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ACCIDENT LAW FOR EGALITARIANS*

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This paper questions the fairness of our current tort-law regime and the philosophical underpinnings advanced in its defense, a theory known as corrective justice. Fairness requires that the moral equality and responsibility of persons be respected in social interactions and institutions. The concept of luck has been used by many egalitarians as a way of giving content to fairness by differentiating between those benefits and burdens that result from informed choice and those that result from fate or fortune. We argue that the theory of corrective justice, along with its institutional embodiment of tort law, is at odds with an egalitarian commitment to fairness because it allows luck an unjustifiable role in determining dissimilar liability for similar wrongs and dissimilar compensation for similar losses to bodily integrity. Many egalitarian political theorists have also recognized, if not defended, the notion of distinct forms of justice, namely corrective, retributive, and distributive. Although theorists of these different forms of justice have been concerned with negating unfair luck inside the operations of each form of justice, there has been little attention to the way in which luck operates to sort cases into each form of justice. We claim that there is a significant way in which luck operates to subject different people to principles of corrective, retributive, and distributive justice—thereby assessing dissimilar liability for similar wrongs and disparate compensation for similar losses—which flies in the face of the egalitarian value of fairness. After surveying the arguments put forward by theorists defending a categorical distinction between corrective justice and retributive and distributive principles, we argue that although analytical distinctions can be made between different forms of justice (although, we also suggest that the distinctions are not as sharp as some commentators suggest), there is no good reason to defend an acoustic separation between these forms of justice when doing so creates unfair outcomes.

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I. INTRODUCTION: LUCK AND FAIRNESS

There is a large body of literature distinguishing corrective justice from other forms of justice—namely retributive and distributive justice.[1] This literature sets out to define the law of torts as an autonomous normative sphere, under the sole reign of corrective justice, whose operations and principles can be understood without reference to other forms of justice.[2] However, the theoretical possibility of defining corrective justice as a distinct form of justice does not imply it is desirable to do so. Below we illustrate a number of cases where the theoretical and institutional separation of corrective justice from other forms of justice generates a host of unfair outcomes. In light of these examples of unfair outcomes, this paper explores whether the fact that we *can* distinguish corrective justice from other forms of justice implies we *ought* to do so. We argue that for those committed to a strong version of egalitarian fairness—a view that practices and principles of justice ought to minimize the operation of random luck in core domains of social life—this question must be answered in the negative.

This paper is motivated by a commitment to egalitarian fairness and by a few simple intuitions about the role of luck in determining outcomes in accident law, in terms of both liability for carelessness and compensation for misfortune. We propose a criterion of strong egalitarian fairness to evaluate the normative principles and institutional practices dealing with accidental injuries and risk creation. This strong egalitarian criterion takes the formal ideal that like cases should be treated alike as a substantive commitment to reducing the operation of undeserved luck in the operations of justice. From this premise, we argue that anyone committed to this principle must be concerned with the meta-role of luck introducing normatively irrelevant factors into the assessment of liability and compensation for accidental losses.

Many egalitarian political theorists have recognized, if not defended, the notion that corrective, retributive, and distributive justice constitute distinct forms of justice. Corrective justice (CJ) concerns the fair terms of rectification for largely unintentional private wrongs, such as bilateral accidents, and the losses that flow from such private wrongs. It is a theory

1. ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 62–70 (1995); Jules Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 257–321 (Brian Bix ed., 1998); Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Law*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 141–162 (Brian Bix ed., 1998). Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 528 (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW (1999).

2. Formalist theorists, such as Ernest Weinrib and Peter Benson, have sought to identify the conceptual features of tort law that structure it as a coherent normative practice, arguing that we can thereby conceive of corrective justice as enforcing a unique form of equality in transactions. Positivistic theorists of corrective justice, such as Coleman, Perry, and Ripstein, have looked to identify a theory of justice operative in tort-law doctrines that embody a coherent and normatively desirable conception of responsibility and wrongdoing. WEINRIB, *supra* note 1; Benson, *supra* note 1; Coleman, *supra* note 1; Perry, *supra* note 1; RIPSTEIN, *supra* note 1. Sections VI, V, and VI significantly explore these issues.

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associated with tort law. Retributive justice (RJ) concerns the fair terms of punishment for public wrongs, intentional acts of harm to others that offend the social order, according to principles of harm and/or moral blameworthiness. It is a theory traditionally associated with criminal law. Distributive justice (DJ) concerns the fair allocation of social burdens and benefits in terms of the design of core social and economic institutions. It is a theory traditionally associated with tax and transfer laws; it deals with the duty to contribute to and the right to receive from the collective assets of a political community. Within each form of justice, theorists have devoted significant energy to defining what types of luck must be negated to assure fair operation of the principle of justice. Traditionally, RJ, CJ, and DJ have been considered distinct forms of justice operating in different spheres of human affairs, just as their respective areas of law operate largely independently of one another.[3]

Yet in the most general formulation, all egalitarian theories of CJ, RJ, and DJ share a common commitment that fairness requires treating people as equals. Fairness encompasses the moral intuition, often expressed in egalitarian theories of justice, that persons are moral equals with a capacity for and interest in being responsible for their lives. Responsibility is an aspect of the moral equality of persons because it is a necessary concept to realize our shared aspiration to call our deeds and lives *our own* in a community of equals.[4] Responsibility is what allows us to be authors of our own lives, to realize our equal capacities for a sense of justice, and "to have, to revise, and to rationally pursue a conception of the good," to borrow Rawls's terms.[5]

The concept of *luck* has been employed by many egalitarians to give content to the idea of fairness by differentiating between those disparities in benefits and burdens that result from informed choice and those that result from fate or fortune. Many egalitarians explore *negating* luck as a way of expressing their commitment to treating people as equals whose lives should (as much as possible) be a reflection of their choices as opposed to the afflictions of chance. This is the normative premise of our paper, which we call the "fairness test."[6] As we explain more below, the fairness test

3. To use Aristotle's famous expression, CJ enforces *an arithmetic equality* in transactions such that no individual may gain or lose their due according to the norms of interaction; DJ enforces a *geometric proportion* such that each citizen contributes and receives a portion of social resources according some merit, however social resources and merit are defined. ARISTOTLE, NICOMACHEAN ETHICS, Book V, *available at* http://classics.mit.edu/Aristotle/nicomachaen.5.v.html.

4. For example, Jules Coleman talks about the importance of a concept of responsibility in a liberal society not merely in terms of accountability but as "the core of the liberal ideal: that if we are to have a certain concept of the individual as an agent, as a being who acts and is not merely acted upon, then it must be true that the individual can have a certain kind of ultimate responsibility for how his life goes." JULES COLEMAN, THE PRACTICE OF PRINCIPLE 60 (2001).

5. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18–19 (Erwin Kelly ed., 2001).

6. The fairness test and the strong egalitarian principle which motivates it make up the premise of our argument. It bears mentioning at this point that some may well not be moved

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assesses whether luck is allowed to play an unjustified role in compensation for similar losses or liability for similar wrongs.

In the following three sections we discuss the roles of *control* and *luck* in CJ, DJ, and RJ and their respective substantive notions of fairness. In doing so, we employ Dworkin's terms "brute luck" and "option luck," not necessarily as an endorsement of his theory of DJ but rather because the terms usefully illustrate the normative distinctions various theories make—as a matter of fairness—between personal responsibility and undeserved misfortune. Dworkin defines option luck as "a matter of how deliberate and calculated gambles turn out," whereas brute luck is "a matter of how risks fall out that are not in that sense deliberate gambles."[7] We find the brute/option luck distinction a useful heuristic device for understanding how different theorists of justice make determinations between personal and collective responsibility according to the substantive criterion of fairness they propose. We do not take a position on where the line between brute and option luck should be drawn; we employ the distinction to argue that, wherever that line is found, fairness requires we negate the unacceptable operation of brute luck.

In DJ, many egalitarian theorists hold that fairness requires us to negate differences in social resources that flow from mere luck—things outside one's control, such as circumstances of birth or innate talents—and allow differences in resources due to informed choices and strategic decisions.[8] A significant literature is devoted to debating where the line between luck and choice should be drawn to reflect the normative

by this article as it does not offer a substantive defense of this normative premise. This point is further elaborated in Section VIII, the Conclusion.

7. Ronald Dworkin, *What Is Equality. Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 293 (1981).

8. Elizabeth Anderson has presented a compelling critique of formulating egalitarian commitments in terms of luck. Elizabeth Anderson, *What Is the Point of Equality*? 109 ETHICS 287 (1999). Anderson criticizes what she terms "luck egalitarians," who see the aim of DJ to be exclusively the compensation of undeserved misfortune with the surpluses of undeserved fortune. She criticizes this school for fetishizing the distinction between luck and choice over what she argues are the true aims of egalitarianism—to distinguish between those social relations that enable oppression and exploitation from those that positively ensure democratic equality and equal opportunity for functioning. Anderson claims that both luck and democratic egalitarians are committed to upholding personal responsibility. Luck egalitarians do so by insuring against only certain *causes* of losses (those due to brute luck), whereas democratic egalitarians do so by insuring against only certain *types* of losses (guaranteeing those "capacities necessary to functioning as a free and equal citizen and avoiding oppression"); *id.* at 327. We find many of her critiques of luck egalitarianism compelling. We are nonetheless using luck as our heuristic device to talk about an egalitarian regime for dealing with accidents because we think it is the most familiar heuristic to motivate notions of fairness. Thus, although our paper is formulated in the register of luck egalitarianism, we think that the substance of our argument could be reformulated in terms acceptable under Anderson's conception of democratic egalitarianism. Our argument in terms of democratic egalitarianism would be that because interests in the "core," namely, to bodily integrity, are so essential to equal functioning, they are exactly the types of losses for which a democratic egalitarian would assure equal compensation regardless of the source of destruction. We are thankful to Gregory Keating for bringing this point to our attention.

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commitments of egalitarianism—that is, fostering the social and political conditions of equality. In RJ, theorists debate whether fairness requires equal moral blame and/or punishment be imposed upon one whose criminal intent is thwarted by luck (say, the target's sudden movement evades the sniper's bullet) as upon one whose criminal intent was fully actualized into a criminal deed. The motivation in this literature is to assure a fair operation of retributive principles: that similar levels of moral blameworthiness trigger similar outcomes. In CJ, most theorists hold that fairness requires agents be held liable only for those losses reasonably attributable to conduct under their control—harms caused by violating some duty of care—but not those losses primarily attributable to luck, such as harms primarily produced by nature or unforeseeable in kind. The doctrines of duty and causation reflect this desire to negate the unfair operation of luck in assessments of liability.[9] In all of these theories of justice, the line between luck and responsibility is not determined by an empirical or metaphysical inquiry into whether something was "really" the result of luck or whether it was under human control. Rather, it is determined by a normative argument about what sorts of things are reasonable to expect in terms of rights and duties from people living in a shared world.

Although theorists of these different forms of justice have been concerned with negating unfair luck *inside* the operation of each form of justice, there has been little attention to the way in which luck operates to sort cases *into* each form of justice. In this paper we argue that there is a significant way in which luck operates to subject different people to principles of CJ, RJ, and DJ, and that this operation of luck flies in the face of egalitarian fairness. The specific unfairness we are concerned with in this paper is how luck in causation—in terms of the source of injury for victims and the manifestation of harm for careless actors—operates to determine dissimilar compensation and liability for similarly situated cases. Similar victims of misfortune will receive massively dissimilar compensation, because one can draw on institutions of DJ, while another can draw on institutions of CJ and RJ. Similarly careless actors—say, two drivers who both violate norms of care by speeding on the road but only one injures someone—can be subjected to massively dissimilar liability. This is because one who causes harm is subject to at least damages in tort (an institution of CJ), while one who misses a victim may be subject to at most a fine or a ticket (an institution of RJ).

Although the sorting of these cases into distinct institutions of justice may make sense from the internal perspective of the principles of CJ, RJ, and DJ, the resultant pattern of cost-bearing it creates violates an intuitive notion of fairness that like cases be treated alike. CJ theorists have advanced a host of accounts of how and why CJ is categorically distinct from either

9. The treatment of luck within each form of justice is further elaborated in Sections II through IV.

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DJ or RJ.[10] We argue in this paper that egalitarian fairness transcends the analytical boundaries of different forms of justice. Hence we claim that maintaining strict analytical boundaries (or what we will call an "acoustic" separation among principles of CJ and DJ or RJ)[11] between RJ, DJ, and CJ fails the "fairness test" and is therefore unjustified and undesirable.[12] This global notion of fairness—a commitment to treating people as moral equals with a like interest in responsibility—can and should guide the normative approach to any scheme for assessing liability for wrongs and compensating misfortune.

In spite of the fact that our inquiry is highly theoretical, our critique has very concrete implications for how we believe egalitarian principles ought to compel the reform of our current scheme of compensation and liability for accidents. The practical upshot of our theoretical argument is that any scheme of accident law must entail some liability for risk creation (though not necessarily on par with liability for harm caused) and assure equal terms of compensation for victims who suffer comparable losses to bodily integrity, regardless of the source of that loss. As we discuss in Sections V and VIII, we believe there is a "zone of fairness" in which various alternative acceptable schemes would satisfy the demands of global egalitarian fairness we advance in this paper.

Five Motivating Cases

In order to motivate the intuitions about fairness in compensation and liability discussed above, consider the following cases. The first three describe victims of misfortune, the next three describe doers of careless or noncareless actions. (For ease of navigation, all cases are summarized in the Appendix):

Consider the victims:

1. Amy is twenty years old. She became blind as a result of a car accident. It was the other driver's fault. If Amy lives in a no-fault state (a state that administers automobile accident losses via regulated insurance markets), then she is

10. WEINRIB, *supra* note 1; Coleman, *supra* note 1; Perry, *supra* note 1; Benson, *supra* note 1; RIPSTEIN, *supra* note 1.

11. For a description of the categorical distinction between CJ and DJ, *see* WEINRIB, *supra* note 1. Although not all CJ theorists see CJ as categorically distinct from DJ, most see the inability of a CJ theory to distinguish itself from DJ as a fatal theoretical flaw for any plausible conception of CJ. *See* Coleman, *supra* note 1; Perry, *supra* note 1; Benson, *supra* note 1; RIPSTEIN, *supra* note 1.

12. From the late 1960s to the early 1990s there was a series of well-argued critiques of the distinctive formulation of CJ and the institution of tort law upon which we draw inspiration throughout this paper. *See* Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 808–814 (1967); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?* 6 LAW & PHIL. 1–23 (1987); Richard Epstein, *Luck*, 6 SOC. PHIL. & POL'Y 17 (1988); Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 440 (1990).

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expected to receive from her insurance company a fixed sum of money calculated to compensate her for her injuries and associated medical bills. If she does not live in a no-fault state, then she is expected to collect, under most circumstances, a larger fixed sum of money to compensate her for her injuries and associated medical bills (and possibly pain and suffering and/or punitive damages in addition) from the other driver or her insurance company.

2. Bill is twenty years old. He became blind as a result of a car accident. The other driver was at fault yet underinsured. Specifically, the other driver's insurance limit was at the state-mandated minimum. The other driver has no other assets to collect from, and therefore Bill can recover no more than the policy limit, which will be much less than the sum received by Amy.
3. Carol is twenty years old. She became blind as a result of a congenital disease such as meningitis. At best, if she is well insured, she will have her basic medical costs covered. At worst she will not be able to get private insurance, will turn to federal programs such as Supplemental Security Income (SSI) or Medicaid, and be able to get some minimal medical coverage and perhaps a relatively low monthly disability benefit.

Consider the following drivers:

4. David is an attentive, careful driver. Every day he leaves for work on time and obeys the speed limit and other norms of safe driving. One morning he is rushed, speeds to work, and on the way causes an accident because of his speeding. David hits Amy and is found liable for her ensuing blindness.
5. Ed speeds to work recklessly everyday. He sleeps in and leaves late. In his haste he cuts off other cars, runs Stop signs, speeds, and otherwise flouts the norms of safe driving on a daily basis. Ed never gets into an accident, partially because other drivers accommodate his reckless driving by slowing down and exercising extra caution in his presence. On the morning David hits Amy, Ed would have hit another driver had it not been for the fortuitous intervention of a bird that caused the other driver to swerve, thereby preventing Ed from hitting the other driver's car. Ed never bears any cost for his reckless driving.
6. Fran is a careful driver who never exceeds the speed limit or violates norms of careful driving. Every day she takes the same route to work as Ed and exercises extra caution because of Ed's unpredictable driving.

The cases of Amy, Bill, and Carol have one major thing in common: they all suffered the loss of their eyesight through no fault of their own. Insofar as each loss was not the fault of the individual who suffered it, these losses are, in a relevant normative sense, alike. Yet each person ends up with very different access to compensation for his or her loss. As mentioned above, Amy will end up with full compensation for medical costs, lost income, and costs of accommodating her life to blindness, and if she lives in a "negligence" state as opposed to a "no-fault" state, she may even be awarded pain and suffering and punitive damages. Bill will end up with possibly only a fraction of his medical bills paid from the underinsured motorist who hit him; he will be left to bear the remainder of the costs of his injury himself. Carol, if she is uninsured at the time her disease is discovered,

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will be uninsurable in the private market for insurance as it relates to the disease that caused her blindness. Both Bill and Carol might be able to get some monthly benefits through a combination of public programs (i.e., Medicare, SSI, and, if their income drops, Medicaid).

The decisive factor determining what compensation will be available to Amy, Bill, or Carol is something outside his or her control. This factor is whether each can attribute the "cause" of his or her blindness to the negligence of another person and, if so, the level of insurance the other driver carried at the time of the accident. (We ignore for now the level of insurance that they carried). We commonly talk about those factors that are outside our control as *luck*. Therefore the compensation available to these equally innocent victims is largely due to luck.

The cases of David and Ed have one major thing in common: they have both violated the duty of care established by the norms of safe driving. The decisive factors that render David liable for massive damages but not Ed are outside the control of both of them—the position of other drivers and one little bird—again, factors we understand as *luck*. In fact, Fran, the consistently careful driver, is treated the same as Ed, the consistently careless driver. Therefore the unequal liability imposed on these equally faulty drivers (David and Ed) is largely due to luck, as is the equal treatment of unequally careless drivers (Ed and Fran).

Are the cases of Amy, Bill, and Carol—and David and Ed—alike in a normatively relevant sense such that their differential treatment is unjustified? Many of us would share the moral intuitions that there is something troubling about the dissimilar outcomes illustrated by these cases, given their relevant similarities. Most theorists of tort law would maintain that the differential outcomes illustrated by the cases of Amy through Fran are not necessarily unfair. Such theorists would explain the differential outcomes with reference to the distinction between CJ and other forms of justice, namely DJ and RJ. The cases of Amy, Bill, and David are subject to the principles of CJ, whereas the cases of Carol and Ed are subject to the principles of DJ and RJ, respectively.

The cases of Amy, Bill, and David are subject to CJ because they involve losses suffered from *and* caused by human agency. The case of Carol (meningitis) represents loss caused perhaps by a cruel God or the vicissitudes of nature but by no (negligent) agent in particular; it therefore falls to DJ. The case of Ed (the reckless driver who hits no one) represents a wrong involving losses to no one in particular and is therefore governed by, if anything, RJ. The distinction between CJ, DJ, and RJ creates a sorting rule by which cases of misfortune and misconduct are placed under the auspices of one or another form of justice. These cases are subject to distinct forms of justice, and that produces differential patterns of cost-bearing. Yet the argument of this paper is that the theoretical claims supporting these distinctions between forms and institutions of justice violate a basic notion of fairness that transcends the bounds of either CJ, DJ, or RJ.

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In the following three sections we explore how theorists of DJ, RJ, and CJ express their substantive commitments to treating people as moral equals with like interests and capacities for responsibility by assuring that the operation of luck is confined to fair terms. We hope to show that within each form of justice, the substantive terms of fairness in that realm require that choice (those thing reasonably within one's control), as opposed to brute luck (those things not within one's control), determines one's life outcomes. We argue that this overarching value of fairness informs our assessments not only of acceptable outcomes *within* each sphere of justice but also of outcomes of cases sorted *between* spheres of justice.

II. LUCK IN DISTRIBUTIVE JUSTICE

In this section we explore how fairness in DJ can be understood as limiting the role of luck such that that informed choice, as opposed to happenstance of birth or circumstance, determines one's share of social burdens and benefits. Our aim in this brief overview of DJ literature is to show that egalitarians have expended significant theoretical energy to assure that brute luck does not inhibit individuals from equal standing and opportunities in a democratic society. We develop these insights from DJ to evaluate the fairness of unequal compensation to equally blameless victims. In Section VI, we argue that once one accepts the normative premise of egalitarianism that moral equals deserve to stand in relations of equality and responsibility to each other, it is arbitrary to allow the source of one's disadvantage—nature, as opposed to (negligent) human agency—to limit the application of this principle.

The question of fairness in DJ is how to structure the central institutions of society such that people, as moral equals, have substantially similar opportunities to pursue meaningful lives. Interestingly, major DJ theorists support the division of labor between private law (as the manifestation of CJ) and tax and transfer laws (as the manifestation of DJ).[13] An argument for this view seems to be that redistribution through a DJ system is less restrictive of liberty and autonomy to choose a preferred path in life than is redistribution via regulating bilateral interactions through private law.[14]

The notion of egalitarian fairness in DJ can be gleaned from looking at the types of questions debated among its theorists. First, theorists debate what the DJ machine should operate upon; that is, what is the appropriate

13. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 274–280 (1971). *See also* RONALD DWORKIN, LAW'S EMPIRE ch. 8 (1986) (arguing that the concern for other people's well-being is the responsibility of the government and not of the citizens in their daily transactions utilizing private property).

14. For a critique of this sort of liberty-based defense of tax-and-transfer rules as the exclusive domain of redistributive policy, *see* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980).

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equalisandum (the thing to be equalized)?[15] Or, as Amartya Sen famously poses the question: "Equality of what?"[16] The responses from egalitarian theorists include: equality of "welfare,"[17] "primary goods,"[18] "resources,"[19] "access to advantage,"[20] "opportunity for welfare,"[21] "capabilities to achieve functioning,"[22] and "capabilities for equal citizenship,"[23] to name a few.

With few notable exceptions, egalitarians disagree less about what should be left out of the DJ machine than about the best "catchy" term for a single equalisandum that can capture all our widely shared intuitions about how a Western egalitarian society should operate.[24] Theorists' views can be seen as an attempt to formulate a middle ground between focusing purely on people's welfare and focusing purely on their resources as the relevant equalisandum. Despite these differences, we believe that few egalitarian theorists, if any, would disagree that bodily integrity falls within the core of interests that must be collectively insured, that is, inside the DJ machine.

Assuming a given equalisandum, the second thing that liberal egalitarians debate is: What limitations should be imposed on its distribution? What would justify a deviation from pure mathematical division of the equalisandum? Many DJ theorists, whether liberal egalitarians or libertarians, seem to agree that other considerations, such as liberty, responsibility, and so on, come into play in answering this question.[25] Although there is no consensus on what precise role justice dictates for responsibility, liberty, or choice in distribution of the equalisandum, there is agreement that these

15. G.A. Cohen says "an equalisandum claim specifies that which ought to be equalized, what, that is, people should be rendered equal in." G.A. Cohen, *On the Currency of Egalitarian Justice,* 99 ETHICS 906–944 (1989), at 908.

16. Amartya Sen, *Equality of What? in* EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307 (Stephen Darwall ed., 1995). The importance of the question, as Sen observes, lies in the fact that, for example, equal opportunities can correspond with very unequal income. Equal income can exist simultaneously with differences in wealth. Equal wealth can coexist with unequal happiness. Equal happiness can go with divergent fulfillment of needs. And equal fulfillment of needs can be associated with different freedoms of choice. AMARTYA SEN, INEQUALITY REEXAMINED 2 (1992).

17. John Roemer, *Equality of Resources Implies Equality of Welfare,* 101 Q.J. ECON. 751 (1986).

18. Rawls, *supra* note 13, at 62, 92.

19. Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare; Part II: Equality of Resources,* 10 PHIL. & PUB. AFF. 185, 311 (1981) (resources include mental and physical capacity).

20. Cohen, *supra* note 15, at 916.

21. Richard Arneson, *Equality and Equality of Opportunity for Welfare,* 56 PHIL. STUD. 77 (1989).

22. SEN, *Equality of What?* and INEQUALITY REEXAMINED, *supra* note 16.

23. Elizabeth Anderson, *supra* note 8.

24. *See, e.g.,* John C. Harsanyi, *Problems with Act-Utilitarianism and with Malevolent Preferences,* in HARE AND CRITICS: ESSAYS ON MORAL THINKING, 89, 96–98 (Douglas Seanor & N. Fotion eds., 1988); *see also* KENNETH ARROW,*Some Ordinalist Notes on Rawls' Theory of Justice, in* COLLECTED PAPERS 1, n. 104 (1983).

25. For a short discussion of the way DJ theorists limit equalization of their equalisandum subject to these principles points, *see* Kyle Logue & Ronen Avraham, *Redistributing Optimality: Of Tax Rules, Legal Rules, and Insurance,* 56 TAX L. REV. 157–257 (2003), at 161–164.

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considerations need to play some role.[26] No matter what equalisandum we endorse, a commitment to liberty and responsibility requires us to make a distinction between differences in resources, primary goods, and so on arising from voluntary, informed choice and those arising from individuals' differing initial endowments of talent, opportunities, genes, or unchosen social and environmental circumstances.[27] In other words, a distinction should be made between "brute luck" and "option luck," to use Dworkin's terms.[28] The idea is to make an objective distinction between luck and responsibility with respect to one's misfortunes.[29] Bad luck is the individual's problem if it is a result of her choices and ambitions; it is society's problem if it is a result of her unchosen circumstances. Hence most egalitarian DJ theorists attempt to design a distributive policy that is "endowment-insensitive" but "ambition-sensitive" thereby respecting both equality and responsibility.[30]

Whether an agent's particular action is a matter of choice, control, or chance (that is, the distinction between brute and option luck) might seem like a metaphysical question that involves a deep analysis of concepts of free will, causation, and the like. Yet in practice it is determined by standards of reasonableness informed by culturally and temporally specific norms of socially acceptable behavior. As we state above, the line between luck and responsibility in DJ is drawn by normative notions of what is fair for members of a political community to expect from one another. To illustrate the role of luck and control in our commonsense assessments of fairness in DJ, consider:

> George, who has declined to seek gainful employment and instead enjoys the sands of Santa Monica as a full-time beach bum; and
>
> Harriet, who was injured during service in the U.S. military.

26. No theorist really claims that a static snapshot of people's holdings is informative as to whether the society is just. Robert Nozick distinguishes between *patterned* and *historical* theories of justice. A patterned theory of justice evaluates holdings at a specific time. A historical theory, in contrast, looks at how the current pattern came about. Nozick argues for a historical theory of distributive justice, libertarianism; our argument in the text is that all theorists are to some extent concerned with the dynamic aspect of holdings—there is always concern for how the holdings came about. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 161–162 (1972).

27. *See generally* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 75 (1990) ["People's fate should depend on their ambitions in the broad sense of goals and projects about life, but should not depend on their natural and social endowments (the circumstances in which they pursue their ambitions)"].

28. *See* Dworkin, *supra* note 7. Our conception of brute luck is somewhat broader than Dworkin's, however. For us, brute luck arises when an individual's misfortune is not the result of a risk she could *reasonably* have avoided. *See* Logue & Avraham, *supra* note 25, at 161–165 (using the same conception of brute luck to analyze the optimal division of labor between tort law and tax and transfer law).

29. When we employ the term "objective," we mean a standard that is fixed by publicly agreeable notions of reasonableness and representation, as opposed to a "subjective" standard that looks at something about the specific doer, such as intentions, control, etc.

30. Dworkin, *supra* note 19, at 293, 330; *see also* G.A. Cohen, *supra* note 15, at 908 (arguing that one of the primary egalitarian impulses is to extinguish the influence on distribution of brute luck).

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Most would agree that, in 2006 in the United States, there is a fairly strong political consensus that abstaining from work when physically able is not a reasonable choice,[31] and therefore someone who voluntarily decides to be a beach bum does not have a legitimate demand on the state for income support to satisfy his otherwise reasonable consumer preferences. Military service, on the other hand, has been constructed as reasonable choice, and therefore Veterans Administration health care or income support programs that compensate for resultant injuries are considered legitimate distributive undertakings. George's lack of income would therefore be considered option luck, because it results from a free and informed choice not to work. Our political community has determined that people are not owed compensation for the outcomes of such choices. On the other hand, Harriet's lack of income would be considered brute luck, because it results from a choice we deem reasonable, a determination that reflects substantive normative standards about things like citizenship and responsibility. Our practices in the realm of DJ, such as in the areas of income tax and transfer policies, medical care, education provision, and so on, reflect these substantive normative determinations of what we think is fair to expect of each other and therefore what burdens should be born collectively by the political community as opposed to individually by the decision-maker alone.

To sum up, DJ egalitarians are mostly committed to fairness by creating institutions that allot equal amounts of welfare/opportunity/resource (the equalisandum) but that also reflect notions of responsibility. Responsibility in DJ entails holding people accountable for their choices, therefore immunizing them from misfortunes that befall them either as a function of nature or while they are making reasonable decisions (brute luck) but not from misfortunes arising from unreasonable choices or informed gambles (option luck).[32] Egalitarians hold that as moral equals, we deserve equal opportunities to pursue our life projects regardless of how brute luck afflicts us, and that as agents who have an interest in being responsible for our lives, we can reasonably be said to own the outcomes of things considered option luck. This is how luck is dealt with in DJ.

31. Option luck can be outcomes of unreasonable choices *or* of deliberate and informed gambles, the costs or benefits of which are therefore fair to expect the gambler to bear. For example, investing in the stock market is not a unreasonable choice, but we think it is reasonable to expect people to bear the losses just as they would enjoy the benefits from the outcomes of such gambles. It resembles the difference between contributory negligence and assumption of risk as defenses in torts.

32. Jules Coleman makes this point well when he says: "In order to realize the idea of responsibility implicated in the concept of a life lived rather than a life had, political institutions must be arranged so that individuals' lives reflect to a greater degree, or to the greatest possible degree, their choices rather than their circumstances of birth and the subsequent influences of fortune." COLEMAN, *supra* note 4, at 60–61.

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III. LUCK IN RETRIBUTIVE JUSTICE

Luck is also an important concept in RJ. In this section we explore how fairness in RJ requires that one's desert, in terms of punishment or moral blameworthiness, is determined by things reasonably within one's control, as opposed to brute luck. Our aim in this brief exploration of the debates around luck in RJ is to show that in RJ there is a consensus that wrongful actions are of some normative concern irrespective of whether the lottery of causality produces harm or not (although there is a debate whether the level of actual punishment should be determined by the outcome). We argue that this insight should be carried over to the realm of actions traditionally regulated by CJ such that wrongful actions—creation of unreasonable risk—should be assessed some measure of liability irrespective of whether it actually manifests in harm.

RJ requires punishment of a wrongdoer in proportion to the gravity of the wrongdoer's act towards the public and the victim. RJ focuses on the moral responsibility of the doer and the punishment he deserves. The role of luck in RJ is famously explored by Bernard Williams and Thomas Nagel.[33] Thomas Nagel, in his seminal paper fittingly titled "Moral Luck," brings to our attention the way in which "natural objects of moral assessment are disturbingly subject to luck."[34] Nagel argues that insofar as we premise our judgments of moral responsibility on some notion of control—that people can be held responsible only for things reasonably within their control—most of these judgments are suspect. Because outcomes of actions are always, to a greater or lesser extent, consequences of causal forces outside the control of the actor, our moral assessment of an actor is always tainted by the role of forces beyond the actor's control. For Nagel, moral luck complicates the question of how to draw the line between "what is us and what is not, what we do and what happens to us, what is our personality and what is an accidental handicap."[35] Moral luck raises the question of why equally careless actors should be viewed as morally different if one party—such as David in our example (the one who hits Amy)—occasions harm whereas another actor—such as Ed (the one who misses his potential victim)—does not because of the presence or absence of a victim or a bird, a fact neither party had any control over.

The debates around moral luck in RJ can be expressed in terms equivalent to option luck and brute luck, more familiar in the DJ context. Consider:

> Ilay, who is a very careful driver and never exceeds the speed limit or violates norms of careful driving. One morning on his way to work, Ilay runs over a pedestrian who unexpectedly rushes into the road.

33. The papers, both entitled "Moral Luck," were originally published in 1 *The Aristotelian Society Supplementary*, (1976). Revised versions of these papers are included in the excellent anthology edited by Danny Statman; *see* MORAL LUCK 1–25 (D. Statman ed., 1993).

34. THOMAS NAGEL, *Moral Luck*, *in* MORTAL QUESTIONS 60 (1979).

35. *Id.*

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Ilay is not blameworthy. In a way, he is outside the scope of the moral-luck paradox. His decision to drive carefully is reasonable, the fact that he kills a pedestrian is something that is beyond his *reasonable* control, and therefore he is immune from both civil and criminal liability.[36] With respect to Harriet (injured in military service) and Ilay, RJ theorists' and DJ theorists' treatments of luck are similar. If one makes a reasonable decision, the luck that strikes is "brute" and is therefore negated. For Harriet, the costs of her bad luck are negated by society (through compensation); Ilay's bad luck of killing someone is negated because he is not forced to bear the costs by being held civilly or criminally liable. In both cases, theories of justice (and the law) treat the bad luck as brute luck: it is negated.[37]

The story becomes more complicated once option luck, and not brute luck, is involved in bringing about the outcome in question. Such is the case with the examples of David and Ed presented in Section I. Both speed to work; both behave unreasonably. David has the bad luck to hit Amy, and Ed has the good luck not to hit anyone. Because their choice of speeding is unreasonable, the upshot of their actions can fairly be termed option luck. Just as George's bad luck in being poor is considered option luck because choosing to be a beach bum is considered an unreasonable decision, so the causal upshots of David's and Ed's decisions to speed are considered option luck.

But while DJ theorists agree more or less that option luck should not be negated, RJ theorists are divided on how to deal with option luck.[38] Some argue that both David and Ed are equally morally blameworthy, while others argue that they are not. This is the moral-luck paradox, which we describe above.[39] The debate in RJ is whether unsuccessful attempts at harm, such as attempted murder, are *equally* as morally blameworthy as fully successful murders; there seems to be a fairly strong consensus that an attempt is morally blameworthy to *some* extent. Yet many theorists also

36. We emphasize "reasonable" control because it was in his control in the sense that he could have chosen not to drive at all. But that would be an unreasonable demand of him.

37. Again, luck is a way of talking about a substantive notion of fairness, of what is appropriate to expect from others, of what constitutes reasonable behavior.

38. The literature on the debate is infinite. Some of the recent literature includes Stephen Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363 (2004); Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791 (2000); David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 63–57 (1989); Larry Alexander, *Crime and Culpability,* 5 J. CONTEMP. LEGAL ISSUES 1–30 (1994).

39. Indeed, in the literature on moral luck, there is some confusion as to whether both drivers should be blamed at the highest level, as if they both killed a person, or at the lowest level, as if they both did not, or at some intermediate level. As Zimmerman observes, Nagel seems to embrace the idea that both drivers deserve no blame at all. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374–386 (1987), at 382. Zimmerman seems to argue—but he is somewhat vague on this point—that they are both blameworthy to the highest extent since it is the risky action or wrongful intent that is blameworthy, and the resultant harm is merely an occasion to evaluate the wrongful conduct. *Id.* at 383–384. *See also* David Enoch & Andrei Marmor, *The Case against Moral Luck,* USC Law and Public Policy Research Paper No. 03–23 (December 2003), *available at* http://ssrn.com/abstract=475161; Steven Sverdlik, *Crime and Moral Luck, in* MORAL LUCK 181–194 (D. Statman ed., 1993).

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accept that even if successful and unsuccessful attempts are equally morally blameworthy, there might be other considerations, such as epistemic limitations, that would inhibit imposition of equal punishment.[40]

In the next section, we claim that these insights about the role of luck developed in RJ and DJ should be applied more generally, even to misfortunes traditionally dominated by CJ.

IV. LUCK IN CORRECTIVE JUSTICE

CJ is concerned with the fair terms of responsibility in bilateral accidents. A doer hits a sufferer. CJ theorists are also concerned with luck, but only with respect to the *internal* operation of CJ. Indeed, CJ theorists talk about luck and responsibility as a way of distinguishing those losses for which a specific person is responsible from those for which no one in particular is responsible that therefore must lie where they fatefully fall (as a victim's bad luck). Such is the case when a victim suffers injury from a nonnegligent doer and therefore, in a negligence regime, can state no legal claim for compensation. Fairness in CJ also demands that one will not be able to escape responsibility for behavior that was under one's control and caused harm to another. CJ theorists posit a "luck–control" spectrum that explains which losses are appropriately considered the doer's and which are the sufferer's to bear. Losses in which the doer's control was a substantial factor (where the doer did not live up to the objective criteria of reasonable care) are ipso facto not the result of luck and are therefore the doer's to alleviate.[41]

40. *See* Norvin Richards, *Luck and Desert, in* MORAL LUCK 167–180 (D. Statman ed., 1993). Those who hold this view need to explain why the legal system treats both drivers so differently. This is the legal luck paradox. One of the most powerful responses is that epistemological shortcomings, and nothing else, are what prevents the legal system from imposing a punishment on the unsuccessful doer. The causation of harm signals the legally determinate level of carelessness or criminal intent, which is uncertain in the cases of an attempted crime or a victimless reckless act, because we can never know if, in the last instance, the person would not have exercised more care or abandoned the criminal enterprise. (The Model Penal Code imposes, in general, the same punishment for an unsuccessful attempt and the completed crime; Model Penal Code, sec. 5.05. Yet it seems that most states do not currently employ this policy.) We find this response problematic, however, because it seems to confuse two distinct stages in the criminal trial. The first is the finding of guilt, to which epistemological shortcomings are relevant. The second is the sentencing, to which epistemological shortcomings are irrelevant. In the first stage, paradoxically, the mens rea requirement to find someone guilty of an attempted crime is sometimes *higher* than the mens rea requirement for the complete crime; *see* Model Penal Code, sec. 5.01(a). In the second stage, the stage at which the convicted defendant receives the sentencing "discount" for committing an attempted and not a completed crime, there are no epistemological shortcomings left. The court is presumably convinced beyond any reasonable doubt that the convict would have completed the crime; otherwise the court would not have convicted him in the first stage. Hence it seems to us that epistemological shortcomings cannot explain the legal paradox.

41. Different CJ theorists define these criteria of control differently. *See,* for example, Perry, *Responsibility for Outcomes, Risk and the Law, in* PHILOSOPHY AND THE LAW OF TORTS 73–123

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This is the principle of fairness in CJ. The doctrine of proximate cause in tort law manifests this principle of fairness by negating brute luck for doers. A doer is not responsible for the sufferer's harm even if the doer was negligent, unless the harm was "caused" (proximately caused) by the doer's negligence. One of causation's most powerful operations is to shelter the defendant-doer from liability in cases where (bad) luck is the dominant factor that contributed to the plaintiff-sufferer's harm. Because the doer did not *cause* the harm in the sense that the harm was not under his control, it is not fairly considered his responsibility.[42]

There is much more to be said about the role of luck in the internal operation of tort law. But for our purposes it suffices to summarize that the instinct about negating brute luck appears in the internal operations of CJ, mainly in the doctrine of causation that diminishes the doer's liability in cases where bad luck plays the most significant role.[43]

To summarize, be have seen that in CJ, DJ, and RJ, a lot of thinking has been sunk into limiting the role of luck, because an active role for luck leaves us uncomfortable. Unfettered luck is perceived as introducing arbitrariness, contrary to the most fundamental understanding of the operation of justice. In all three theories of justice, it is control (the other side of luck in the spectrum) that we feel should determine outcomes, whether it is the moral worth of the doer and his punishment (RJ), civil liability and compensation (CJ), or a citizen's share in the social pie (DJ). Negating luck in RJ, DJ, and CJ expresses a substantive commitment to fairness as respect for equality and responsibility.

In Section II, we saw how DJ theorists treat sufferers' luck: Brute luck is negated, but not option luck.[44] In Section III, we saw how RJ theorists treat doers' luck: Brute luck is negated, and there is some debate with respect to option luck. In this section, we argued that although the role of luck in DJ and RJ (determining one's fair share of society's resources in the former instance and one's moral blameworthiness or punishment in the latter) is different from the role of luck in CJ (determining adequate liability of a wrongdoer and adequate compensation to the victim); there is a lot to be learned from the previous discussion. Specifically, we think that the principles of fairness in luck developed independently for doers and sufferers (in RJ and DJ, respectively) should inform principles of liability and compensation in bilateral accidents, traditionally dominated by CJ. Unfortunately,

(Gerald J. Postema ed., 2001); Ripstein, *supra* note 11, at 94–109 (for a general discussion of the objective criteria of reasonable foresight).

42. Of course, a tort where everything is under the doer's control does not exist. Luck always plays some role. We are focusing on the cases where luck is the dominant factor that contributes to the harm. Compare *In re* Polemis & Furness, Withy & Co., 3 K.B. 560 (1921), with Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928).

43. Even in places where luck plays a secondary role, the doctrine of causation is still active. It limits the doer's liability to the extent that she, and not luck, caused the harm.

44. Of course, what is debated among DJ theorists is precisely what is properly considered brute, as opposed to option, luck.

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CJ theories have not been concerned with integrating these principles of luck and fairness developed in RJ and DJ in such a way that addresses discrepancies in liability and compensation identified in our initial examples of Amy to Fran.

V. LUCK, FAIRNESS, AND THE TREATMENT OF EQUALLY CARELESS ACTORS

In this section we discuss the role of luck on the side of doers. We argue that it violates egalitarian fairness to allow things outside the control of similarly careless actors to determine massively dissimilar liability. The traditional responses of CJ theorists to such critiques focus on distinguishing CJ from retributive principles such as desert and moral blameworthiness and on the internal structure of CJ as a correlative principle concerned with rectification or redress of wrongful losses caused by a specific agent and suffered by a specific victim. We argue that although these explanations satisfy the internal coherency of CJ as a form of justice, they do not satisfy the egalitarian impulse to do global fairness across the boundaries of forms of justice. Moreover, we also argue that the very foundational values of CJ—reflecting and enforcing the terms of equal, responsible agency in a shared physical world—are underenforced when we restrict our attention to *only* those cases of careless action that unluckily cause harm. We claim that retributive notions such as desert and blameworthiness do, in fact, inform fair practices of assessing liability for risky actions because these actions manifest the same objective disrespect for the security interests of others, even if they luckily cause no harm.[45]

The cases of David and Ed demonstrate the role of luck in determining vastly different liabilities for the same careless behavior. We claim that a global commitment to fairness cannot allow such a disparity in the assignment of liability to these two actors. We do not argue that doers such as David and Ed are morally indistinguishable and therefore must be necessarily treated identically; we are not assessing the moral status of doers but the wrongfulness of their conduct. Rather, we claim that all careless action—irrespective of the causation of harm—is an appropriate object of concern for any principle of justice in transactions because all such action objectively disrespects the security interests of others by imposing unreasonable risks

45. Thus we would like to emphasize that our argument is not motivated by theoretical obsessive compulsive disorder (T-OCD) to clean all traces of luck from the operations of justice but rather a desire to implement more comprehensively and consistently the foundational normative commitment we glean in corrective justice, that of responsible agency. Larry Alexander makes a similar point in advancing his subjectivist approach to criminal law in which culpability alone, as opposed to causation of social harm, determines criminal liability. The argument rests not on "the need to extirpate the effects of luck in determining criminal liability . . . but on the nature of retributive desert," a principle that is concerned with those that "have flouted the principle of respecting the rights of others whether or not harm ensues." Alexander, *supra* note 38, at 30.

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on them in pursuit of one's own ends. Relying on causation of harm as a *necessary* determinate of liability is unfair because causation is primarily a function of luck.

There are two primary ways in which luck conditions the liability for similarly careless actions. First, there is the familiar issue of causation luck. Christopher Schroeder illustrates well the wrench that moral luck—through the doctrine of causation—throws into CJ's project of grounding tort law in some sense of moral responsibility.[46] He reminds us that moral theories, insofar as they serve as guides to action, usually concern themselves with the ex ante viewpoint, judging both actors and choices from the viewpoint of what they knew or should have known at the time of action.[47] In this sense tort law is out of sync with most moral theories of responsibility because its cause-in-fact requirement employs an ex post viewpoint to make a moral assessment. The cause-in-fact requirement of tort-law premises liability not on negligent action but on the ex post "contingency of what causal chain actually materializes after [one] acts."[48] Schroeder argues that the conclusions of CJ—that the "successful" negligent driver should be assessed full liability and "unsuccessful" negligent drivers zero liability—are therefore morally arbitrary. Indeed, the pervasive role of luck in determining liability makes the term liability lottery a particularly apt expression.[49]

In the liability lottery, luck is not limited to the role of causation; the level of liability for which an actor might ultimately be held responsible also involves the lottery of victims. Hitting a victim who has a frail, "eggshell" constitution or who earns high wages will necessarily result in higher compensatory damages than a similar impact on a more stalwartly constituted or low-income victim. Thus the objective probability of causing a particular type of injury through a specific careless act may be equivalent with two similarly careless actors, but the expected harm from such carelessness—the probability of injury times the magnitude of injury—might not be equal. We might term this second operation of luck—the luck of hitting a particularly frail victim—"eggshell luck."[50]

A common response to the apparent unfairness of luck's role in manifesting massively different liability for similarly careless acts refocuses the question as one of ex ante as opposed to ex post fairness. Such an argument defends the current practice of relying on causation luck and eggshell luck

46. Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439–478 (1990), at 440.

47. *Id.* In addition to Schroeder, Coleman also argues that liberal political philosophy is directed at guiding action by providing criteria for judging between choices, saying "the fact that events affect individual welfare or well-being is normatively important because effects on individual welfare are the kinds of things that provide agents with reasons for acting." Jules Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53–71 (David G. Owen ed., 1995), at 54.

48. Schroeder, *supra* note 46, at 457.

49. Schroeder, among others, uses the term lottery to describe the operation of liability. *Id.* at 465.

50. We are thankful to Charles Taylor for raising questions about this other level of luck.

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to determine liability for carelessness by casting the practice as one that exposes equally careless drivers to equal *risk* of liability. If a careless driver's actions expose other drivers around him to a 40% chance of injury, he himself is exposed to a 40% chance of financial liability for such injuries. Jeremy Waldron describes such an argument as a "liability lottery" in which causation does not necessarily have *independent* normative relevance in grounding the duty to compensate but merely "happens to be the method we have adopted for ensuring that those who expose others to risks are exposed to substantially the same risk themselves."[51] The ex ante fairness argument could just roll eggshell luck into causation luck: the lottery of liability is ex ante fair with respect to both kinds of luck because similarly careless drivers are being subjected to exactly the same risk of damages as that to which they expose others. The existence of eggshell victims is an empirical fact that is already factored into the calculus of the liability lottery.

We would like to make two points about the arguments describing the liability lottery as ex ante fair. First, although such an account might resolve some discomfort about the fairness of the comparative treatment of similarly careless drivers, it leaves untouched the question of the absolute appropriateness of our current practice of assessing either full (when causation strikes) or zero (when careless action luckily eludes victims) liability.[52] This question is especially salient in cases where eggshell luck is at work—or, to borrow Jeremy Waldron's terms—where "moments of carelessness" cause massive damages. Therefore causation and eggshell luck give us occasion to question the motivation for limiting ourselves to accident schemes in which the *only* possibilities are zero liability or full liability.

Second, assume we are satisfied that any claim of unfair treatment by a successful careless driver (who is made to pay full liability) in relation to an unsuccessful careless driver (who pays nothing) is resolved by reference to the ex ante identity of the liability lottery faced by careless drivers to the risk lottery faced by their potential victims. This does not satisfy us with respect to the claims of unfair treatment by *careful* drivers in relation to unsuccessful careless drivers. From the point of view of careful drivers, such

51. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387–408 (David G. Owen ed., 1995), at 407. The ex ante perspective led Schroeder to advance a scheme of accident law where both careless drivers (successful and unsuccessful ones) would be assessed equal monetary liability set at the level of expected harm of the negligent activity. Schroeder distinguishes his proposal from "communal or group responsibility" because "the ex-ante proposals advanced here are predicated on individual, private morality, arguing only that implementation can be done in nontraditional litigation structure" to conform more closely with moral notions of accountability and eliminate the "lottery" character of liability based on outcomes as opposed to faulty actions. *Supra*, at 472.

52. Jeremy Waldron makes this point from the perspective of moral desert of careless actors. He says that although the liability lottery may be "macabrely appropriate," it is not necessary that we achieve compensation of victims by a system that imposes a liability lottery where the outcomes are either substantial liability or zero. He claims that if we can find better ways of compensating victims, then "imposing this risk on negligent persons will seem unnecessarily retributive and arbitrary, in the sense of being insufficiently motivated by any good reason." Waldron, *supra* note 51, at 406.

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as our case of Fran (who consistently drives carefully and has occasioned no harm to others), it may be fair to hold successful careless drivers liable for full damages yet unfair to allow unsuccessful careless drivers (such as Ed, who consistently drives carelessly and also occasions no harm) to be treated identically to careful drivers, escaping any fine or liability. We argue that the foundational values of CJ should lead us to be unsatisfied with relying *exclusively* on causation to audit careless action because it underenforces the norms of responsible action that reflect respect for others' security interests as being equally important as one's own.

Tony Honore offers another version of this ex ante fairness argument as a justification for the current regime framed in terms of a single recurring actor engaging in careless activity, as opposed to comparing two different similarly situated careless actors.[53] Rather than comparing two different drivers, he asks us to think of these two drivers as two different versions of our own selves. In the long run, the current tort system is a fair lottery, Honore argues, because most of the time my "unsuccessful careless driver self" is not found liable and therefore does not pay for her behavior. Whenever my "successful careless driver self" is found liable and therefore is required to pay damages, it is just the debit side of a long run of credit accumulated in the multiple-selves personal account. Since the credit and debit tend to even out in the long run, it is not unfair to charge the successful and the unsuccessful driver differently. We disagree for several reasons.

First, as Ripstein notes, to assume that the credit and the debit parts in each person's life will always cancel out is a very optimistic empirical assumption. The more harm a driver causes (and therefore is required to pay more damages), the more we need to assume that he must have escaped liability for risk creation; otherwise the credits and the debits will not cancel out. Harm creation and risk creation may be correlated, but not necessarily perfectly so. For example, two doers can impose the same risk but, due to pure eggshell luck, one creates more harm than the other. It is exactly this luck with which we are concerned that Honore's argument leaves unsettled. Moreover (and again, as an empirical matter) as Ripstein observes, if someone starts by compensating another, she may never get the chance to impose risks on others.[54] Second, Honore's claim that both drivers are treated fairly does not resolve the fact that Fran, the consistently careful driver, has a clear claim in justice against being treated identically to Ed, the consistently reckless driver who escapes liability on account of luck alone. Third, and more importantly, even if Honore is correct empirically, and even if his system is fair (in the long run), it may still be the case that one can think of a system that is, also in the long run, even more fair because

53. Tony Honore, *Responsibility and Luck: The Moral Issues of Strict Liability,* 104 *Law Q. Rev.* 530 (1988).

54. Ripstein, *supra* note 11, at 74.

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it is fair not only from the ex ante perspective but also from the ex post perspective.

Another familiar way CJ theorists address this apparent unfairness of unequal treatment of equally careless actors is by reminding us that CJ is concerned not with assessing the moral status of negligent actors but rather with fairly assigning responsibility to the consequences of careless actions. For example, Coleman argues that CJ deals with "objective" wrongdoings that do not necessarily "mark a moral defect in the agent," and therefore the duty to repair wrongful losses is not because the injurer is wrong but rather because the wrongful loss is the doer's responsibility, "the result of his agency."[55] Ripstein agrees that liability must be assigned in accordance with morally acceptable norms of responsibility but rejects the idea that "lack of care should be the relevant dimension along which similarly situated people [should be] treated alike."[56] For Ripstein, "[t]he failure to exercise appropriate care is one moral failing among others," and he does not see what the rationale is for classifying people as relevantly similar along that dimension compared to other possible moral failings.[57] Again, because CJ is making an objective inquiry into the wrongness of an action, not an actor, the fact that others are equally blameworthy in a moral sense is not relevant. Ripstein explains that negligence is not a sign of moral defect but rather "a failure of conduct," and CJ does not set out to "ensure like treatment of all bad behavior" but rather to assign the costs of negligent accidents fairly.[58]

If we grant that CJ is not concerned with the moral evaluation of actors and, rather, concerned with assigning liability on the basis of objectively faulty actions, does the moral-luck critique still offer us anything? We think the answer is yes.

First, with respect to the faulty action versus faulty actor distinction made by various CJ theorists, we think this is an important distinction that we in fact endorse. However, we believe it can be applied more coherently than CJ theorists do in defending the current tort-law system. We are not proposing that David and Ed should be treated exactly alike because they are moral equals, but rather that their similar defect of conduct—their similar wrong in disrespecting the security interest of others—should trigger a similar concern, though not necessarily an identical remedial response. In fact, we are, just like CJ theorists, not fixating on the doers' moral worth. We also care about the faulty action and not the faulty actor, but we do not condition our inquiry on the misfortune of harm.

55. Jules Coleman, Risks and Wrongs 324–326 (1992). Coleman points out that RJ is concerned with annulling the consequences of wrongdoing on the basis of the moral blameworthiness (culpability) of wrongdoers. CJ, unlike RJ, assesses the wrongness not of the doer but rather of the action, according to an objective standard of fault to determine liability.

56. Ripstein, *supra* note 1, at 74.

57. *Id.* at 81.

58. *Id.* at 74, 80–82.

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The operation of luck illustrated by our examples of David and Ed demonstrates that sorting cases into the CJ machine happens in such a way that is *underinclusive* of egalitarian foundational commitments to negating luck in order to manifest equality and responsibility. Indeed, by excluding the likes of Ed from the CJ machine many individuals who manifest this same defect of conduct as those held responsible for their carelessness, namely unsuccessful careless actors, escape any consequences for their action. The principle of equal respect for others' liberty and security interests that is embodied in the standards of care of tort law can be used to evaluate all action, including action that does not cause harm.[59] Most CJ theorists defend the fault principle over strict liability precisely because they do not see the occasion of harm (as a causal upshot of agency) as morally sufficient to ground the duty to compensate. The normative role of faulty action in justifying the duty to compensate implies a concern about such action—because it does not show respect for the interests of others as equal to one's own interests—that must be somewhat independent of the fact that harm is caused in some instances.

Drawing from the literature on moral luck, we think that the existence of harm may solve an epistemological problem we may have (but may not necessarily have) in detecting faulty behavior. To use faulty action to ground the duty to compensate, as many CJ theorists do, implies that we should be concerned with *all* such faulty action, even if it luckily does not cause harm. Harm, in other words, is a sufficient but not a necessary starting point for our inquiry about the doer's behavior. This is not to say that all similarly faulty action ever can be treated identically, merely that our inquiry into fair treatment of careless actors should not be limited to the cases where harm manifests.

CJ theorists would respond to our discomfort about the unequal treatment of David and Ed, despite their relevant similarity, by reminding us that in the case of Ed there was no victim. The now near-consensus on the centrality of *correlativity* in CJ shows that the existence of a victim is not merely an occasion to evaluate a doer's action but a fundamental component of the inquiry into the demands of CJ. If there is no mess to clean up, there is no occasion to ask the question of CJ: Who should bear the costs of this misfortune? As Weinrib puts it, "tort law is not concerned solely with the defendant's emission of a harmful possibility but with that possibility's coming to rest on a particular plaintiff."[60] Therefore causation does not so much particularize the defendant as a uniquely blameworthy doer as it particularizes the plaintiff as the appropriate recipient of compensation for the losses attributable to the wrongdoer's carelessness. Rectification of

59. As Christopher Schroeder puts it, "faulty" can "identif[y] an aspect of actions that can be present regardless of whether harm is caused in any specific instance." Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 347–362 (David G. Owen ed., 1995), at 353.

60. Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 414 (1987).

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wrongful losses thereby restores the initial equality between the plaintiff and defendant.

The reasons why the cases of David and Ed are not problems for CJ are internal to CJ and demonstrate that global consideration of luck do not pose a problem for the coherence of the theory. Yet internal coherence may prove insufficient comfort in the face of patent unfairness that results from segregated, albeit internally coherent, spheres of justice. We claim that CJ theorists cannot rest after giving a coherent account internal to their own theory if they simultaneously hold commitments to global fairness that is disturbed by maintaining a distinction between CJ and RJ.

Although the operation of CJ rectifies the wrong between that specific doer and sufferer, we claim that the wrongful "emission of a harmful possibility"[61] by the unsuccessful actor is still an outstanding matter of social concern. The response of CJ to concern over the comparative treatment of David and Ed does not so much justify the unequal treatment as it begs the question of the sufficiency of the limited question posed by CJ to this situation. That is, the fact that we do nothing with Ed but assess David's liability is the result of the theoretical and institutional segregation of CJ and RJ, not because there are not relevant questions to ask in the case of Ed, questions that are motivated by the same concern for equality and responsibility as the CJ question.

This is not to say that the normative criteria of fault in CJ should or can be collapsed into the criteria of moral blameworthiness in RJ. Rather, retributive principles may constrain and inform our actions in the traditional CJ realm. Various theorists have argued that retributive principles should constrain the operation of CJ in several respects. For example, Tony Honore and Jeremy Waldon have both explored how the retributive principle, which *forbids* imposing sanctions massively out of proportion to the gravity of an offense, might demand some sort of loss-spreading mechanism (such as insurance) and abandonment of "zero or full" liability schemes.[62] Yet the retributive principle, which *requires* imposing sanctions in proportion to blameworthiness, may also inform our actions in the traditional CJ realm because all careless action, whether or not it manifests in harm, disrespects the security interests of others and therefore is of some social concern.[63]

This points to another reason why all careless conduct should be an object of social/normative concerns is that the unsuccessful negligent driver does actually occasion harm to society. By behaving without care, David violates the norm of responsibility, the foundational value of CJ that demands we all show equal regard and respect for the interests of others, and by doing so,

61. *Id.*

62. Tony Honore, Responsibility and Fault 87 (1999); Waldron, *supra* note 51.

63. Honore makes the distinction between two aspects of RJ: "[o]ne *requires* that a sanction be imposed that is roughly proportionate to the moral gravity the conduct," and the other "*forbids* that a sanction be imposed that is out of proportion to the gravity of the conduct." Honore, *supra* note 62, at 83.

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he imposes costs on others in his sphere of action. Other drivers (like Fran, who consistently drives carefully), need to change their behavior by showing extra care and caution on the road as David menaces their security interests with his car. Unsuccessful negligent actors have violated norms of equal terms of interaction; this forces others to compensate for their disregard.

As a normative matter, luck alone cannot give us the contours of proper practice. As in current tort doctrine, liability is not determined by the physics of causality but rather by settled notions of what duties of care we owe each other and when we think certain risks are reasonably within the foresight and control of actors. This discussion of luck leads us to conclude that any acceptable scheme of accident law inside an acceptable "zone of fairness" would (1) involve some assessment of liability on unsuccessful careless actors; and (2) consider assessing less than full damages on those successful careless actors whose level of carelessness is massively out of proportion to the harm ultimately caused because of the "eggshell" characteristics of their victims. Several schemes, including the one advanced by Schroeder, in which all similarly careless actors are charged expected harm, or a mixed scheme in which successful careless drivers are charged close to full damages and unsuccessful careless drivers are charged expected harm, would fall within the "zone of fairness." We are not proposing constructing a perfect scheme in which all luck is negated, assuming it would even be possible to do so. To make such a proposal begs the initial question, which is not whether luck has played *a* role in determining an outcome but rather whether luck has played a *normatively acceptable role*. Fairness, like reasonableness in the law, is a zone whose boundaries are set by foundational commitments to substantive notions of equality and responsibility.

We now turn to the other area where, in our view, luck is allowed to play a normatively unacceptable role in the current tort regime.

VI. LUCK, FAIRNESS, AND THE TREATMENT OF EQUALLY BLAMELESS VICTIMS

Symmetric with the CJ-RJ divide we discuss above, there is a CJ-DJ divide that allows a morally unacceptable role for luck in determining treatment of equals on the side of victims. Although the unequal treatment of equally innocent victims has been given less attention in the literature, it poses an equally significant problem as that of equally negligent actors for CJ theorists who are also committed to a global notion of fairness.[64] Consider again the cases of Amy's, Bill's, and Carol's misfortune. In each of these cases, the compensation available to the victim is entirely a function of luck. In none of the examples is the victim to blame for his or her misfortune; they are

64. Some other authors have addressed these concerns. *See generally* Franklin, *supra* note 12; Sugarman, *supra* note 12; Schroeder, *supra* note 59.

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similar cases in that they are all blameless victims of some exogenous force. Only luck—brute luck—determines whether the harm is caused by an agent or by nature, and only brute luck determines the level of insurance carried by his or her respective tortfeasor. But while the attempt to nullify the role of brute luck in the unfortunate vicissitudes of life is a major issue in the DJ literature and the political institutions proposed therein, there is no similar concern in the CJ literature. We claim that lack of control for victims is a relevant vector of similarity to the lack of control for defendants (which the CJ machine does recognize). There is no obvious principled reason to make a distinction between the compensation due equally blameless victims on the basis of the cause of that loss. Therefore it offends justice that they have such vastly disparate prospects for compensation.[65]

Whereas in the case of the equally careless drivers, the moral-luck paradox pushes us to formulate the zone of fairness enclosing a range of acceptable approaches to assessing liability for similar risk creation, we do not see an equivalent paradox of luck on the victims' side. We do not believe, in other words, that the cases of equally blameless victims present such thorny issues in assessing the appropriate level of entitlement to compensation as the cases of similarly careless actors in assessing the appropriate level of liability.[66] Insofar as one accepts that bodily integrity should be equally assured against brute luck and one does not recognize the difference between agent (negligent or not) versus natural source of harm to this interest as one of normative import, there is no principled basis upon which to deny equally blameless victims anything less than equal compensation. Along these same lines, within the class of negligent victims of agents, there is no principled reason to deny equal compensation because of the brute luck of being injured by a judgment-proof defendant. However, as we discuss more below, we are not attached to the institutional mechanism by which delivery of such similar compensation is assured.[67]

65. Some might argue that the victim of a tort and the victim of nature or a disease are, in fact, *not* equally situated, and the former is more severely injured than the latter even if they both lose their sight due to no fault of their own. It is not in any way obvious that being injured by an agent is indeed worse than being injured by nature. Putting aside the potential for differential compensation, one might "prefer" the death of a loved one by a drunk driver over lightening because that might give a survivor a sense of control in her remaining life, as she could, for example, campaign against drunk driving. On the other hand, there might be something uniquely devastating about losing a loved one to forces outside the bounds of our mortal comprehension or control. We acknowledge, however, the compelling argument that agent-created misfortune might be worse than "natural" misfortune because the former involves some type of dignitary harm to the victim. If one believes that Amy, the victim of an agent's carelessness, is indeed worse off than Carol, the victim of a cruel God, on these grounds and therefore deserves more compensation, any justice system could incorporate additional compensation for such a dignitary harm should it prove legitimate.

66. That is, the issue of moral luck discussed in the section on RJ complicates the question of whether it is fairer to assess similarly successful and unsuccessful careless actors' expected harm or only unsuccessful careless actors' expected harm, while assessing on successful careless actors full costs of manifest harm.

67. It may well be that social insurance for accidental losses is more efficient than a tort-law-like scheme because it distributes compensation faster and carries lower administrative

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Our concern in this paper is with equal compensation for injuries to bodily integrity, an object of normative concern in RJ, DJ, and CJ alike. The relevant similarity of equally blameless victims is necessitated by the first-order commitments of egalitarianism that persons should have equal opportunities to pursue meaningful lives and to be responsible for the outcomes of their lives, in combination with our substantive argument that the source of one's injury is not a morally acceptable role for luck to play. Of course, the question of which kinds of losses should be compensated is not obvious from this approach. As we mention above, the interests essential to facilitating equal, meaningful life opportunities to citizens is a normative question, one that DJ theorist have debated at length and on which we offer no particular view in this paper.

Some CJ theorists do not justify or even defend this unequal treatment of innocent victims. Rather, they point to the division of labor between CJ and DJ and claim that cases such as Amy through Carol, on account of the source of misfortune, simply sort themselves out into different forms of justice. This is not a justification of the disparate treatment as much as it is a description of it. As in the question of unequal treatment of equally negligent actors, it begs the question of why we start from the position of an a priori commitment to a division of labor between CJ and DJ if it comes at the price of generating such inequalities. If CJ is fair and treats people as equals, it must do so not only internally but also in terms of how people get into the CJ system in the first place. Yet most theorists have claimed that the internal rules of CJ take care of this: that the rules for deciding if something qualifies as faulty action or a wrongful loss (and therefore qualifies for the CJ machine) do not pose a problem for fairness.

Recently, some theorists have relaxed the restriction of distributive considerations in CJ. Various theorists recognize that the normative strength of CJ claims is influenced by the fairness of the underlying holdings that CJ protects from wrongful transfer.[68] In this view, the CJ machine stalls only when the underlying distributive shares are disturbingly distant from the demands of DJ. They would refuse Marie Antoinette's claim for her tortiously trampled torte but might not refuse much beyond that.

However, we are claiming something more: that the actual rules for distinguishing between what is in the sphere of CJ versus DJ, as they currently function in our tort system, produce outcomes incompatible with an egalitarian commitment to fairness. Most CJ theorists hold that CJ is a distinct,

costs. On the other hand, it may well be that a tort-law-like scheme for losses is more efficient than social insurance because it creates the optimal incentives for discovering risks and taking caution. This raises a very difficult question that egalitarians have a hard time tackling, which is how to balance various aspects of fairness and efficiency. We do not discuss this question here. We note, however, that given the claims of low deterrence value of tort law in many activity areas (i.e., medical malpractice, auto accidents, etc.) and its high administrative costs, an egalitarian scheme like social insurance might also be cost-saving. It might therefore be easier to convince economists than egalitarians that tort law as we know it should be abolished.

68. COLEMAN, *supra* note 55, at 350–354; *see also* Ripstein, *supra* note 11, at 264–296.

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independent system and that there are reasons it should remain so.[69] We now turn to exploring some of the reasons that have been offered in defense of this proposition.

How and Why Are Corrective and Distributive Justice Distinct?

Although various analytical distinctions can be made between DJ and CJ, these distinctions must be evaluated and justified in the same way any human construct is evaluated—with reference to values we share.[70] There are various ways theorists have forged a distinct domain for CJ, constructing its principles and sphere of operation as independent from DJ. Although some of these arguments are conceptually compelling, we think they leave unanswered (and unasked) the practically compelling question of whether drawing the theoretical distinction and applying the institutional divide between CJ and DJ comports with egalitarian fairness. Below we briefly explore how some theorists have distinguished CJ from DJ and ask not only whether these are successful arguments but why we would want to defend them.

For example, many theorists have characterized CJ as operating on agent-created misfortune whereas DJ operates on those misfortunes brought about by acts of nature or by the normal, acceptable operation of political, economic, or social institutions. The nature of CJ as a distinctive principle of justice operating on the realm of human-occasioned harm is expressed in Coleman's concept of "responsible agency" and Perry's concept of "outcome-responsibility."[71] Central to Coleman's conception of CJ is the principle of responsible agency, which "provides wrongdoers with reasons for acting that are peculiar to injurers . . . to annul losses for which they are responsible."[72] Perry formulates the distinctive nature of CJ in terms of outcome responsibility. He advocates a notion of "responsibility premised on control [capacity to avoid] . . . [as a] normative connection between actor and outcome."[73] The normative concern driving both these conceptions

69. Indeed, Coleman famously abandoned his annulment thesis because it failed to differentiate CJ and DJ. COLEMAN, *supra* note 55, at 311–312.

70. We thus reject Weinrib's internal, circular justification for corrective justice. Weinrib's formulation seems to rest on the normative grounds of coherence as the manifestation of justice. To be sure, coherence is not without value—it helps in insulating law from politics, or, at least, apparently so. But if coherence leads to not treating people as equals, as we argue, then local coherence loses its normative force. There is no reason to think that Weinrib is indifferent to the fact that CJ is costly in terms of global equality. But as Weinrib is not involved in designing an optimal tort regime but rather in describing what a tort system *is*, all he could agree to is to abolish tort law altogether and implement a different system, which will not be called tort law. We are not committed to calling an alternative system tort law, so we hope Weinrib will join us.

71. Stephen R. Perry, *On the Relationship between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE 238 (4th ser., Jeremy Horder ed., 2000); Coleman, *supra* note 1.

72. Jules Coleman, *The Mixed Conception of Corrective Justice,* 77 IOWA L. REV. 427, 442 (1992).

73. Perry, *supra* note 1, at 151.

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of CJ seems to be the necessity for some principle of justice requiring agents to clean up the messes their irresponsible actions inflict on others, given that we share physical and social space with other agents deserving of equal respect and concern. We agree that a world without such an operative principle of justice would be an impoverished world indeed. However, the need for such a principle does not give us the boundaries of CJ as we know it (indeed, the boundaries of CJ may well be underinclusive of this principle). The mere existence of a conceptual distinction between harms occasioned by agents versus harms occasioned by nature does not demand a distinction between CJ and DJ. Indeed, we would venture to argue that some obvious, commonsensical distinction between acts of agents and acts of nature did not give rise to the boundaries of CJ, but rather our customary distinctions between acts of agents and acts of nature is a product of the social-historical practice of tort law.

DJ often deals in human-occasioned harm, and even where nature has a primary role in causing the harm, there are always ways to describe causation in such a way that an act or omission of a human agent plays a significant role. Consider two examples. GM shuts down operations in Flint, Michigan, a very specific act of human agency, and thousands of devastated workers seek compensation from various institutions of DJ: unemployment, food stamps, job training, and so on. In this case the condition of human agency and causality is satisfied, but yet the sufferer has no claim in torts. Or, to take a more recent example, when Hurricane Katrina hit the southern coast of the United States, and hundreds of thousands were economically harmed (ignoring, for a moment, the numerous tragic deaths), even if a major reason for their loss is that resources to strengthen the levees of a nearby lake were unjustifiably shifted by humans to a different place, this does not create a cause of action in torts against anyone in particular.

In both cases (GM and Katrina) the sufferer has no valid claim on the CJ machine, even though the harm was occasioned by a human agent's decision. In both cases, the sufferers might have a sound plea for charity and, some might even say, a valid claim on the DJ machine to be compensated for their brute luck.[74] Thus agency as the source of harm in itself is not determinative of whether the misfortune is sorted into the CJ machine.

Recall our initial examples of differential compensation to victims (Amy, Bill, and Carol) and differential liability for careless actors (David and Ed). In both Coleman's and Perry's accounts, the concepts of responsible agency and outcome responsibility explain the differential treatment of these cases coherently because they posit the "relevant principle of responsibility as 'responsibility for outcomes' not 'responsibility for acts.'"[75] Someone is responsible *to* Amy and Bill, and only David is responsible *to* someone within

74. Of course, the differences in compensation that would result from these losses being sorted into the DJ versus CJ machine and the fairness of such differences make up the central normative question of this paper.

75. Coleman, *supra* note 1, at 312.

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the principles of CJ. While both Coleman's and Perry's accounts certainly can provide a coherent distinction between CJ and DJ, they do not provide a compelling reason for maintaining the distinction if doing so compromises respecting its constitutive commitments, those of equal enforcement of responsible agency and annulment of wrongful losses. These accounts deal only with how the operations of CJ are fair once something is subject to CJ. The unfairness might emerge when we step back and look at why certain cases are being sorted between the CJ and DJ machines in the first place. For us, the question is not whether we can draw a coherent distinction between CJ and DJ on the basis of a concept related to human agency or responsibility but rather whether we *should* want to and why. A global commitment to fairness and the negation of brute luck that it entails (again, as a way to manifest equality and responsibility) demands that we do not segregate our approach to getting people their due compensation and enforcing responsible terms of interaction. It demands that we take into account the interaction between institutions and theories of DJ and CJ, not just content ourselves with answers such as "but that is a concern of distributive, not corrective justice," or vice versa.

A separate distinction between DJ and CJ, preferred by formalist theorists, is on the basis of the "thick" versus "thin" concept of personality necessary to establish its principles. In formalist theories of CJ, such as Weinrib's and Benson's account, the notion of correlativity operates on the structure of CJ, whereas the notion of personality operates on the substantive content of the rights and duties relevant to CJ. In these accounts of CJ, personality is "thin" in that it merely entails that "parties are viewed as purposive beings who are not subject to a duty to act for any purpose in particular, no matter how meritorious."[76] Their only duty is a negative one—not to interfere with others' life paths. According to Weinrib and Benson, this "thin" concept is limited only to private law. In other contexts, such as in DJ, the operative concept of personality is "thicker," as it extends beyond the negative duties of noninterference of a specific doer and sufferer to accommodate larger sets of duties related to the richer realms of social interactions.[77]

Benson justifies his "atomistic" view of agents by claiming that "the minimal condition of agents being genuinely responsible subjects is that they have the moral power to choose from a standpoint that is not tied to anything particular."[78] But why choose the "minimal condition" in the first place? Why choose a "thin" concept of personhood that is wholly independent of any reference to a shared conception of good or right? After

76. Ernest Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 111 (2001).

77. *Id. See also* Benson, *supra* note 1, at 535: "Whether a person has rendered or received what is due in terms of holdings can be determined without reference to the ends he or she may have, and thus independently of such considerations as intention or character which are the defining concern of the other virtues."

78. *Id.* at 562.

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all, individuals are inescapably particular and inextricably social. Is it not a wrong move to abstract from the reality of agency in a shared world into a hypothetical world of abstract will and abstract right, especially when we eventually need to move back into the reality of a more particular world to enforce those claims formulated in the abstract?[79]

Moreover, as Weinrib emphasizes, his theory of CJ does not postulate a conception of personality and then derive tort theory from it. Rather, it works backward from the doctrines and institutions of tort law to the most pervasive abstractions (correlativity and personality) implicit in it. For Weinrib, tort law is a normative practice, and his notions of personality, together with correlativity, are concepts that make this practice coherent.[80] There are no independent normative justifications for these concepts, only instrumentalist ones; together they make a coherent but completely internal understanding of tort law feasible. Weinrib's analysis says nothing about whether a world with tort law in it should exist. Indeed, our main argument is not so much that a commitment to fairness constrains the content and application of CJ institutions, but rather that this commitment raises doubts about the legitimacy of these institutions altogether as a way of dealing with accidents.[81] Similarly, Benson himself eventually admits that even the complete absence of a CJ sphere is not a problem for his CJ theory and that it might therefore be possible to leave no space for the operation of CJ at all.[82]

Another way in which CJ theorists talk about a necessary distinction from DJ is that the former elaborates principles that govern local interactions, whereas the latter elaborates principles that govern global interactions. CJ defines fairness in transactions, whereas DJ defines fairness in allocation of social burdens and benefits. Weinrib claims, "there is a conceptual difference between the correlative logic of CJ and the comparative logic of distributive justice."[83] He maintains, "no distributive considerations can serve as a justification for holding one person liable to another" and that "for purposes of justifying a determination of liability, corrective justice is independent of distributive justice."[84] For Weinrib, these two distinct principles successfully rationalize our intuitions in an exhaustive fashion in these realms.

79. Charles Taylor, *Atomism, in* COMMUNITARIANISM AND INDIVIDUALISM (Shlomo Avineri & Avner de-Shalit eds., 1992). We realize these questions involve philosophical debates beyond the scope of this paper and that our short treatment of these issues cannot do justice to those debates. However, we do believe it is a fair critique to question why we start from a theoretical proposition that may be logically coherent and beautifully explicated yet unnecessary and may perhaps undermine the normative project of global equality and responsibility.

80. Weinrib, *supra* note 76, at 125.

81. For how commitment to fairness may constrain the content and application of CJ institutions, *see* Logue & Avraham, *supra* note 25.

82. Benson, *supra* note 1, at 619.

83. Ernest Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349.

84. *Id.* at 349.

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Along these same lines, Perry makes a claim about the unique nature of CJ when he characterizes it as addressing a "local problem" whereas DJ addresses a "global problem." He describes the issue as, "corrective justice rectifies loss on a local scale, between two persons . . . the local mechanisms cannot respond satisfactorily to the global problem [of maintaining a distributive scheme]."[85]

Yet, we find this distinction unconvincing in forging a conceptual cleavage between CJ and DJ. Although the operations of CJ in assessing liability and awarding compensation are structured according to a correlative, local logic, CJ also admits of comparative logic in a fundamental way. In determining both which interests are protected and which actions are faulty, CJ must engage in the type of global accounting and distributing characteristic of DJ. In order to specify which security interests are protected and thereby subject to compensation if transgressed, CJ must indeed take account of global issues such as how specific interests in things (such as bodily integrity and property) allow us to lead a meaningful life.[86] Hence, with respect to designating a specific standard of care, we need to take account of global issues to determine behavioral standards that reflect what levels of care and precautions are reasonable to expect of citizens as they go about their diverse life projects.

Coleman and Ripstein make essentially this point in their paper "Mischief and Misfortune." The authors claim that both CJ and DJ are responses to the question of "who owns which of life's misfortunes?" and that their respective institutional embodiments both seek to "allocate misfortune and its burdens *fairly*."[87] Yet accounting for a fair distribution of misfortune requires an analytically prior account of the costs of activities and a general theory of what we owe each other, both of which are "normative all the way down."[88] The fault system embodies egalitarian commitments to both fairness and equality. It is fair because it divides the risks of activities between potential plaintiffs and defendants in a way that is acceptable to both parties and it reflects equality because everyone is given a like level of security and liberty interests. However, formulating specific standards of care and selecting which interests are to be protected requires taking account of the "particular liberty interests and security interests that are at stake" and making substantive, normative arguments about the importance of those interests.[89] Therefore the fault system involves global logic because, in drawing moral boundaries between persons, it invokes local concepts

85. Perry, *supra* note 1, at 244.

86. Weinrib and Benson will object to this statement because for the "thin" concept of personality that they employ in their account of CJ, global issues must not be taken into account. We raise doubts above about the normative importance of their thin concept of personality.

87. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 McGill L.J. 91–130 (1995–1996), at 94 (emphasis in original).

88. *Id.* at 98.

89. *Id.* at 110–111.

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such as "control, agency, and choice" that make sense only "in concert with substantive judgments about why various activities matter to us and about the ways in which they do."[90]

The interests that are protected by CJ are those that allow individual citizens to stand in relations of equality in public and private relations. If CJ admits these global normative considerations that justify protecting the particular interest of bodily integrity, the burden would fall on tort theorists to defend why, if we had to design the fairest regime, we would protect this interest with a regime that offers compensatory recourse contingent upon the luck of the draw with respect to the sources of destruction (local interactions).

Another familiar distinction that is pointed to as a reason for maintaining a theoretical and institutional divide between CJ and DJ has to do with the types of reasons each principle supplies. Coleman, among others,[91] claims that CJ and DJ are distinguished from one another on the basis of the former's *agent-relative* normative claims as opposed to the latter's *agent-general* normative claims. An agent-relative normative claim gives an agent a moral reason to act that is specific to her because of a particular relationship she has to another agent. An agent-general normative claim gives us all equal reason to act in a specific way because of our membership in a community; its terms are equally binding on all of us.

However, is it accurate to characterize CJ and tort law as motivated purely by "agent-specific" reasons? Although the institution of tort law enforces agent-specific obligations, it is motivated by elements of agent-general reasons as well. Tort law is not funded by "user fees";[92] the United States devotes significant public resources to providing a venue to allow individuals to pursue tort claims. If the claims of CJ were just the concern of the doer whom it binds and the victim whom it benefits, why not make the administrative cost of enforcement of the CJ claims an element of the liable party's damages? We conjecture that what drives the public provision of CJ institutions is that we all share some agent-general interest in the values of equality and responsibility represented and enforced by CJ claims. Viewed as a whole, the duties of care in tort doctrines embody the political ideal of a civil society of equals. This would imply that we have a similar concern for the behavior of both David and Ed, despite the fact that Ed did not occasion harm to another. We are still concerned with the "social harm" Ed imposes and with the fact that he does not show respect for others in his actions.

Tort law not only reflects the values of equality and responsibility, it also functions to instill them. There is a sense in which we all share an interest

90. *Id.* at 109.

91. Perry, *supra* note 11.

92. By user fee we mean an administrative fee for the private benefit bestowed by some public institution or resource.

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in bringing about the state of affairs in which people compensate those harms caused by their faulty action, which is an agent-general motivation. This desire is motivated not just by the principle of CJ—that people ought to bear these costs because of a fundamental principle of outcome responsibility or because the fault principle points to the defendant as the appropriate bearer of these costs. It is also motivated by the notion that in such a world our fellow citizens are instilled with the social values of responsibility and prudence.[93] Instilling values does not have to be reduced to the notion of deterrence in the law and economics model of calculating the appropriate level of care based on the costs of conduct. Rather, we mean instilling in the sense of reflecting in our practices a fundamental moral sense of respecting others as ends in themselves, of taking their security and liberty interest seriously as *reasons* for conforming our conduct to an appropriate level of care. This is the kernel we want to keep from tort law. The harm-based operation of tort law personalizes the potential consequences of our actions in a way that general maxims to "take care" do not.

To sum up, we believe the various arguments put forward in the literature for maintaining the distinction between CJ and DJ (allocation of resources versus private wrongs, thick versus thin view of personality, global versus local interactions, agent-general versus agent-specific reason-giving properties) cannot justify the distinction ex ante but at best can describe it ex post. Second, and more important, we believe that these distinctions, even if they offer determinate analytical boundaries between CJ and DJ, should not be internally evaluated but rather be normatively evaluated and justified in the same way any human construct is evaluated—with reference to values we share. We believe that an internal justification, one that justifies a distinction only because it makes CJ (and DJ or RJ) more coherent, is not enough to justify the existence of a distinct CJ machine in the first place, if doing so compromises respecting the constitutive commitments of justice: fairness and equal enforcement of responsibility. Indeed, and unfortunately, viewing these distinctions as relevant does not do much more than maintain the separation between CJ and DJ or RJ as internally coherent machines of justice, yet at the expense of hurting the global production of justice. We believe this should be enough to justify revisiting traditional theories of fairness in dealing with misfortunes, namely CJ, as well as the social institutions created to manifest this theory, namely tort law.

93. Zipursky and Goldberg argue something similar in their paper criticizing G. Calabresi's law-and-economics approach to tort law for failing to understand how law in general can reinforce norms and motivate ethical behavior apart from merely incentivizing action. They argue that "torts can be understood . . . as an effort to recognize, refine, reinforce, and revise obligations that are instinct in various standard social interactions. . . . it [tort law] speaks the language of obligation, helping to settle, as much as possible, what is expected of a person in a range of situations." John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 Md. L. Rev. 364 (2005).

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VII. PRACTICAL REASONS: THE ISOLATION OF CORRECTIVE JUSTICE CREATES UNFAIR OUTCOMES

So far we have focused on sources of luck—the agent of misfortune for victims, and the causation of harm for doers—that create unfair disparities in liability and damages at odds with the normative commitments of CJ that arise from its *theoretical* formulation. In addition to these sources of luck built into the theory of CJ, there are also multiple practical operations that systematically generate unfair discrepancies in liability and compensation for otherwise similar actors. Specifically, factors such as familiarity with legal rights and recourses of the tort litigation system, acquaintance with attorneys, ability to obtain medical care to document injuries necessary to prove harm, economics of case litigation, and other related social and economic factors all affect the compensation similarly situated accident victims receive. The relevant point we hope to touch on in this brief section is that these factors, like the luck of the draw of causation, are morally irrelevant and whenever possible should be addressed to assure like cases are treated alike.

Tort law provides only 10% of the $500 billion annual recoveries for accidents in the United States. Tort law therefore constitutes a relatively small portion of the institutions compensating the victims of misfortune.[94] Further, there is no efficient coordination of benefits between various federal programs, private insurance markets, and tort law. This problem, besides exacerbating the inefficiencies in the overall recoveries system, increases the lack of horizontal and vertical equity between similarly and differently (respectively) situated unfortunates.[95]

A particularly worrisome issue in the current tort system is that most tort victims are left outside the CJ justice club, to change the metaphor just a bit. This, of course, creates a problem of underdeterrence, which we ignore for now. Instead, we focus on why this is a concern from an egalitarian perspective—that injured people are denied entrance to the CJ justice club but are left with some limited access to the DJ club. There are various reasons why people are denied access to the CJ club. For example, a victim's lacking information on the causal chain of the injury, difficulties proving the case in court even if the facts are known (say, because of inadequate access to medical care or if injuries were not sufficiently documented), and so on are all such reasons. These reasons make a lot of sense from an internal CJ perspective; indeed, why would someone who cannot prove her

94. Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury,* 93 COLUM. L. REV. 75, 78–85 (1993).

95. *Id.* We are using *horizontal equity* to refer to the concept that people who suffer from similar harms (from no fault of their own) should receive the same level of compensation. We are using *vertical equity* to refer to the concept that people who suffer different harms should receive different levels of compensation in proportion to the harm suffered and independently of the exact way it was brought about.

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case in court (even if not her fault, but neither the defendant's) get access to the CJ club? Yet these reasons make little sense from a broader egalitarian perspective.[96]

Another related point is to observe who the people are who are denied access to the CJ club. Once we observe that the high costs of the current tort system (which we believe are an unavoidable consequence of the requirement of CJ to prove causation, prove harm, etc.) prevent people with low expected recovery from receiving any CJ benefits at all, the answer is clear. It is those who, we worry, would not get good seats in the DJ club either. Because compensation in the current tort law is significantly based on loss of income for the remaining working years, those of low income, the old, women, children, and minorities—who on average have lower incomes—are less likely to have expected recoveries large enough for lawyers to take their cases in the first place. Those who lack social networks inclusive of attorneys and are unfamiliar with the operations of insurance and tort law also tend to be less likely to get full compensation for their injuries because they might not pursue legitimate claims either from lack of information on how to do so or lack of financial or time resources to do so. Moreover, low-income and high-income victims pay the same price for products, services, automobile insurance, and so on; prices of all these products and services reflect the expected damages for loss of income in the entire pool of consumers, patients, insureds, and so on. This means that, in effect, low-income people cross-subsidize the high-income people in the current tort system.[97] These, in our view, are important pragmatic points against CJ in an institutional form segregated from distributive and retributive considerations.

In practice, race, gender, and age are highly correlated with access to the CJ justice club. Thus, even if the CJ normative defense of the current tort system were compelling, the fact that the only way it is manifested in practice leaves so many people out of the CJ club raises questions about the legitimacy of the CJ club. The fact that those people who are left out of the CJ club are exactly those who should concern us most in the DJ context just reinforces the critique. A legal system that implements notions of CJ such that it disproportionately benefits those with high income in terms of both access to and benefits of the justice system goes against basic egalitarian impulses.

Last, we cautiously conjecture that perhaps the fact that there is a justice club for the elite (CJ) and a separate justice club (DJ) for all the others who practically cannot get into the CJ club, where the bundle of benefits they

96. For a fully developed critique of how the practical operation of tort law fails to embody the commitments of CJ, *see* Sugarman, *supra* note 12.

97. To clarify this point, consider the following example. A is a high-income victim and B is a low-income victim, and both suffer the same injury, say, from a product that was defective. A will get much higher economic damages. But both paid the same price for the defective product (which reflected the average legal liability associated with the product). As a result, B paid more than its actuarially fair price for the product and A paid less. B cross-subsidized A.

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can get at the DJ club is nevertheless determined by the same elite,[98] may explain why this strict separation has been stable for so many years despite its evident unfairness.[99]

VIII. CONCLUSION

In this paper we try to develop the simple intuition that egalitarian fairness requires that like cases be treated alike as much as possible. Of course, in what sense cases are alike is a fundamental question for this project. We propose a strong version of egalitarianism that holds that brute luck should not determine how one's life goes in certain core domains as the relevant criteria for alikeness. If two cases are otherwise alike but for the intervention of brute luck, they should be treated similarly. We argue that the luck that determines dissimilar liability and compensation in our examples of Amy through Fran is at odds with this version of egalitarian fairness as equality and responsibility. We claim that the dissimilar liability and compensation are largely due to a strict distinction between forms and institutions of justice, a distinction that fails the "fairness test" by allowing for a normatively unacceptable role for the operation of luck. After surveying the arguments put forward by CJ theorists defending a categorical distinction of CJ from retributive and distributive principles, we argue that although analytical distinctions *can* be made between different forms of justice (though we also suggest that the distinctions are not as sharp as some commentators suggest), there is no good reason to defend a rigid separation between these forms of justice when doing so creates unfair outcomes.

We are not the first to observe that our distinct institutions of CJ, DJ, and RJ deal in human misfortunes not so definitely distinct from one another or that these principles of justice may conflict with each other in theory and practice.[100] Yet in this paper we suggest something more.[101] First, we

98. By this we mean that the benefits offered by social programs and other income transfer programs are the outcome of a political system primarily controlled by the economic elite.

99. Developing and supporting our conjecture is beyond the scope of this paper, but we think this is a significant concern.

100. For example,Weinrib has argued that "the legal regime of personal injuries can be organized either correctively or distributively. Correctively, my striking you is a tort committed by me against you, and my payment to you of damages will restore the equality disturbed by my wrong. Distributively, the same incident activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion. From the standpoint of Aristotle's analysis, nothing about a personal injury as such consigns it to the domain of a particular form of justice. The differentiation between the corrective and distributive justice lies not in the different subject matters to which they apply, but in the differently structured operation that each performs on a subject matter available to both." Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 415 (1992). *See also* Coleman & Ripstein, *supra* note 88.

101. Larry Alexander has skillfully demonstrated that not only do CJ, DJ, and RJ operate in overlapping domains of social life, but their substantive demands regularly conflict with each other primarily because of CJ's reliance on "but for" causation. CJ's reliance on "but for"

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argue that as a normative matter, egalitarians cannot consistently hold a commitment to the a priori theoretical distinctions between RJ, DJ, and CJ as lexically prior to their commitment to global to fairness. The specific unfairness we are concerned about in this paper is that some victims of misfortune are afforded massively dissimilar compensation because of irrelevant differences—the luck of the source of misfortune—and some careless actors who violate duties of care escape any assessment of liability whatsoever because of arbitrary factors—the luck of the absence of victims. The source of this unfairness is the role luck is allowed to play in sorting different cases into different institutions of justice.

Second, we claim that this unfairness does not arise simply because the various theories of CJ, DJ, and RJ are imperfectly implemented in their respective institutions. Rather, we believe that many CJ theorists have expended unnecessary theoretical energy trying to conceptualize the demands of CJ as impervious to the principles of either RJ or DJ. Our intuitions about fairness in compensation for misfortunes and liability for careless actions are best captured when we integrate insights of both RJ and DJ in theorizing what justice demands in liability for risks and compensation for harms. This is not to say that CJ can or should be reduced to principles of either DJ or RJ. CJ expresses a unique and irreducible intuition that we are concerned with equality in transactions and personal responsibility for actions. We argue that these values are underenforced when we limit our concern over careless action to *only* those cases in which the actor unluckily caused harm and when we allow the luck over the source of misfortune to determine massively dissimilar compensation to otherwise identical injuries.

Another way of expressing our argument is that by relaxing the strict bilateral, correlative structure of tort law, we can maintain the core commitment of CJ—that of doing justice between wrongdoers and their victims—while expanding the scope of fair treatment to both unsuccessful careless doers and similarly situated blameless victims.[102]

Our fairness test is driven by the same impulse of fairness that drove Judge Andrews's dissenting opinion in *Palsgraf v. Long Island R.R,* the majority in *Summers v. Tice*, the majority in *Sindell v. Abbott Laboratories* and in

causation may often require damages to be paid out of proportion to the defendant's moral desert from a retributive standard or may require compensation that defies the just distributive allocation (damage payment upsets the defendant's allocative share under both patterned and historical DJ schemes). Alexander does not see any good normative argument for why CJ principles should "trump" RJ or DJ principles in these instances of overlapping jurisdiction, and essentially concludes that RJ and DJ demands should take precedence over CJ principles. See Alexander, *supra* note 12. Although we agree with the motivating instinct identifying these cases of conflict, we do not conclude that tort law is undesirable on the basis of DJ's and RJ's lexical priority as principles of justice. Rather, we argue that the strong principle of egalitarian fairness can be used to identify how we must bring these spheres of justice into harmony with each other, as opposed to assigning one lexical priority.

102. We thank Gregory Keating for this formulation of our argument.

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Hymowitz v. Eli Lilly & Co.[103] In *Palsgraf v. Long Island R.R.*, the negligent act of the Long Island Rail Road employee in dislodging the package of fireworks caused Mrs. Palsgraf's injury, but since the package was innocent-looking, the effect on Mrs. Palsgraf of handling it negligently could not have been reasonably anticipated. Judge Andrews argued that "where there is the unreasonable act . . . there is negligence whether damage does or does not result. That is immaterial."[104] He then provided an example: "should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large."[105] Judge Andrews's words reflect two points we mentioned earlier: first, that the occurrence of harm should not be a necessary condition for assessing liability; second, that careless action involves a kind of social harm, what he calls the wrong to the public at large.

In *Summers v. Tice*, the plaintiff, Summers, was severely injured while hunting with the defendants, Tice and Simonson, who both shot negligently in his direction. He could not prove which of the two negligent hunters had actually injured him and which had missed him. The Supreme Court of California took the innovative step of shifting the burden of proof to the defendants to disprove their causal contribution to Summers's injury. Because as an empirical matter it was impossible to sort out who actually hit the defendant, the Court in effect found them jointly and severally liable because both were negligent. Again we see the drive to relax the strict demands of causation for a fairer result, globally understood.

Sindell was a product liability case involving the drug Diethylstilbestrol (DES) in which the daughters of mothers who took DES during pregnancy and subsequently developed cancerous vaginal and cervical growths sued various manufacturers of the generic drug. The daughters could not show which manufacturer was the actual supplier of the pills used by their mothers, and therefore the causal link between plaintiff and defendant was unspecified. The California Supreme Court held that when a *substantial share* of DES manufacturers are brought together as defendants, market share liability is appropriate, and the burden of proof is shifted to each defendant to demonstrate that in fact they did not sell to the plaintiff's mother's drugstore. Judith Thompson posed the prescient question of why the court placed the condition that Sindell must join in her action a *substantial* share of the manufacturers that were risk creators. After all, if their liability is capped

103. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Summers v. Tice, 33 Cal 2d 80, 199 P.2d 1 (1948). Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal, 1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y 1989).

104. *Palsgraf, supra* note 103, at 349.

105. *Id.* Weinrib is right that Andrews's analysis does not make sense from an internal CJ perspective. But since we are not interested in necessarily maintaining that perspective, we believe our analysis is immune from that critique. Weinrib, *supra* note 60.

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in their market share, why would it matter? We think that the answer might be that the court was concerned about the unfairness in distribution of liability between similarly situated negligent actors when only some are required to pay their share while many others are not. As Thompson explains: "if the plaintiff sues only those who manufactured . . . 40% of the drug, and they lose, then admittedly they pay only 40% of the plaintiff's costs; but the other who manufactured the remaining 60% of the drug have no liability imposed on them at all."[106]

Lastly, in *Hymowitz*, another DES case, the New York court ruled that each manufacturer was negligent and that each should therefore pay according to the market share that it possessed at the time the mothers ingested the drug, irrespective of any causal inquiry. In this way *Hymowitz* goes beyond *Sindell*, because the court held that *all* manufacturers should pay, even those who could show they did not cause a particular plaintiff's injury. *Hymowitz* demonstrates in an even stronger way the intuitive drive to hold similarly situated wrongdoers liable for wrongful conduct at the expense of relaxing the CJ requirement of a causal link between doer's wrongful conduct and sufferer's harm.

In sum, all these examples represent the same intuition that once someone is negligent, she should bear liability even if the damage is remote (as in *Palsgraf*), if it is not clear that the negligent act caused the damage at all (as in *Summers*), if it is clear that it did not (as in *Hymowitz*), or if the defendant cannot disprove her causation of harm (as in *Sindell*). While these intuitions about fairness in liability might not be legitimately accommodated by a CJ conception of tort law because they violate the correlative principle, they do have a place in a more globally fair scheme that deals with misfortunes. Moreover, as we explain at length above, not only do we share the same fairness concerns expressed in these cases, we go one step further and apply the same intuition to the victim's side.[107]

It is important to clarify what we do *not* argue. First, we do not offer an original, substantive defense of the notion that luck should not determine people's desert and responsibility. We try to show that this notion is deeply rooted in most accounts of DJ, RJ, and CJ and we treat it as a shared

106. Judith Jarvis Thompson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101–123 (1984). Thompson thinks that a better reason for the substantial share requirement is that the relevant market share for which each defendant is held liable for is calculated with respect to the total share held by the actual defendants in the lawsuit. Accordingly, if the plaintiff does not bring together a substantial share of the risk, defendants might pay way more of their original market share. Thompson's interpretation of the relevant market share was later declared as incorrect, as explained by the California Supreme Court in Brown v. Superior Court of San Francisco, 751 P.2d 470 (Cal. 1988). In any case, at least one Supreme Court relaxed the requirement that the plaintiff must join in her action a *substantial* share of the manufacturers that were risk creators. *See* Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984) (allowing defendant to proceed in a tort action even when a single DES manufacturer, not representing a substantial share of the market, is present).

107. For a different account of these cases, *see* A. Ripstein & B.C. Zipursky, *Corrective Justice in Age of Mass Torts, in* PHILOSOPHY AND THE LAW OF TORTS (G.J. Postema ed., 2001).

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normative starting point from which to build our critique. Those who do not share a commitment to negating (some) luck as a way to increase fairness may not be moved by the arguments offered here. Second, we are not claiming that these various principles of justice—corrective, distributive, and retributive—can be reduced to a "comprehensive doctrine" of fairness that can be applied in a standardized fashion to the structuring of the respective institutions of accident law, tax and transfer systems, and criminal law. Rather, we argue that the notions of fair treatment developed in each cannot always be confined to that realm and have implications for the evaluation of our practices in the other realms. Third, we do not say that a commitment to CJ as categorically distinct from DJ or RJ costs too much in terms of society's resources; our argument here is not that the tort system is too expensive and therefore should be abolished, although that may well be the case. The only currency we are using here is the currency of fairness. Thus we believe we avoid issues of incommensurability, because all the trade-offs we are talking about at this stage are in terms of notions of fairness.

As mentioned above, we concede that there may well be room for tort law on efficiency grounds. If tort law as we know it is exceedingly more efficient at preventing accidents than a fairer scheme would be and is also cheaper, then there might be some room for trade-offs between tort law and a more egalitarian scheme after all. However, we are skeptical about that possibility. First, there seems to be only a little evidence that tort law promotes optimal deterrence of risky behavior and it might be possible to come up with an egalitarian scheme that is at least as effective in that respect. Second, the available evidence suggests that the administrative costs associated with tort law are very high. So we think that it might not be that hard to convince economists that tort law as we know it should be abolished. In this paper however, we have tried to convince egalitarians.

Fourth, our argument is not limited to a critique of the imperfect way in which principles of CJ, DJ, or RJ are incarnated in institutions of tort, taxation, or criminal law. The inadequacy of our social welfare system to distributive ideals is not a necessary premise for our argument. Were theories of egalitarian DJ, CJ, and RJ instituted perfectly, there would still be a disturbing discrepancy in the treatment of equally blameless victims and equally careless actors. This is so because theories of CJ (and DJ and RJ) remain committed to an acoustic separation between their respective principles, a separation that impairs us from hearing the costs to fairness that arise from a sorting rule in which luck plays a major role.[108]

108. Of course, if a *perfect* DJ theory is implemented, such that luck is not a factor in determining peoples' life outcomes, then indeed we would not worry about the CJ-DJ distinction. However, such a perfect DJ theory does not exist; all existing egalitarian theories call for a DJ-CJ distinction. Such a perfect theory of DJ may be proposed and still insist on the nomenclature of DJ, whereas we are indifferent to how one calls it. But the fact of the matter is that no one has offered such a theory of DJ. Major theorists of DJ (and CJ) have always defended a distinction

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We take no view of whether CJ is presocial and therefore analytically prior to DJ, as Benson argues, or vice versa, as Alexander seems to argue; we think that the fair negation of luck should be prior to both.[109] Put differently, we do not accept a limited role for fairness because of a lexically prior commitment to CJ, DJ, or RJ, but rather accept a limited role for CJ, RJ, and DJ as developed by various theorists because we believe it serves well our lexically prior commitment to fairness.

Last and most important, we do not argue that *all* losses that may be attributable to luck should be totally negated from our lives. Just as not every type of misfortune (in love or cards, for example) is society's concern, not every type of loss due to brute luck—the vicissitudes of nature or fortune—is of collective, normative concern. It is not possible in practice nor necessarily desirable in theory to design institutions negating all losses due to luck.[110] However, we think there is a relevant *core* of types of losses to which society has a duty to at least considering responding. We hold that this includes at least losses to bodily integrity and perhaps much more. Rawls calls those core things that a reasonable person needs to live a meaningful life "primary goods."[111]

Similarly, we are not arguing that all instances of any type of careless action not resulting in harm should be subject to fines; this would require unmanageable inquiries and violations of liberty and privacy. Rather, we are concerned only with those types of actions that, if harm *did* manifest, would result in a finding of liability. There are epistemological and normative reasons for limiting our concern to that set of careless actions. In terms of the normative limits of our concern, tort law already grapples with questions of what, as a social and political community, we think are reasonable standards to which we expect people to conform their behavior as a manifestation of equal respect for others' security interests. The doctrines of duty of care in negligence law reflect a social determination on the normative question of what is reasonable as opposed to unreasonable risk imposition. As a general matter we find that resolution fairly satisfactory. However, the point of this paper is not to make a substantive defense of specific duties of care in tort law but merely to say that once we have established exactly what the

between rules that apply to the "basic structure" of society, to use Rawls's term, and rules that apply to private interaction. We elaborate on this point below.

109. *See* Benson, *supra* note 1; Alexander, *supra* note 12. *See also* Hanoch Dagan, *The Distributive Foundations of Corrective Justice*, 98 MICH. L. REV. 138 (1999).

110. In fact, given the objective scarcity of resources, sometimes a role for luck is even required by fairness. As Arthur Ripstein points out, "whether chance is arbitrary depends on *how* it comes to play the role that it does." To use his example, it is more fair to have random police patrols than to use racial stereotyping to police the streets. Having random police patrols apprehend only some "unsuccessful" attempting criminals is not unfair even when such patrols miss other attempting criminals. RIPSTEIN, *supra* note 11 at 12 (emphasis added).

111. Thus we do not think that egalitarians are committed to eliminating athletic contests, given that the brute luck of individuals' athletic endowment largely determines their outcome. Rectifying losses in athletic contests is not in the core of what an egalitarian society owes its members.

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standards of care are that are demanded of equal responsible citizens, there is no reason to limit our concern to only those cases where failure to live up to those standards causes harm. As an epistemological matter, we agree that technical limitations on our ability to detect unsuccessful careless acts may and should limit the types of conduct we can target because the distastefulness of excessive surveillance should be an independent limitation on state action. But that is a technology-dependent matter which might well be resolved with time.

The flip side of the concern that the implications of our argument entail a massive and oppressive state is that the implications of our argument entail nothing more than expanding current retributive institutions and practices, such as policing, regulatory enforcement of standards, and/or fines. Our focus in this paper is less on actual institutional design and more on the theoretical and normative reasons for changing our practices. Terming our assessment of liability to unsuccessful actors "fines" is, well, fine with us.[112] The distinction between what we propose here in terms of financial assessments on risk creators and traditional RJ fines is that whereas the latter are often determined by notions of optimal deterrence or the fiscal needs of a state, the former should be informed by notions of fairness in rectifying a wrongful act calculated in terms of social harm done and expected harm from the type of risk imposed.

Having said all that, we would like to note that we believe there might be various institutional approaches that would address the unfair role of luck we identify in liability and compensation. As discussed in the sections on DJ, RJ, and CJ and luck, egalitarian theorists dispute substantive notions of fairness. The question of what is properly considered brute luck as opposed to option luck is ultimately a normative question that must be hashed out in the political arena. Our argument in this paper is merely that any such system must take account not only of corrective principles but also of distributive and retributive principles to assure global fairness.

Our substantive arguments about the moral similarities between equally blameless victims and equally careless actors do not dictate a unique policy approach. With respect to the cases of equally blameless victims, we believe that any accident compensation scheme must assure that comparable bodily harms are compensated similarly, regardless of the cause of the harm. This argument is based not on the claim that there is something essential and true about the physical similarity of injured individuals but on a normative egalitarian commitment to assuring equal bodily integrity.

Similarly, with respect to the cases of equally careless doers, we believe that various approaches would fall within the "zone of fairness"[113] defined by respect for responsibility and equality. We argue that relying exclusively

112. Larry Alexander has offered a compelling argument that tort law should be replaced with a combination of prohibitions, regulation and social insurance. Alexander, *supra* note 12, at 17–23.

113. *See* discussion in Section V.

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on causality and harm, as does the current regime of tort law, underenforces the values of responsibility and equality that CJ expresses. We believe that the values of equality and responsibility, which, expressed in the correlative structure of CJ, ground the duty to compensate for wrongful losses, extend beyond that structure and actually have implications for fairness in compensation and liability for blameless victims of nature and unsuccessful wrongdoers. Whereas CJ theorists argue that harm is a necessary condition for liability (and harm plus fault are sufficient conditions), we distinguish between necessary and sufficient conditions for imposing liability on doers and for compensating victims. Thus we argue that violation of a duty of care alone is a necessary and sufficient condition to impose some measure of liability on careless doers, whereas the existence of harm, in our view, should not be a necessary condition at all in assessing liability. But that of course does not mean that the existence of harm is not important. Harm is a necessary and sufficient condition for compensating the *victims,* no matter what the source of the harm is, if it falls within what we called the "core." The level of harm is also a good measure of the liability to be imposed on the wrongdoer, although certain types of "eggshell luck" might need to be eliminated there too.

We conclude that there are no good theoretical or normative reasons *not* to address the unfairness inherent in the current tort-law approach to accidents.[114] Indeed, we have tried to show that for those committed to egalitarian fairness, probing alternative approaches to current accident law is imperative.

APPENDIX: THE CHARACTERS

1. Amy is twenty years old. She became blind as a result of a car accident. It was the other driver's fault.
2. Bill is twenty years old. He became blind as a result of a car accident. The other driver was at fault yet underinsured.
3. Carol is twenty years old. She became blind as a result of a congenital disease such as meningitis.
4. David is an attentive, careful driver. Every day he leaves for work on time and obeys the speed limit and other norms of safe driving. One morning he is rushed, speeds to work, and on the way causes an accident because of his speeding. David hits Amy and is found liable for her ensuing blindness.
5. Ed speeds to work recklessly everyday. He sleeps in and leaves late. In his haste he cuts off other cars, runs Stop signs, speeds, and otherwise flouts the norms of safe driving on a daily basis. Ed never gets into an accident, partially because other drivers accommodate his reckless driving by slowing down and exercising extra caution in his presence. On the morning David hits Amy, Ed

114. The question that remains to be answered is whether there are neither *practical* consideration to impede constructing a more fair institution of accident law which minimizes the objectionable operation of luck we identify in this paper. This is, of course, a significant topic for a separate paper.

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would have hit another driver had it not been for the fortuitous intervention of a bird that caused the other driver to swerve, thereby preventing Ed from hitting the other driver's car. Ed never bears any cost for his reckless driving.

6. Fran is a careful driver who never exceeds the speed limit or violates norms of careful driving. Every day she takes the same route to work as Ed and exercises extra caution because of Ed's unpredictable driving.
7. George has declined to seek gainful employment and instead enjoys the sands of Santa Monica as a full-time beach bum.
8. Harriet was injured during service in the U.S. military.
9. Ilay is a very careful driver who never exceeds the speed limit or violates norms of careful driving. One morning on his way to work he runs over a pedestrian who unexpectedly rushed into the road. Ilay was not blameworthy.

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