. *Id.* at 137–39. In some states, any tort claims must be brought in the same lawsuit as the divorce claims. This presents a huge disincentive for domestic violence survivors who might only be able to consider a tort claim after they have obtained a divorce and found a safe setting in which to contemplate such a lawsuit. *Id.* at 140–41.

externalities of automobiles were not understood or considered. Instead, they reflected widespread love for automobiles and the freedom they provide, concern for the physical injuries they cause, and appreciation of their economic importance.[62] Auto injuries also fit within the tort paradigm of accidental harm caused by strangers.[63] The panoply of tort and insurance mechanisms that disadvantage domestic violence injuries mostly arose when interspousal tort immunity was in force and when the legal system excluded women from decision-making roles. Domestic violence injuries, which are likely to be intentionally caused by a person whom the victim knows, fall outside the traditional tort paradigm of accidental harm caused by one stranger to another.[64] Advantaging auto injuries while disadvantaging domestic violence injuries is unjustifiable from deterrence, compensation, corrective justice, and gender equality perspectives. Neither set of remedial arrangements is inevitable. In other work, I have suggested an approach for making domestic violence torts into injuries *with* remedies and promoting deterrence, compensation, justice, and gender equality;[65] I will not repeat that here. Instead, I will approach auto insurance as a public health and environmental issue, taking auto injuries as paradigmatic injuries *with* remedies and moving toward broader consideration of the activity of driving itself.

II. AUTO INSURANCE AS A PUBLIC HEALTH, COST, AND ENVIRONMENTAL ISSUE: TOWARD A BROADER CONCEPT OF PUBLIC POLICY

A. The Many Reasons to Discourage Driving

Given the huge public health problems, environmental degradation, and other costs caused by cars, there is an urgent need for a shift in public policy regarding cars' use. Emissions from cars

62. *See* Jain, *supra* note 15; Simon, *supra* note 6. For instance, Catherine Barnes writes that autos were warmly welcomed by African-Americans who, if they could afford a car, rushed to enjoy the freedom it gave them from Jim Crow restrictions in public transportation. CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 17–18 (1983).

63. *See* Wriggins, *supra* note 5, at 178–83.

64. *Id.*

65. *Id.* at 129.

are a huge element of greenhouse gas emissions.[66] Greenhouse gas emissions are the primary cause of global warming, which has had and will have massive consequences and costs.[67] Cars have negative public health consequences in terms of reducing humans' physical activity and increasing heart disease, in addition to affecting human health through air pollution.[68] Sprawl, which both necessitates and is a product of car dependence, entails huge financial and non-financial costs.[69] While many factors determine how much people drive, including economic and family necessity, it is still clear that Americans drive more than they need to, and that the amount of driving is unsustainable. Auto liability insurance is a staggering cost to consumers, and road maintenance and construction are immense costs to society.[70] Assumptions and priorities that held sway during the last ninety years about expanding insurance and victim compensation in the auto field, which were aimed at making driving economically safer and more widespread as an activity, must be revised.

Federal incentives and regulations focused on externalities from driving have targeted emissions and fuel efficiency, while state rules on driving have been directed at driver safety.[71] Insurance regulation, in the purview of the states—while purportedly based on public policy—has been implicitly opposed to the goal of reducing greenhouse gas emissions and driving.[72] Rather, insurance regulation

66. Woodcock et al., *Energy and Transport*, 370 LANCET 1078, 1078–88 (2007).

67. *Key Findings*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, http://www.globalchange.gov/publications/reports/scientific-assessments/us-impacts/key-findings (last visited Sept. 2, 2010).

68. Woodcock et al., *supra* note 11, at 1930.

69. Katharine B. Silbaugh, *Walmart's Other Woman Problem: Sprawl and Work-Family Balance*, 39 CONN. L. REV. 1713, 1713–14 (2007).

70. ABRAHAM, *supra* note 2, at 69 (stating that the cost of liability insurance for auto accidents is $110 billion per year; cost of first party insurance and other forms of physical damage to the policyholder's own car is an additional $70 billion); DAVID BURWELL & ROBERT PUENTES, NAT'L GOVERNORS ASS'N, INNOVATIVE STATE TRANSPORTATION FUNDING AND FINANCING 1 (Darren Springer ed., 2008) (noting that the National Surface Transportation Policy and Revenue Study Commission in 2008 recommended spending at least $225 billion annually for the next 50 years to maintain and enhance the U.S. surface transportation system).

71. ALLEN GREENBERG, FED. HIGHWAY ADMIN., DESIGNING PAY-PER-MILE AUTO INSURANCE REGULATORY INCENTIVES USING THE NHTSA LIGHT TRUCK CAFE RULE AS A MODEL 13 (2006).

72. *Id.* at 5–6.

has treated driving almost as a right of Americans; the privileging of auto injuries over other injuries reflects this assessment.[73]

Little attention has been given to discouraging driving, although reducing miles traveled would be as effective a strategic response to many of the public concerns linked with driving as the focus on fuel efficiency, emissions, and safety.[74] Simply put, if people drive less, they will use less gasoline, cause fewer emissions, and be less at risk of suffering injury in a car accident. A reduction in driving would also have substantial health benefits, particularly by lowering heart disease.[75] Public policy connected to automobiles now cuts strongly in favor of finding ways to discourage driving.[76]

Driving is inextricably tied to insurance. Therefore, automobile insurance reform should be tailored to discourage driving. All alternatives that discourage driving should be evaluated, including analyzing and questioning the insurance mechanisms that encourage driving.[77] Even the use of the negligence regime for auto accidents, because it does not affect activity levels, should be discussed.[78] Relatively uncontroversial mechanisms, such as assigned-risk pools that force companies to insure people they do not want to insure and that give risky people the right to drive, should be analyzed and questioned.[79] Legislatures' and courts' narrow view of "public policy" in the context of insurance policies should be reconsidered.[80] Two of the most promising ideas for discouraging driving are first, making people more aware of day-to-day insurance costs, and second, making auto insurance pricing more sensitive to the amount people drive through pay-as-you-drive, or usage-based, rate policies.

73. Since states require that insurance be offered even to potentially risky drivers and have detailed statutory limitations on policy cancellations, state laws treat driving almost as a right. *See, e.g.*, ME. REV. STAT. ANN. tit. 24-A, § 2911 (1977). The fact that one has to pay to exercise this "right" does not undermine the point, because there are many rights in our system of negative rights that a person has to pay to exercise. *See, e.g.*, Harris v. McCrae, 448 U.S. 297 (1980).

74. GREENBERG, *supra* note 71, at 13.

75. Woodcock et al., *supra* note 11, at 1930, 1935–36.

76. *See, e.g.*, *id.* at 1930 (discouraging travel in private motor vehicles to provide larger health benefits).

77. Given the use of the negligence regime in the context of auto injuries, it is hard to imagine repealing mandatory auto insurance laws or changing uninsured/underinsured options, but more thought should be given to aspects of our system that we take for granted. *See supra* Parts I.A. and I.B.

78. *See supra* Part I.A.

79. *See supra* Part I.D.

80. *See supra* Part I.F.

B. Two Insurance-Related Ways to Discourage Driving

1. Make Insurance (and Gas) Costs More Visible

Many insureds are not conscious of the ongoing cost of insurance as they use it because the insurance costs, after the initial purchase, are not visible to consumers. The current choice architecture of auto insurance pricing encourages driving for two main reasons. First, people may feel the sting of making monthly payments to their insurance companies, but people do not see or think about the costs as they drive.[81] Second, the insurance costs of the activity do not correlate to the amount people use it.[82] While it is in both society's interest—and in many cases an individual's interest—to drive less, the incentive structure does not support driving less. Restructuring the choice architecture of auto insurance pricing to make costs more salient would incentivize driving less.

A person's energy use is generally invisible to that person. According to studies by Clive Thompson, making the amount of household energy that consumers use more apparent and visible to them results in significantly less energy use.[83] It is likely that installing some kind of meter (similar to a taxi meter) by the dashboard of a car—so that drivers could see in dollars and cents as they drive how much money they were spending per mile on insurance—would help reduce driving.[84] Perhaps when a person gets out of her car the device could print out a "receipt" or display the cost of the trip on a screen. The meter could be standard equipment and could be programmed to calculate the insurance cost to the individual or the average cost of insurance in that area. With digital technology, this sort of device would probably be very cheap indeed. This device could reduce driving by foregrounding costs that are practically invisible on a day-to-day basis, even without changing the pricing structure.

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81. *See generally* THALER & SUNSTEIN, *supra* note 7, at 100–01 (stating that people discount opportunity costs of car ownership and insurance as less salient than using taxis); *id.* at 187–97 (discussing ways to give consumers more feedback about their energy use so as to encourage them to use less energy).

82. *See infra* Part II.B.2.

83. THALER & SUNSTEIN, *supra* note 7, at 196.

84. The meter could add in gas usage and price to create an even more complete picture.

2. Encourage Usage-Based, or Pay-As-You-Drive, Auto Insurance

In addition to making costs more visible, another idea for decreasing car use through insurance changes is the usage-based option, also known as pay-as-you-drive, which makes the amount one drives a significant component of the price of insurance.[85] In October 2009, California, the largest private car insurance market in the United States, adopted regulations allowing companies to adopt pay-as-you-drive insurance.[86] This type of mechanism deals with the issue of the blunt pricing of auto policies discussed above to make pricing more correlated to actual miles driven.[87] The proposal is to allow, encourage, or require a pay-per-usage option, so that in addition to broad risk gauges currently used, insurance companies would be allowed, encouraged, or required to offer a pay-per-usage option.[88] The technology exists now to cheaply monitor miles driven, location of those miles, time of day, and even aggressiveness or lack thereof of driving.[89] A recent study on this issue estimates that if this type of pricing were widely adopted, driving would decline by 8 percent nationwide, thereby reducing oil consumption by 4 percent and carbon dioxide emissions by 2 percent.[90] Further, the study estimates that it would reduce driving-related harms by approximately $50 to 60 billion a year.[91] It also would reduce insurance costs for about two-thirds of customers.[92]

A recent Brookings Institution report details the following three-part strategy: (1) states should pass laws allowing mileage-based premiums; (2) the federal government should increase funding to pilot programs by $15 million over five years (a pittance); and (3) the federal government should adopt a $100 tax credit for each new

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85. *See* DEWEY & LEBOEUF LLP, CALIFORNIA PAY-AS-YOU-DRIVE AUTO REGULATIONS: AN OPPORTUNITY TO GO GREEN AND GARNER A GREATER SHARE OF THE COUNTRY'S LARGEST PRIVATE PASSENGER AUTO MARKET (2008), *available at* http://www.deweyleboeuf.com/~/media/Files/clientalerts/CaliforniaPayAsYouDriveAutoRegulationsAnOpportunitytoGoGreenandGarneraGreaterShareoftheCountrysLargestPrivatePassengerAutoMarket.ashx.

86. CAL. CODE REGS. tit.10, § 2632.5 (2009); *see* DEWEY & LEBOEUF LLP, *supra* note 85.

87. *See supra* Part I.E.

88. *See* BORDOFF & NOEL, *supra* note 10, at 5; GREENBERG, *supra* note 71, at 3–4.

89. Progressive's insurance includes data on sudden acceleration and how often a driver slams on the brakes. *Snapshot Privacy Statement*, PROGRESSIVE.COM http://www.progressive.com/snapshot/privacy-statement.aspx (last visited May 13, 2010).

90. BORDOFF & NOEL, *supra* note 10, at 2.

91. *Id.*

92. *Id.*

policy a company writes, as the costs of monitoring mileage may be greater than the expected benefit to individual insurance firms, but are much smaller than the social benefit.[93] This tax credit should be phased out once five million vehicles are covered.[94] California's recent step of allowing pay-as-you-drive by regulation is even more straightforward than making changes by legislation, and indeed under most state laws, pay-as-you-drive can be implemented without legislative change.[95]

To be sure, various issues remain to be resolved, including the specificity of the data to be received by the insurance companies and how the insurance companies will obtain that data.[96] Drivers could provide to insurance companies very specific data on location, time of day, and other factors, even including aggressiveness of driving; such data could be provided on an ongoing basis using GPS, or other technology, so that rates could be regularly adjusted.[97] Progressive Insurance has sold, for several years, a type of policy in some states (called "MyRate") where customers install a sensor-chip device that transmits data regarding time of day, location of miles, and some specific driving information (like sudden stops) to Progressive. This allows for continuous rate adjustments depending on these factors, in exchange for a minimum fixed discount of 5 percent and the possibility of larger discounts based on usage.[98] General Motors Acceptance Corporation offers insurance using the OnStar data transmission system.[99] There is an online message board consisting

93. *Id.* at 21–23.

94. *Id.*

95. *See* RANDALL GUENSLER ET AL., CURRENT STATE REGULATORY SUPPORT FOR PAY-AS-YOU-DRIVE AUTOMOBILE INSURANCE OPTIONS (2010).

96. Usage-based insurance, for example, would not solve all the financial issues related to funding the U.S. road system. *See* JAMES M. WHITTY & JOHN R. SVADLENAK, OR. DEP'T OF TRANSP., DISCERNING THE PATHWAY TO IMPLEMENTATION OF A NATIONAL MILEAGE-BASED CHARGING SYSTEM (2009), *available at* http://onlinepubs.trb.org/onlinepubs/sr/SR299Mileage.pdf. The question of whether usage-based auto insurance should be mandatory is beyond the scope of this Article.

97. According to fueleconomy.gov, a United States Department of Energy website, "aggressive driving . . . can lower your gas mileage by 33 percent at highway speeds and by 5 percent around town." *Driving More Efficiently*, U.S. DEP'T OF ENERGY, http://www.fueleconomy.gov/feg/driveHabits.shtml (last visited July 2, 2010).

98. Details vary by state. Aaron Landry, *Progressive MyRate*, S4XTON.COM, http://s4xton.com/1753/progressive-myrate/ (last visited May 13, 2010).

99. *The GMAC Insurance Low-Mileage Discount*, ONSTAR.GMAC.COM, http://onstar.gmac.com (last visited May 13, 2010).

of Progressive customers' observations about the program that contains a range of praise, concern, and criticism.[100]

The California Insurance Commissioner, in adopting regulations, made the mileage determination hinge primarily on odometer readings done by certain actors such as auto repair shops, smog-check stations, insurers, or the insured. The new regulations also allowed use of technological devices, but only for actual miles driven, not for other characteristics of the insured's driving.[101] Under the new regulations, insurers can retroactively or prospectively adjust premiums based on actual miles driven, as long as the consumer is given notice.[102] Many specifics have yet to be worked out. As Aaron Edlin, a long-time proponent of pay-as-you-drive insurance, stated in some of his comments to the California commissioner:

> [A]ll the benefits from pay-as-you-drive—less accidents, less emissions, less congestion, less road expenditures—depend upon people choosing to drive less. To this end, as much of the fixed cost of insurance as possible must be shifted to the marginal mile of driving, where the decision is, and people must understand this. The system must be simple and transparent.[103]

Edlin includes several invoice forms so that the discount from driving less will be as clear as possible to drivers. If the Progressive Insurance message board about the MyRate program is an accurate indicator, the frequent rate changes depending on driving details make MyRate customers very aware of their day-to-day driving decisions. Nuanced feedback such as that from the MyRate program likely makes drivers more aware of their daily driving decisions than

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100. Someone wrote "installing this chip would probably increase my insurance by 1,000%. I have a lead foot." Someone else wrote that if his speed was monitored it would help him slow down. Several people objected to insurance companies having detailed data about their driving. Several made comments such as

> people complain that their rates aren't representative of their actual driving behavio[]r. Now that there's an option to show the insurance company how they actually drive, people are complaining that the IC [insurance company] will have accurate data. Bottom line, only the people who have something to hide won't wanna join the program . . . which is exactly the point.

Landry, *supra* note 98.

101. CAL. CODE REGS. tit. 10, § 2632.5(c)(2)(F)(i)(1)–(5) (2009).

102. *Id.* § 2632.5(c)(6)(ii).

103. AARON S. EDLIN, EXTERNALITIES AND PAY AS YOU DRIVE AUTO INSURANCE (2008), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1066&context=aaron_edlin.

an annual discount or surcharge as contemplated by the California regulations would do. Nonetheless, the California regulations and other states' efforts offer exciting possibilities for making auto insurance more price-sensitive and reducing auto use and its negative consequences.

CONCLUSION

This Article looks at the privileged status of auto accident injuries through a skeptical lens. Car accident injuries are injuries with remedies compared to other types of injuries, and "the cumbrous and expensive machinery of the state," in Justice Holmes's words,[104] gives auto injuries a most-favored injury status. The exceptional panoply of compensation mechanisms available to people injured by cars arguably disadvantages victims of other sorts of injuries, and promotes driving in a variety of ways. While this hierarchy of injury and encouragement of car use were understandable decades ago, they are unjustifiable today. Given the negative consequences of driving, and the importance of insurance to all aspects of driving, it is time to consider ways that auto insurance may be structured so as to discourage driving. The choice architecture of auto insurance pricing and payments encourages driving, but several shifts could be made that would discourage driving. The first is to make the ongoing costs of auto insurance visible to people as they drive, instead of making those costs practically invisible as the current payment structure does. A second way is to not only allow, but actually encourage, usage-based, or pay-as-you-drive, programs on a widespread basis. This would make the insurance component of the price of driving more closely related to the amount people drive and provide a financial incentive to drive less.

104. HOLMES, *supra* note 1, at 76.