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## Odds and Ends: An Epstein-Inspired Look at Luck

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## ODDS AND ENDS:

### AN EPSTEIN-INSPIRED LOOK AT LUCK

Lee Anne Fennell\*

Consider the following hypothetical: one day in 2020, unusual “cosmic rays”<sup>1</sup> hit Earth at a particular angle, refract through a pane of glass at The Bank of the United States, burn through a wire, and create a computer hiccup that randomly scrambles one day’s worth of transactions for which no backup records yet exist. Some customers gain, while others lose. Untangling the effects would be difficult and costly. There is no way to know whether such an event will ever be repeated. Upon hearing of this occurrence, Richard Epstein begins work on a characteristically well-argued op-ed on the best way to address the problem. But what response does he advocate?

Predicting Epstein’s answer is difficult because the situation throws into conflict two principles that run through his work. To leave the bank account balances scrambled would upset the settled expectations upon which the entire edifice of property law is established, generating insecurity and deeply eroding incentives.<sup>2</sup> On the other hand, the glitch was nobody’s fault,<sup>3</sup> and correcting it would impose heavy costs, involuntarily, on everyone.<sup>4</sup> The people harmed by these random losses can, after all, seek assistance from decentralized, voluntary associations, such as friends, families, religious groups,

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\* Professor of Law, University of Chicago Law School. I thank Christopher Fennell and participants in the Tulsa Law Review’s Scholarship Symposium Honoring Professor Richard A. Epstein for helpful comments and questions, and Eric Singer for excellent research assistance.

1. See Richard A. Epstein, *Luck*, 6 Soc. Phil. & Policy 17, 30 (1988) (describing a harm caused by cosmic rays rather than by any identifiable defendant).

2. See e.g. Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 Stan. L. Rev. 1003, 1037 (2000) (referencing “the ancient insight that a system of property is necessary to make sure that those who sow shall also reap, lest there be no sowing at all”) (footnote omitted).

3. Perhaps Epstein would place the burden on the company that made the computer for not protecting it against such cosmic rays, or for not creating more frequent backups that would reduce the damage caused by the scramble or mitigate the cost of undoing it. But if we assume this was something quite unforeseeable (cosmic rays had never aligned in quite this manner before, and there was no warning that they would do so this time) it is not clear on what basis liability would rest. See Richard A. Epstein, *Torts* 269 (Aspen 1999) (discussing dramatic, unprecedented natural events “against which no prudence can guard”).

4. See e.g. Epstein, *supra* n. 1, at 33 (distinguishing “between those forms of arbitrariness that are the result of *nature* and those forms of arbitrariness that are the result of *human intervention*”) (emphasis in original).

and benevolent societies.<sup>5</sup> While this hypothetical may seem far-fetched, individuals often experience strokes of misfortune that are just as quick, unexpected, and devastating. What, if anything, should society do about such events?

In two articles published twenty years apart, Epstein explicitly takes up the question of fortune—both good and bad.<sup>6</sup> An Epsteinian view of luck and the appropriate legal response to it can also be found in his other work on property, torts, and health law.<sup>7</sup> In this brief essay, I will unpack and critique Epstein's approach to fortuitous events. The point of this essay is not to endorse or reject as a normative matter any particular vision of luck's legal treatment. Instead, I wish to examine how society's management of the odds (and associated payoffs) that its members face might serve or disserve the ends to which Epstein is committed.<sup>8</sup>

Significantly, Epstein does not object to the correction of luck's vagaries on principle; on the contrary, he assumes reductions in the arbitrariness afflicting human life would be a desirable thing.<sup>9</sup> Yet it generally costs more for the state to remove luck's influence, he posits, than it is worth. This conclusion proceeds from two premises. The first is that disaggregating the effects of luck (unchosen inputs) from effort or agency (chosen inputs) is often an impossibility.<sup>10</sup> Where choice and chance are intertwined, the costs of separating them may be greater than the gains associated with responding optimally to each component.<sup>11</sup> The second premise is that luck corrections cannot be successfully unbundled from politics. On this view, people contracting behind the veil<sup>12</sup> cannot select a world in which outcomes are less influenced by fortuity without also selecting unwelcome levels of rent-seeking and influence-peddling.<sup>13</sup> Epstein concludes that certain kinds of "decentralized" responses to fortuity are generally superior to governmental correctives. These decentralized approaches include both *ex ante* measures like private insurance and *ex post* approaches like private charities and

5. See e.g. Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 *Theoretical Inquiries in L.* 309 (2008).

6. *Id.*; Epstein, *supra* n. 1. I will use the terms "luck" and "fortune" interchangeably to refer to both negative and positive events.

7. See e.g. Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 *S.D. L. Rev.* 1, 6–10 (2005) [hereinafter Epstein, *Liberty Versus Property?*]; Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 *B.U. L. Rev.* 1, 3–6 (1994) [hereinafter Epstein, *Genetic Discrimination*]; Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 *B.U. L. Rev.* 1, 2–3 (1996) [hereinafter Epstein, *Tort/Crime Distinction*].

8. These ends include efficiency objectives that can be advanced or hindered by the means selected to achieve other normative objectives. See Epstein, *supra* n. 1, at 33 (observing that particular ends cannot be considered in isolation without also taking into account the means for achieving them).

9. See *id.* at 17.

10. See e.g. *id.* at 26–27.

11. See Epstein, *Liberty Versus Property?* *supra* n. 7, at 9 ("[T]he effort to isolate *proportionate* contributions from luck and from effort falls apart because of the inability to conduct sensible measurements over countless individuals for countless periods. It would be so defective that it is in the long-run interest of everyone to abandon any effort to isolate and reallocate the *unearned increment* (or decrement) that attaches to human labor. Therefore, a rough and ready rule that follows the naïve sense of desert works better in practice than any overt system that seeks to divert wealth to other individuals, who are less deserving than the person whose labor created the wealth in question within the rules of the game." (emphasis in original)).

12. The reference here is to John Rawls's famous "veil of ignorance" thought experiment. John Rawls, *A Theory of Justice* 136–42 (Belknap Press 1971); see Epstein, *supra* n. 1, at 32–33.

13. See Epstein, *supra* n. 1, at 34.

extended family support networks.<sup>14</sup> As these examples suggest and as his further discussion makes plain, Epstein's preferred luck-response mechanisms are not only decentralized, but also private and noncoercive.

In this essay, I suggest that we might approach luck in the same way that Guido Calabresi approached accidents, by asking how to minimize the sum of the costs produced by luck and by luck-buffering efforts.<sup>15</sup> While Epstein skillfully highlights the costs of addressing luck through governmental means, he does not devote much ink to the costs that unbuffered fortuity imposes on individuals and society. Epstein also concentrates more on the negative case against coercive governmental involvement than on the affirmative case for alternative luck-response systems. As a result, he does not fully address whether the disadvantages that he cites in connection with the former are truly ameliorated through resort to the latter, or whether these latter alternatives introduce new costs of their own.

In the sections that follow, I construct a framework for thinking about luck that accommodates these additional costs while holding in view the concerns that animate Epstein's approach. Part I lays the analytic groundwork for what follows by defining and categorizing types of fortuity. Part II examines the costs of unbuffered luck. Part III parses the costs of responses to luck, with a particular focus on the extent to which different mechanisms alter the cost equation. Part IV puts these costs together and distills two principles for restricting both the influence of luck and societal responses to it: reciprocity and reversibility. These principles are broadly consistent with the spirit of Epstein's approach to fortuity and resonate with his other writings as well.

Before beginning, one additional note about luck requires emphasis: it has been my tremendous personal good fortune to be in the right time and place to learn from (and argue with) Richard Epstein. Everyone should be so lucky.

## I. TERMS AND TAXONOMIES

Because luck can be a rather slippery concept, it is helpful to begin by defining terms and laying some taxonomic groundwork.

### A. *Defining Luck*

While we often think of luck as the product of pure chance (whatever that may mean), it is perhaps more helpful to associate it with unchosen inputs into outcomes. From the point of view of a given individual, *A*, there is no morally relevant distinction between unchosen outcomes that are a function of truly stochastic processes and those that are a function of the unconsented-to (or uncontracted-over) acts or omissions of other parties. Clearly, it is unlucky to be struck by lightning and lucky to win the lottery. But it is also unlucky to be struck by a drunk driver, or to suffer from a disease that could

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14. See Epstein, *supra* n. 5, at 313–14, 317.

15. Guido Calabresi, *The Costs of Accidents* 26–31 (Yale U. Press 1970). Calabresi explicitly included administrative costs in his analysis, along with the costs of accidents and the costs of preventing accidents. See *id.* I do not include a separate discussion of the administrative cost category here, but my analysis of luck-buffering costs includes some important sources of administrative costs, such as the costs of distinguishing choice from chance.

have been prevented by timely immunizations in one's infancy. Conversely, it is lucky, other things being equal, to be born into a family with plenty of money or to be assigned to a good elementary school. All of these events can be classed as matters of fortuity from *A*'s perspective, even if they were the product of choices made by others.<sup>16</sup> Thus defined, "luck" is not a label that permanently adheres to particular events, but rather a measure of the extent to which a given event was out of the control of the person under consideration.

### *B. Dividing Luck*

The universe of luck can be divided up in a variety of ways that may be relevant to the appropriate policy response.

#### 1. Brute Luck and Option Luck

Scholars writing about luck often begin with Ronald Dworkin's distinction between "brute luck" and "option luck."<sup>17</sup> "Brute luck" refers to the results of risks that lie wholly out of one's control, like developing a genetic disease or being born with high or low intelligence. "Option luck," on the other hand, refers to the results of risks that people voluntarily accept. Dworkin argues that people should be credited and debited for the outcomes associated with option luck but shielded from the impacts of brute luck.<sup>18</sup> The basic idea is, in Dworkin's words, to make outcomes "ambition sensitive" but not "endowment sensitive."<sup>19</sup>

Although this distinction resonates strongly with moral intuitions, it founders on difficulties in unangling chosen risks from unchosen ones.<sup>20</sup> Nearly everything can be characterized as a form of option luck, because it is almost always possible to identify an unchosen alternative that would have eliminated a given risk.<sup>21</sup> Just going out into the world (or, alternatively, staying home) exposes one to a wide range of risks. While certain forms of bad luck (a poor genetic endowment or an unfortunate set of parents) are not matters of the victim's choice, they result in part from someone's choice, such as a parent's decision to have children.<sup>22</sup> To avoid the indeterminacy suggested by this criticism, a gloss of "reasonableness" in risk-taking has been superimposed onto the

16. See e.g. Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?* 9 *Theoretical Inquiries in L.* 239, 243 (2008) (observing that in luck egalitarianism, "'luck' is defined negatively to include all factors for which individuals are not responsible").

17. Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 *Phil. & Pub. Affairs* 283, 293 (1981).

18. See *id.*

19. *Id.* at 311.

20. See e.g. Epstein, *supra* n. 5, at 326–28.

21. See e.g. Martin E. Sandbu, *On Dworkin's Brute-Luck-Option-Luck Distinction and the Consistency of Brute-Luck Egalitarianism*, 3 *Politics, Phil. & Econ.* 283, 294–99 (2004). Conversely, one might say that nearly everything is a matter of brute luck, if original low endowments lead to poor decisions. Epstein, *supra* n. 5, at 327.

22. See e.g. Adam Samaha, *What Good Is the Social Model of Disability?* 74 *U. Chi. L. Rev.* 1251, 1276–77 (2007). For further discussion of the genetic case, and the observation that the parents, too, have suffered brute bad luck in their genetic makeup, see Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 *Cal. L. Rev.* 1345, 1365–67, 1389–94 (2002).

Dworkinian distinction, as follows: one will be deemed to have been a victim of “brute luck” rather than “option luck” if one took only risks that one could not reasonably avoid.<sup>23</sup>

Another problem stems from “differential option luck.”<sup>24</sup> Suppose that two people, *A* and *B*, both choose to take a wild gamble. *A* wins, while *B* loses. Although both chose to gamble and hence can be readily distinguished from those who did not, the difference between the *ex post* outcomes of *A* and *B* was produced not by choice, but rather by the random workings of luck. It is difficult to formulate any principled reason why differential option luck should be treated differently than differential brute luck, as Kasper Lippert-Rasmussen has persuasively argued.<sup>25</sup> Why should all bets be off once someone makes a risky choice, if we find the workings of luck to be problematic when the risk is one that is harder to reasonably avoid? In both cases, outcomes fail to track differences in risk-taking behavior. This same point surfaces in the moral luck literature, which addresses whether a person who has caused great harm should be judged more harshly than someone who undertook exactly the same behavior but was simply luckier in avoiding harm.<sup>26</sup>

In some contexts we might say that those undertaking voluntary gambles were consciously seeking to accept risk, and that to replace their actual outcomes with the expected value of those outcomes would undo the very choice they had made.<sup>27</sup> Certainly, this critique would apply to things like playing roulette in a casino, where taking on risk is the entire point.<sup>28</sup> But as Lippert-Rasmussen explains, most of the risks that people run do not take this paradigmatic form, but rather constitute “quasi-gambles” like smoking or riding a motorcycle.<sup>29</sup> In such cases, the fact that a person has exhibited

23. See Sandbu, *supra* n. 21, at 295–97 (2004) (describing the “least risky reasonable prospect view of brute luck”). For a discussion of the characterization of brute luck as risks that are not “reasonably avoidable,” and a critique of this reasonableness inquiry, see Peter Vallentyne, *Brute Luck, Option Luck, and Equality of Initial Opportunities*, 112 *Ethics* 529, 532–34 (2002).

24. See Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 *Ethics* 548, 548 (2001) (noting that “many egalitarians treat inequalities reflecting what Ronald Dworkin has called ‘differential option luck’—the varied outcomes stemming from voluntary gambles—“as unobjectionable”). Lippert-Rasmussen provides a detailed critique of this view. See generally *id.*

25. *Id.* at 549. For discussion and critique of the view that differential option luck as well as differential brute luck should be neutralized—an approach termed “all-luck egalitarianism”—see Shlomi Segall, *Health, Luck, and Justice* 45–57 (Princeton U. Press 2010).

26. See e.g. Bernard Williams, *Moral Luck*, in *Moral Luck: Philosophical Papers 1973-1980* at 20 (Cambridge U. Press 1981); Thomas Nagel, *Moral Luck*, in *Mortal Questions* 24 (Cambridge U. Press 1979). Moral luck has obvious relevance for tort law. Jeremy Waldron offers the example of two drivers, Fortune and Fate, who each become momentarily distracted when passing a store window. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *Philosophical Foundations of Tort Law* 387 (David G. Owen ed., Oxford U. Press 1995). Fortune proceeds without incident, while Fate, whose conduct was no more risky than Fortune’s, collides with a motorcycle rider and inflicts costs of \$5 million. Both Fortune and Fate behaved unreasonably, and each chose to take a gamble; it is hard to see why Fate, whose gamble ended tragically, should be treated more harshly than Fortune, whose identical unreasonable choice ended benignly. *Id.* See also John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *Cornell L. Rev.* 1123 (2007).

27. See e.g. Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 *Theoretical Inquiries in L.* 271, 287 n. 51 (2007).

28. See e.g. Barbara H. Fried, *Ex Ante, Ex Post*, 13 *J. Contemp. Leg. Issues* 123, 140, 144 (2003). Imagine how boring it would be to “play roulette” if, regardless of the outcome of the spin, one always walked away with the small loss that represented one’s expected return from the game.

29. Lippert-Rasmussen, *supra* n. 24, at 554–56; see also Fried, *supra* n. 28, at 137–46 (noting that most risk-related behavior is even further removed from the casino than the extreme examples like helmetless

a preference for the activity notwithstanding its expected cost provides no particular reason to think that she also prefers the pattern of risky outcomes to the expected value associated with that pattern.<sup>30</sup>

Insurance plays an interesting role in the brute luck/option luck dichotomy. If insurance is available for a given risk, then people have the opportunity to accept the risk or to swap the risk for its expected value. Thus, we can view the failure to insure an insurable risk—even one that we might view as a matter of brute luck if insurance were unavailable—as an instance of option luck.<sup>31</sup> If insurance were available for every risk, people could choose à la carte whether to accept each risk or whether instead to take its associated expected value. The limitations of insurance as a response to luck will be discussed below, but two points suffice for now: first, private insurance mechanisms are not realistically available for all instances of good and bad fortune; and second, mandatory societal risk-pooling mechanisms often make it impossible for people to bear certain risks even if they so choose.

## 2. Good Luck and Bad Luck

One distinction that seems particularly important is that between good luck and bad luck. Whether a particular fortuitous happening actually constitutes bad luck rather than merely the absence of good luck depends, however, on the implicit baseline in use.<sup>32</sup> Classification is tricky because there is no “natural” rate of return that one is entitled to receive for one’s efforts. Certain kinds of adverse events (such as bad weather) occur with sufficient regularity to be built into one’s baseline over time, but their short-run impacts still look like strokes of misfortune.

Given the cognitive tendency to weight losses more heavily than failures to achieve gains,<sup>33</sup> it is perhaps unsurprising that unevenly distributed results seem more troublesome when these results are framed as bad luck rather than the absence of good luck. Yet the distinction between good and bad luck may amount to more than a matter of framing in some cases. Stochastic events that cut deeply into one’s ability to live a minimally decent life, which are easy to classify as bad luck, may be objectively more likely to cause societal harm if left unbuffered. In contrast, windfalls (assuming they are appropriately characterized as such),<sup>34</sup> present a more ambiguous picture. People may

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motorcycling that feature prominently in the literature on luck egalitarianism).

30. See Lippert-Rasmussen, *supra* n. 24, at 554–56. Lippert-Rasmussen also notes an inconsistency in attributing to those who take knowing quasi-gambles a preference for the risky pattern of outcomes instead of the expected value of the gamble while assuming that those who avoid all (reasonably) avoidable gambles would uniformly prefer the expected value of the remaining brute luck to its actual value. *Id.* at 556–57.

31. See Dworkin, *supra* n. 17, at 296–97 (explaining how insurance effectively transforms brute luck into option luck).

32. Likewise, good luck can be recharacterized as the absence of bad luck. On the economic equivalence of losses and failures to achieve gains and the psychological effects of these alternative ways of framing a given impact, see e.g. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Sci.* 453 (1981). The same problem of baselines complicates takings analysis. See e.g. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’* *Law*, 80 *Harv. L. Rev.* 1165, 1196–97 (1967).

33. See Tversky & Kahneman, *supra* n. 32.

34. See Eric Kades, *Windfalls*, 108 *Yale L.J.* 1489, 1505–15 (1999) (arguing that many gains are incorrectly characterized as windfalls).

cherish the thought of enjoying a windfall at some future date, and the fact that many people purchase lottery tickets to engineer such a possibility is suggestive.<sup>35</sup>

### 3. Temporality and Diffusion

Luck can also be categorized based on its temporal positioning and the diffusion or concentration of its effects. Being lucky or unlucky in one's genes, parents, and basic endowments is one thing, encountering lucky or unlucky circumstances as one passes through life is another, and the lucky or unlucky way that various "rolls of the dice" turn out as one undertakes particular projects or runs particular risks is yet another.<sup>36</sup> These different sorts of luck elicit different societal responses and offer different opportunities to insure. The earlier in one's life a piece of bad luck occurs, for example, the less one is plausibly responsible for it, but the harder it may be to obtain private insurance to cover the event. For example, once one is born it is too late to spread certain risks, yet people who have not yet been born are in a poor position to secure insurance.<sup>37</sup>

Strokes of good and ill fortune also vary in the duration and diffusion of their effects. Some kinds of bad luck yield long-lasting outcomes like chronic poverty, while others manifest themselves in acute events like car accidents or floods.<sup>38</sup> The degree of diffusion determines the extent to which a piece of hard luck stands out from or blends into the background facts of one's life, and hence may bear on the societal response.<sup>39</sup> For similar reasons, luck may exhibit path dependence. Patterns of past luck, which help to form the background conditions against which misfortunes are judged, can make new blows of fate harder to identify as such. This suggests people can be lucky or unlucky in the type and timing of the fortunate and unfortunate events that they experience, quite apart from the substantive gains or losses that those events produce.

35. For discussion of possible rationales for lottery play, see e.g. Edward J. McCaffery, *Why People Play Lotteries and Why It Matters*, 1994 Wis. L. Rev. 71 (1994).

36. Scholars writing on moral luck have, for example, distinguished "constitutive luck" and "circumstantial luck" from luck relating to causes and effects. Daniel Statman, *Introduction*, in *Moral Luck* 1-21 (Daniel Statman ed., St. U. N.Y. Press 1993) (discussing use of these luck categories by Bernard Williams and Thomas Nagel, and subdividing the last category into "causal luck" and "resultant luck"); Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 *Theoretical Inquiries in L.* 165 (2008) (discussing "liability luck"); see also Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 *Ethics* 374, 376 (1987) (distinguishing "situational" from "resultant" luck, based on Nagel's classifications).

37. See Richard J. Zeckhauser, *Coverage for Catastrophic Illness*, 21 *Pub. Policy* 149, 159 (1973) ("By the time a child is born, his catastrophic health needs are determined to a substantial extent in the statistical sense."). Kyle Logue and Joel Slemrod discuss the possibility that parents could insure future children against unfavorable genetic profiles through a form of pre-conception "genetic endowment insurance." Kyle Logue & Joel Slemrod, *Genes as Tags: The Tax Implications of Widely Available Genetic Information*, 61 *Natl. Tax J.* 843, 859 (2008). However, even this insurance would come too late to fully spread risks, given the influence of the parents' genetic endowments on their children's potential genetic draws.

38. The way in which a given event will be viewed may be a function of conscious framing efforts. See Michele Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 *L. & Socy.. Rev.* 257, 260-62 (1999).

39. Differential reactions to chronic and acute manifestations of bad luck may be partly evidentiary—when someone who otherwise appears successful suffers a setback as a result of an identifiable, isolated event, it is easier to identify the component of bad luck involved and harder to mistake it for choice. Another possibility is that the greater political power of those who have experienced past success enables them to engineer redistribution, whereas the chronically poor have relatively little political power. See *infra* Part III(B).



#### 4. Fungible and Nonfungible Fortuity

Another distinction relates directly to the prospects for societal responses. Good and bad luck can arrive in fungible form (such as cash, or routine property damage that can be readily fixed with cash) or in nonfungible form (such as attractive facial features or a low IQ). When luck arrives in nonfungible form, there are practical and ethical barriers to evening it out in-kind.<sup>40</sup> Similarly, there may be objections to requiring payments of fungible resources from those who have received nonfungible luck (e.g., a great deal of marketable talent) but have not voluntarily chosen to convert that luck into fungible form (e.g., an income stream). For example, it is often viewed as problematic to impose taxes commensurate with the income of a stockbroker on someone who passed up that job in order to live as a beachcomber.<sup>41</sup>

## II. THE COSTS OF LUCK

Epstein alludes to the costs of luck at the outset of his 1988 piece on the topic:

There is no doubt but that bad luck has bad consequences for the persons who suffer from it. If there were a costless way in which the consequences of bad luck could be spread across everyone in society at large, without increasing the risk of its occurrence, then most of us would pronounce ourselves better off for the change.<sup>42</sup>

There must be something objectionable about the distribution of bad luck if we would, other things equal, prefer to spread it. Indeed, Epstein's examination of the prospects for decentralized responses to misfortune would be entirely superfluous if luck were truly a matter of societal indifference. So it is worth working through what, exactly, is costly about luck.

Although other breakdowns are certainly possible, there are at least three ways in which unbuffered luck imposes costs. First, it produces a disconnect between inputs and outcomes that can have corrosive effects on *ex ante* incentives (an efficiency cost), as well as creating *ex post* discrepancies between desert and rewards (an equity cost). Second, luck reduces social welfare if people are risk averse and find themselves unable to insure against certain risks, or if they suffer from liquidity shortfalls that limit their ability to respond to misfortune through consumption smoothing. Third, luck interacts with certain cognitive biases such as overoptimism and the illusion of control in ways that may cause people to make suboptimal choices.

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40. Making up for bad luck in nonfungible resources can be attempted in kind (as through special education or cosmetic surgery), but it always requires the expenditure of fungible resources (money) as well. Evening out good luck in nonfungible resources associated with the individual person or family would be plainly horrific. See Kurt Vonnegut, Jr., *Harrison Bergeron*, in *Welcome to the Monkey House* 7 (Delacorte Press 1998) (depicting a dystopian society in which individuals are "handicapped" to remove advantages in intelligence, appearance, and so on).

41. This is the "enslaving the beachcomber" argument against endowment taxation. For discussion of this argument and responses to it, see e.g. Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on Liberty Objections to Endowment Taxation*, 18 *Can. J.L. & Jur.* 47 (2005); see also Markovits, *supra* n. 27, at 291–97 (discussing the specter of "talent slavery" associated with attempts to redistribute from the talented to the untalented).

42. Epstein, *supra* n. 1, at 17.

A. *Attenuating Inputs and Outcomes*

Fortuity can alter outcomes in ways that attenuate them from inputs. A core intuition about this aspect of luck's effects is illustrated by an analogy Epstein used in another context—that of playing tennis in a junkyard.<sup>43</sup> He invoked the analogy to explain the purpose of statutes of limitations: as time passes and memories fade, the outcome of litigation becomes less and less indicative of the relative strength of the parties' underlying positions and more and more a function of random factors, much as accumulations of rusty tin cans and auto parts on a tennis court would attenuate the results of the match from the relative skill of the players.<sup>44</sup> But the same point might be made about the influence of fortuity on the larger game of life, or on each of the diverse endeavors that people engage in within it. Rationales for keeping the field of play level and relatively free of random bits of garbage sound both in efficiency and equity.

No one would suggest that effort always or exclusively determines outcomes, yet faith in that general pattern seems central to a good deal of socially valuable human activity.<sup>45</sup> Where the pattern fails to hold for long periods of time or for large segments of the population, we would expect to see some erosion of incentives. Interestingly, these concerns mirror the costs that Epstein identifies with state-imposed luck corrections. In discussing rules for property acquisition, for example, he recommends that any component of luck in acquisition be ignored in formulating legal rules, lest luck-based societal claims against assets dampen the owner's incentives going forward.<sup>46</sup> As Epstein explains,

decisions on how to improve or use assets so found are heavily dependent upon the anticipated returns from those investments, but the finder cannot calculate that return unless he knows what portion of the return on investment he will be allowed to keep for himself. The greatest effort will be induced where he keeps the entire return for himself.<sup>47</sup>

Assuming this analysis is correct,<sup>48</sup> it does not tell us what to do about luck. On reflection, it is clear that an owner's uncertainty about the portion of his investment returns that "he will be allowed to keep for himself" can stem not only from claims that society might make upon his assets, but also from the unbuffered effects of fortuity itself. To the extent a societal claim against an owner's returns will reduce his incentive to

43. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667, 676–77 (1986).

44. *Id.*

45. Friedrich Hayek struggles with this problem in the following passage:

It is therefore a real dilemma to what extent we ought to encourage in the young the belief that when they really try they will succeed, or should rather emphasize that inevitably some unworthy will succeed and some worthy fail—whether we ought to allow the views of those groups to prevail with whom the over-confidence in the appropriate reward of the able and industrious is strong and who in consequence will do much that benefits the rest, and whether without such partly erroneous beliefs the large numbers will tolerate actual differences in rewards which will be based only partly on achievement and partly on mere chance.

Friedrich A. Hayek, *Law, Legislation, and Liberty Vol. 2: The Mirage of Social Justice* 74 (Chi. U. Press 1976).

46. Epstein, *supra* n. 1, at 26–28.

47. *Id.* at 27.

48. For a challenge to the assumptions underlying the quote, see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?* 8 Hofstra L. Rev. 711, 715–20 (1980).

optimally invest in the asset, so too will the prospect that stochastic processes will reduce his returns.

The equity costs of luck comprise a subject too vast to delve into fully here, but it is worth noting that there are some additional societal effects of leaving (only) certain forms of luck uncorrected.<sup>49</sup> Most notably, the belief that outcomes correspond with merit, effort, character, or other choice factors has pernicious effects on the way in which individuals who experience good or bad luck are evaluated, widening the initial gap associated with differences in fortune.<sup>50</sup>

### B. Risk Aversion and Illiquidity

The effects of luck interfere with human well-being not only through the effects on incentives and desert just discussed, but also for reasons relating to risk aversion and illiquidity.<sup>51</sup> To the extent that people are risk averse, fortuity cuts against social welfare by delivering to them a set of variable results that they value less than the expected value equivalents of those outcomes. Of course, people can respond by purchasing insurance, but only if insurance is available for a given risk and only if their background luck conditions are such that the insurance is affordably available to them. Luck also presents special difficulties to the extent that it produces liquidity shortfalls, given that borrowing is not always available and is always costly. These problems are exacerbated when misfortune drives liquidity levels below those necessary for a minimally decent life.

### C. Cognitive Biases

Another reason that unbuffered luck may produce social losses relates to cognitive biases. One of the most well-known of these, overoptimism, causes people to systematically underestimate their risks of suffering negative events and to overestimate their chances of experiencing positive events.<sup>52</sup> Even when people are ostensibly aware that random processes are partially or wholly at work in generating gains and losses, an “illusion of control” may lead them to overstate their own ability to avoid bad outcomes

49. As discussed below, many matters of luck are routinely evened out by the legal system without comment. Interestingly, the more this is done, the more likely people may be to assume that bad outcomes signify bad choices. Among other things, the pool of individuals who have personal or familial experience with unbuffered misfortune will shrink as a result of such efforts, reinforcing the conviction that people tend to get what they deserve and diffusing the political will to address luck more systematically.

50. An interesting literature suggests the prevalence of a “belief in a just world” that causes people to view outcomes as deserved. For a recent overview of this work, see Dhammika Dharmapala et al., *Belief in a Just World, Blaming the Victim, and Hate Crime Statutes*, 5 *Rev. Law & Econ.* 311, 315–19 (2009) (available at <http://www.bepress.com/rle/vol5/iss1/art14>). The “moral luck” literature also emphasizes that personal moral evaluations seem tightly linked to whether a particular action turned out to have a fortunate or unfortunate result. See e.g. Nagel, *supra* n. 26.

51. These points relate to the diminishing marginal utility of money—that is, the idea that dollars taken away from a smaller stock of monetary resources are more costly in utility terms than dollars taken from a larger stock. See e.g. Richard A. Posner, *Economic Analysis of Law* 11 (7th ed., Aspen 2007). The expected value of a loss can be paid with relatively cheap dollars, whereas a realized loss would cut much more deeply into an individual’s stock of resources, where dollars mean more foregone utility. See *id.*

52. Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 *Vand. L. Rev.* 1653, 1659–62 (1998); Shelley E. Taylor, *Positive Illusions: Creative Self-Deception and the Healthy Mind* 32–34 (Basic Bks. 1989); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 *J. Personality & Soc. Psychol.* 806, 810 *tbl. 1* (1980).

or to achieve good outcomes.<sup>53</sup> As a result, social arrangements that expose people to unbuffered luck rather than to its expected value equivalent may lead to distorted decision making. For this reason, insurance or other social arrangements that confront people with the expected value of the actions they are choosing could lead to more accurate tradeoffs.

While overoptimism and the illusion of control might at times be counterbalanced by risk aversion, this would not always be the case. For example, there is substantial evidence that people are “loss averse” rather than uniformly risk averse.<sup>54</sup> When a loss appears unavoidable absent some gamble, people may become risk-seeking in an effort to “break even.”<sup>55</sup> A tendency to take chances in the hope of coming away from an interaction unscathed would be exacerbated, not dampened, by overoptimism. Similarly, people often ignore or minimize certain risks, and exaggerate others,<sup>56</sup> and these effects could interact with overoptimism and illusion of control in a variety of ways (either offsetting or exacerbating the initial distortion).

Cognitive biases complicate the question of how to go about addressing luck, because they suggest that people may sometimes act in ways that do not serve their own interests. Thus, even when insurance is available and its coverage would be valuable on balance, people may not opt for it. If we think that people are generally made worse off by unbuffered luck, adjustments such as making coverage the default option would offer a potential counter.<sup>57</sup>

### III. COSTS OF LUCK BUFFERING

Epstein suggests that decentralized mechanisms can address the whims of fortune at lower cost than can coercive governmental action. In this Part, I evaluate that claim. First, I consider how each approach deals with the fact that choice and chance are often mixed together. Second, I look at the political costs that accompany the two types of responses. I then turn to questions of coercion and coordination, which also bear on the

53. See e.g. Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *Mgt. Sci.* 17, 27–29 (1993); Ellen J. Langer, *The Illusion of Control*, 32 *J. Personality & Soc. Psychol.* 311, 322–27 (1975).

54. See e.g. Tversky & Kahneman, *supra* n.32.

55. See Richard H. Thaler & Eric J. Johnson, *Gambling with the House Money and Trying to Break Even: The Effects of Prior Outcomes on Risky Choice*, 36 *Mgt. Sci.* 643, 657–58 (1990).

56. See e.g. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *Yale L.J.* 61, 70–85 (2002). Sometimes an exaggeration of risk may be functional, as where it overcomes another cognitive bias, such as self-control. See Juan Carrillo & Thomas Mariotti, *Strategic Ignorance as a Self-Disciplining Device*, 67 *Rev. Econ. Stud.* 529 (2000).

57. There is empirical support for the significance of defaults to insurance behavior. See e.g. Cass R. Sunstein, *Switching the Default Rule*, 77 *N.Y.U. L. Rev.* 106, 114–15 (2002) (discussing the effects of different default legal regimes in New Jersey and Pennsylvania with respect to a motorist’s right to sue) (citing Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, in *Choices, Values, and Frames* 288, 294–95 (Daniel Kahneman & Amos Tversky eds., Cambridge U. Press 2000)); Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, in *Choices, Values, and Frames* 224, 238 (Daniel Kahneman & Amos Tversky eds., Cambridge U. Press 2000). A variety of other approaches have been proposed to address cognitive biases in the insurance arena. See, e.g. Tom Baker & Peter Siegelman, *Enticing Low Risks Into the Health Insurance Pool: Tontines for the Invincibles and Other Ideas from Insurance History and Behavioral Economics* (Univ. of Pa. Inst. for L. and Econ. Research Paper No. 09-07, July 2009) (available at <http://ssrn.com/abstract=1350423>) (proposing a health insurance model that pays a cash bonus to those who end up not using their coverage).

choice of mechanism.

### A. *Disaggregation Costs*

A principal problem with attempting to respond to fortuity is that it is almost invariably entwined with voluntary choices, such as whether to apply effort or take particular chances.<sup>58</sup> Conversely, luck infuses every success and failure, however much those outcomes may be identified with merit. Separating out choice from chance is a very general problem, and one with which any legal system must grapple at some level. It also lies at the heart of the distinction—and the vulnerability of the distinction—between “brute luck” and “option luck.”<sup>59</sup>

The costs of disaggregation include the resources expended attempting to separate chosen and unchosen elements (“separation costs”), as well as the costs of applying the wrong treatment to part or all of an outcome (“misapplication costs”). The latter set of costs fall into two categories: erroneously treating choice as chance, which underassigns responsibility for outcomes to the individual chooser (“underassignment costs”); and erroneously treating chance as choice, which overassigns responsibility (“overassignment costs”).<sup>60</sup> The problem of moral hazard relates to underassignment costs: if an individual knows that she will receive compensation for bad outcomes even when they are the product of her own poor choices, she will have less incentive to avoid making poor choices.<sup>61</sup> Likewise, if an actor will not receive credit for good outcomes, her incentives to achieve them are lessened. But overassignment of responsibility is also a problem: exposure to outcomes that are beyond one’s control attenuates the relationship between inputs and outcomes, distorting incentives.

The problem of disaggregating choice from chance always imposes costs, regardless of how the difficulty is resolved. We must therefore examine whether one of the cost categories mentioned above tends to be systematically lower (at least within certain types of cases), or whether certain kinds of institutional approaches can more cheaply accomplish the disaggregation. The sections below look at these possibilities in turn.

#### 1. Minimizing Disaggregation Costs

If separation costs are higher than either underassignment costs or overassignment

58. See e.g. Epstein, *supra* n. 1, at 26–28; see also Epstein, *supra* n. 5, at 327 (noting the prevalence of “mixed cases” between “brute luck” and “option luck”). There are also conceptual questions about whether things like the application of effort are actually choices, rather than morally arbitrary characteristics. See Rawls, *supra* n. 12, at 74 (“Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances.”).

59. See Dworkin, *supra* n. 17, at 293 (distinguishing “brute luck” from “option luck”); *supra* Part I(B)(1).

60. I use “responsibility” here to denote legal rather than moral consequences—an entitlement to enjoy positive outcomes or exposure to (or liability for) negative outcomes.

61. “Moral hazard” is often used in the insurance context to refer to the tendency of insureds to do less to avoid losses. See e.g. Kenneth J. Arrow, *Insurance, Risk, and Resource Allocation*, in *Collected Papers of Kenneth J. Arrow: The Economics of Information* vol. 4, 77, 85 (Harvard U. Press 1984) (defining moral hazard); Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 *Am. Econ. Rev.* 537, 538 (1968) (reprinted in *Collected Papers of Kenneth J. Arrow: The Economics of Information* vol. 4, 103, 104) (discussing some responses to moral hazard).

costs, then the most efficient approach is clear: society should not bother separating out an outcome's respective inputs of choice and chance, but should instead treat the event either as if it were entirely generated by chance (if underassignment costs are lower) or as if it were entirely generated by choice (if overassignment costs are lower). But the mere fact that separation is too costly to pursue does not tell us which of these alternatives will be preferable in a given case, or in a given category of cases. Sometimes the law opts for overassignment, and sometimes for underassignment.

Consider tort law's practice of requiring compensation only from those who actually cause harm, and requiring compensation only to those who actually suffer harm. Although this approach seems familiar and natural, notice that it makes injurers who generate equal risks gamble as to who will actually be liable<sup>62</sup> even as it forces potential victims to pool the risk that they will suffer harm.<sup>63</sup> Even though tort law contains doctrines that address the grossest forms of overassignment<sup>64</sup> and underassignment,<sup>65</sup> the system as a whole would be expected to overassign responsibility to particular injurers (relative to the acts of potential injurers as a class), and to underassign responsibility to particular victims (again, relative to the acts of potential victims as a class).

Arthur Ripstein gives the example of a pedestrian who is hit by a negligent driver, where the pedestrian would have been able to get out of the way had he not had a particular medical condition.<sup>66</sup> The law does not inquire into whether the medical condition was the fault of the pedestrian; liability is imposed even if the pedestrian's mobility problems clearly stem from smoking, overeating, failing to exercise, negligently crashing a motorcycle the previous year, or any other cause under his control.<sup>67</sup> It is no answer to say that the defendant's incentives to take care would be dampened by taking such factors into account, because it would always be possible to have a system that collects more from the defendant than is delivered to the plaintiff.<sup>68</sup>

62. See Tony Honoré, *Responsibility and Luck*, 104 *Law Q. Rev.* 530, 549 (1988) (observing that the allocation of outcomes to those who cause them means that we are "forced to gamble" because "[c]hoosing is inevitably betting"). The point in the text ignores the effects of insurance which can of course undo this "forced gamble" and, if mandatory, go further to actually require risk-pooling. See generally Baker, *supra* n. 36.

63. Moreover, to the extent that tort law does more than just compensate for harm, it forces participation in what amounts to a lottery system. See e.g. Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 *Mich. L. Rev.* 2185, 2230 (1999); *infra* nn. 117–18 and accompanying text.

64. See e.g. Epstein, *supra* n. 3, at 260–62 (discussing coincidence cases).

65. See e.g. *id.* at 187–219 (discussing doctrines of contributory negligence, comparative negligence, and assumption of risk, all of which take into account the plaintiff's behavior).

66. Arthur Ripstein, *Equality, Responsibility, and the Law* 294 (Cambridge U. Press 1999).

67. See *id.* ("We do not suppose that pedestrians who are slow because of their past choices get what they deserve when they are run down, for we do not suppose that in taking (or even choosing) some risks they forego all other protections."); see also Epstein, *supra* n. 5, at 329–30 (discussing tort doctrines such as "last clear chance" that ignore the earlier poor choices of plaintiffs). Similarly, the law requires accommodations for people with disabilities regardless of how they came to have their disabilities. See e.g. Elizabeth S. Anderson, *What Is the Point of Equality?* 109 *Ethics* 287, 298 (1999); *id.* at 296 (observing that the luck egalitarian's position that society owes nothing to those harmed by their own choices implies that the post office could ban guide dogs assisting those whose blindness was the result of their own careless driving).

68. See Calabresi *supra* n. 15; see also Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 *Md. L. Rev.* 409, 411–12 (2005) ("Calabresi's key insight was that there was no necessary link between compensating victims and deterring or punishing injurers.").

Similar examples can be found in property law. Epstein suggests that acquisition that involves some luck should be treated as if it were entirely the product of skill—even though this involves some overassignment of responsibility.<sup>69</sup> At the same time, people are coercively taxed to support a police force that will protect everyone’s property holdings, even though some people are more vulnerable than others,<sup>70</sup> and some of that vulnerability may be a matter of choice (e.g., being in poor physical condition as a result of lifestyle decisions) rather than chance (e.g., having a slighter build).<sup>71</sup> Similarly, the law provides compensation for takings, protects existing uses, and offers other forms of transition relief even though this may mean buffering the effects of poor decisions as well as bad luck.<sup>72</sup> In all of these cases, chance is equalized even though it also means equalizing (some) choices, and even though it results in some underassignment of responsibility. My point in raising these examples is not to question the law’s choices on these matters. What I mean to emphasize instead is that costly disaggregation problems must be resolved somehow, and that sometimes the law chooses the costs of underassignment over the costs of overassignment. Thus, the law already does a great deal to even out luck that is blended with choice, making the operative question not whether law should reduce the effects of fortune, but only when and how to it should do so.<sup>73</sup>

Epstein’s take on disaggregation lines up reasonably well with these common law examples. For him, the presence of force or fraud makes the case one in which society should accept the costs of overassignment of responsibility to perpetrators and underassignment of responsibility to victims if separation costs preclude a finer-grained assignment of responsibility. In all other cases, Epstein seems to recommend that the law respond to high (or perhaps even moderate) separation costs by treating the entire event as if it were chosen—that is, accepting the costs of overassignment of responsibility in order to avoid the costs that come from underassignment of responsibility. Epstein takes this tack in part because of his view that decentralized mechanisms for responding to luck can perform further disaggregation at lower cost—a claim taken up in the next section.

## 2. Comparing the Costs of Different Disaggregators

Society’s initial approach to mixtures of luck and effort need not be the final answer. Even if the government chooses to treat an event as one for which the individual

69. Epstein, *supra* n. 1, at 26–28.

70. See Epstein, *supra* n. 5, at 333–34 (noting that protection is uncontroversially provided to all, despite its greater advantage to those who are the most vulnerable).

71. Epstein raises a similar point in discussing private necessity cases: the doctrine applies regardless of whether earlier negligence placed the person claiming necessity in danger. See Epstein, *supra* n. 5, at 329.

72. Scholars have conceptualized takings compensation and other forms of transition relief as insurance that can be vulnerable to moral hazard. See e.g. Daniel Shaviro, *When Rules Change* 40–42 (U. Chi. Press 2000); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569, 571–72 (1984).

73. Elizabeth Anderson makes a related point in critiquing Epstein’s approach. See Anderson, *supra* n. 16, at 243 n.4 (arguing that it is inaccurate to think of tax and transfer systems as “interventions” into a preexisting schema of property rights given that, “[f]rom an egalitarian point of view, property rights are artificial, *all the way down*”) (emphasis in original).

is made responsible (or for which she gets credit), private, decentralized, noncoercive mechanisms for evening out the results of luck still exist. Epstein suggests these mechanisms may be superior because (among other reasons) they are better positioned to separate out choice from chance than are centralized governmental bodies.<sup>74</sup> This claim has some plausibility. Insurance companies have financial incentives to price risk accurately, and one way in which they might do so is by grouping together those who have made similar choices (e.g., to smoke).<sup>75</sup> But private insurers do not stop there; to remain competitive and to avoid the unraveling effect of adverse selection,<sup>76</sup> private insurers will make all classifications among risks that are cost-justified.<sup>77</sup> In so doing, they will take into account *any* factors that bear on a person's risk profile, whether related to behavior or to other, unchosen conditions. Because private insurance is typically obtained midstream in a person's life, previous effects of chance as well as choice will bear on the risk categorization.

Thus the incentives to which private insurers respond may at times work in favor of disaggregating choice from chance, but at other times may consciously lump together chosen and unchosen factors in constructing risk categories. This is not to criticize insurance but rather to point out how it works—by pooling similar risks, assessed at the moment that coverage begins.<sup>78</sup> The cost and availability of coverage will necessarily depend not only on choices, but also on past fortuities that affect people's risk classifications and their ability to pay. Added to this problem is the fact that insurance is not available for every risk.<sup>79</sup> Thus, despite their potential advantages as disaggregators, insurance companies are not designed to even out all forms of misfortune.

Epstein also suggests that private, decentralized mechanisms could provide aid *ex*

74. This might be true at two levels of generality. First, perhaps these private entities are better equipped to examine individual cases, rather than whole categories of cases, to determine whether underassignment costs or overassignment costs predominate in a given instance. Thus, even if it still remains prohibitively costly to separate out choice from chance in a given case, the ability to parse among cases within a given category could add accuracy. Second, it may actually be possible to separate out, in individual cases, the elements of luck.

75. See e.g. Richard A. Epstein, *Mortal Peril* 121 (Addison Wesley 1997) ("The insurance company that lumps disparate individuals into a single risk classification invites its own economic ruination.")

76. Adverse selection can become a problem if risk information available to insureds is not accurately priced by insurers—which would generally occur only if the information is private and unavailable to the insurers, or if insurers are forbidden to take particular pieces of information into account. Under these conditions, insurance priced for the average risks of people in the pool will be a good deal for high risk people and a bad deal for low risk people, attracting more of the former and driving out more of the latter, thus threatening the viability of the insurer's business—or so the story goes. For a discussion of this dynamic, see *id.* A countervailing effect of "propitious selection" can also occur if those who are lower risk disproportionately seek insurance, perhaps due to factors like income, cognitive ability, or risk preferences. See e.g. David Hemenway, *Propitious Selection*, 105 Q.J. Econ. 1063 (1990); Hanming Fang et al., *Sources of Advantageous Selection: Evidence from the Medigap Insurance Market*, 116 J. Pol. Econ. 303 (2008).

77. As Epstein explains, no insurer will make infinitely small risk classifications, because the cost of doing so is not worth the advantages of slightly improving the pricing of risk. See Epstein, *supra* n. 75, at 121–22.

78. Epstein analogizes efforts to obtain insurance to cover a preexisting condition to a ship sinking one month and its owner seeking insurance the next. *Id.* at 129.

79. In this connection, it is notable that one of the largest risks to which ordinary families are exposed is also one that is currently very difficult to insure against—fluctuations in home values. See e.g. William A. Fischel, *The Homevoter Hypothesis* 4, 9–10 (Harvard U. Press 2001); see also Robert J. Shiller, *Macro Markets: Creating Institutions for Managing Society's Largest Economic Risks* 79–83 (Oxford U. Press 1993) (discussing some possible ways to hedge home value risk).



*post.*<sup>80</sup> Here, the argument is that such localized institutions as families, religious organizations, and private charities are better equipped to separate out the deserving from the undeserving, to filter out malingerers, and to instill norms and impose nonpecuniary sanctions that address moral hazard concerns.<sup>81</sup> Decentralized bodies that address fewer cases can engage in closer analysis of each one, and many of these entities have access to a larger set of tools for investigating events, eliciting information, and addressing any resulting incentive problems going forward. However, the theoretical advantages of such decentralized alternatives are only relevant to the extent that these entities will actually step in to buffer fortuity. Due to factors entirely out of their own control, individuals affected by bad luck will have differential access to such support networks. It is also unclear that separation costs are always lower in these groups. For example, some groups may provide assistance to their members only after imposing very high separation costs on beneficiaries in the form of severe intrusions into their lives or extreme limitations of personal autonomy.<sup>82</sup> Thus, the idealized vision of a discerning and humane private support group is unlikely to be replicated consistently.

The interaction between private and public approaches to misfortune also requires attention. For example, we might wonder whether different luck-response mechanisms would tend to crowd each other out,<sup>83</sup> or whether particular mechanisms can make adjustments only in one direction (toward greater insurance coverage) and not in the other (toward increased exposure).<sup>84</sup> Incentives to form or join private support networks in the first place could also be affected by governmental policies regarding luck. For example, if governmental policies addressing large-scale misfortunes reduce the universe of claims that one's fellow network members are likely to make, a potential disincentive to participating in such a network would be removed.

80. Epstein, *supra* n. 1, at 34.

81. See Epstein, *supra* n. 5, at 317–18 (suggesting that moral hazard problems are minimized with “private donors” because “these parties working on the ground will in general have information to discriminate, when appropriate, between people who slack off and those who have been hit by genuine misfortune”); see also David T. Beito, *From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890–1967* 45, 49 (U. of N.C. Press 2000) (discussing the measures that fraternal societies took to determine whether conditions of need were self-inflicted and to filter out malingerers); David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 Wash. U. L.Q. 15 (1996) (suggesting that families are often in an especially good position to monitor and influence behavior).

82. See e.g. Lee Anne Fennell, *Relative Burdens*, 45 Wm & Mary L. Rev. 1453, 1488–89 (2004); see also Gary Becker, *Treatise on the Family* 345 (enlarged ed., Harvard U. Press 1991) (discussing incentives in traditional societies where families were held responsible for their members); Anderson, *supra* n. 16, at 243 n.4 (noting the potential of private charitable arrangements to “lead[ ] to relations of personal subjection”).

83. See e.g. Richard A. Epstein, *Hayekian Socialism*, 58 Md. L. Rev. 271, 296–97 (1999) (discussing the potential for public disaster relief to crowd out private insurance markets); Jonathan Gruber, *Public Finance and Public Policy* 191–94 (Worth Publishers, Inc., 2d. ed. 2007) (theory and evidence on the extent to which public provision of public goods crowds out private provision of those goods).

84. If decentralized mechanisms can only make adjustments in the direction of further buffering luck (and never in the direction of increasing exposure to luck), then it might seem to argue for public entities erring on the side of leaving losses where they fall. Yet private entities might, in fact, be able to make adjustments in both directions. For example, the prospect of private forms of “reverse insurance” has attracted theoretical attention. See *infra* Part IV(B). Alternatively, families and other private groups that share resources might make special claims on a person who has received a luck-buffering payment from the government, effectuating a partial undoing of the governmental targeting of assistance.

### B. Political Costs

Epstein also suggests that decentralized mechanisms dodge the high political costs which, in his view, inevitably accompany more centralized efforts to buffer luck.<sup>85</sup> Epstein articulates the point as follows: “The risk-averse inhabitant behind the veil cannot simply opt for a rule that seeks to counteract the roll of the natural dice. Instead, he has to minimize joint risks—nature and politics—that are inversely related.”<sup>86</sup> Clearly, Epstein is correct to observe that a society cannot select redistributive rules without also selecting governmental structures capable of accomplishing that redistribution; ends cannot be selected à la carte without also selecting some means.<sup>87</sup> But the contention that we cannot realistically have a particular luck-buffering rule without also incurring certain political costs has policy traction only if it is possible to avoid those same costs under some other realistically available regime. Is it?

It is difficult to imagine how people negotiating behind the veil could bind themselves to a rule that precludes the government from responding to misfortune—nor why they would want to do so. People in dire need generate externalities for others,<sup>88</sup> and no political system could remain completely unresponsive to threats to the well-being of society, whether luck-generated or otherwise. The current economic crisis offers a case in point. Homeowners at risk of foreclosure and companies at risk of failure may have made bad choices, been unlucky, or both. Regardless, society is responding. Even if luck itself were somehow ruled off-limits as an independent rationale for social policy, as Epstein suggests it should be,<sup>89</sup> interest groups and legislators can couch any desired policy in terms of externality control or other long-run economic benefits.<sup>90</sup> Thus, rent-seeking and inefficiency are not uniquely associated with policies that are premised on the correction of bad luck. Indeed, a cynical view would suggest that hostility to luck-based redistribution operates only to keep the poor and powerless from having their chronic bad luck redressed; those with relatively more political power or greater stakes in the economy will always be able to get their acute bad luck buffered, even when it is quite obviously entangled with bad decisions.

Decentralized response mechanisms add new wrinkles to the political story. These approaches might be preferable on political grounds if they somehow reduced the incentive for people to engage in rent-seeking or agitate for inefficient redistributive measures. But it is not clear why this should be the case. Perhaps the ability of these

85. The political costs that he has in mind presumably include both the resources lost in the course of rent-seeking, as well as the costs associated with implementing an inefficient redistributive rule.

86. Epstein, *supra* n. 1, at 34.

87. This is a very general point that is not unique to responses to fortuity. However, Epstein suggests that efforts to buffer luck are difficult to bound. *See id.* (“Let it be decided that these naturally morally arbitrary distributions do not stand, and the entire system of property rights becomes indefinite.”).

88. *See e.g.* Richard H. McAdams, *Economic Costs of Inequality* (U. of Chi. L. & Econ. Olin Working Paper No. 370, Nov. 2007) (available at <http://ssrn.com/abstract=1028874>); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 Wis. L. Rev. 235, 267–74 (1994).

89. Epstein, *supra* n. 5, at 313.

90. *Cf. Lucas v. S. C. Coastal Commn.*, 505 U.S. 1003, 1025 n. 12 (1992) (arguing that relieving a legislature of the compensation requirement whenever it can produce a “harm-preventing justification” merely “amounts to a test of whether the legislature has a stupid staff”).

mechanisms to meet needs and address risk would make governmental responses less necessary and hence less worth lobbying for. However, reliance on decentralized mechanisms may also change the political dynamic by creating groups with an interest in receiving benefits from the government in exchange for their role in addressing societal needs. Thus, in place of individuals attempting to obtain redistribution, we might well have industry groups, charities, and the like agitating for benefits. It is an empirical question whether these forms of rent-seeking are less costly than ones undertaken by unlucky individuals.

Moreover, the internal dynamics of the groups in question cannot be ignored. Even within the smallest and most intimate groupings, families and religious communities, members' efforts to secure resources could easily generate high costs. While it might be said that these costs are voluntarily assumed in the sense that they flow from membership in private groups, they represent costs nonetheless.

### C. *Coercion and Coordination*

The full Epsteinian case for decentralized approaches would go beyond claims about their lower disaggregation and political costs to focus on their apparently noncoercive and autonomy-preserving nature. While the point resonates with our intuitions, there are three important qualifications that deserve exploration.

First, the mere fact that an approach is decentralized does not necessarily mean that it will be free of coercion. Families are voluntarily formed to some degree, but not all familial relationships are chosen, and even when they are chosen, individuals may not have meant to take on particular burdens.<sup>91</sup> Within other organizations, the provision of aid may be coercive in some sense, as where an entity's benefits are withheld from those who do not agree to contribute. Moreover, private mechanisms can be the subject of governmental coercion, as where insurance is made mandatory.<sup>92</sup>

Second, ruling out coercive responses to misfortune may also mean forgoing certain benefits associated with coordinated responses. As a "classical liberal," Epstein is willing to accept compulsion (as through taxes and eminent domain) to solve collective action problems.<sup>93</sup> In asserting that coordination is unimportant in addressing misfortune,<sup>94</sup> Epstein seems to assume that unbuffered luck does not present a collective action problem. But relieving misfortune that would otherwise generate externalities constitutes a public good, and people may attempt to free-ride on the contributions of others in providing it.<sup>95</sup> The potential underprovision of public goods is of course a

91. See e.g. Norman Daniels, *Am I My Parents' Keeper? An Essay on Justice Between the Young and the Old* 28–34 (Oxford U. Press 1988); Michael Walzer, *Politics and Passion: Toward a More Egalitarian Liberalism* 1–11 (Yale U. Press 2004).

92. See e.g. Baker, *supra* n. 36, at 172 (observing that "auto insurance is mandatory in all but a very few states" (footnote omitted)); George W. Overton, *Ethics and Economics in the Dual Representation of an Insurer and Its Insured*, 15 CBA Rec. 48 (Jan.2001) (describing as "involuntary insureds" those who are required by law to purchase automobile insurance when they would prefer not to do so).

93. Epstein, *supra* n. 5, at 316, 318.

94. See *id.* at 318–19.

95. See e.g. Wil Arts & Peter van Wijck, *Share and Share Alike? Social Constraints on Income Equalization*, 3 Soc. Just. Research 233, 235 (1989) (casting income distribution as a public good); Christopher C. Fennell & Lee Anne Fennell, *Fear and Greed in Tax Policy: A Qualitative Research Agenda*, 13 Wash. U.

standard argument for governmental involvement.<sup>96</sup> It might, however, be possible for the government to provide a coordinating role or devise legal mechanisms that would assist private entities in addressing outstanding needs.<sup>97</sup>

Third, it is worth noting that governmental solutions need not be coercive ones; it would be possible for the government to offer alternative risk arrangements without requiring everyone's participation.<sup>98</sup>

#### IV. EPSTEIN<sup>n</sup> BEHIND THE VEIL

Epstein suggests that people negotiating behind a veil of ignorance would reject centralized luck-buffering efforts other than those relating to losses produced by force or fraud. But it is not clear that this would be the case—even if we assume that everyone behind the veil subscribes to Epstein's own worldview.

To be sure, an assembly of Epstein clones ("Epstein<sup>n</sup>")<sup>99</sup> would be worried about the capacity of luck-buffering responses to dampen incentives to put in effort and exercise prudence where luck is mixed together (as it inevitably is) with chosen inputs. However, the Epsteinian assemblage would also be bothered by the capacity of the winds of fortune to attenuate the relationship between inputs and outcomes, especially where (for whatever reason) insurance is unavailable. Similarly, Epstein<sup>n</sup> would be concerned about the effects on costs and political incentives of a governmental willingness to buffer luck. But Epstein<sup>n</sup> would also recognize that stopping principles are necessary regardless of which approach to luck is nominally chosen behind the veil—the lesson that rules about luck do not come à la carte applies across the board. Epstein<sup>n</sup> would dislike the idea of governmental coercion directed toward the end of buffering luck, but would, I think, also be troubled by the possibility that private coercion might replace it. Moreover, the discussions behind the veil would undoubtedly address collective action problems, because these problems are likely to go unresolved in the absence of some coercion.

In the remaining space, I wish to briefly sketch what an Epstein-inspired<sup>100</sup> vision of luck might look like. I will suggest two design principles for cabining luck and responses to it: a principle of reciprocity and a principle of reversibility.

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J.L. & Policy 75, 104–09 (2003) (discussing the free-riding dynamic in the redistribution context and its relationship to experimental literature on contributions to public goods). Similarly, if a particular level of assistance is both necessary and sufficient to achieve the misfortune-alleviation goals of a group or society, the response takes the form of a step-level good; in the absence of compulsion or coordination, would-be contributors may be reluctant to contribute for fear that their contributions will be either pointless or superfluous. See e.g. Ido Erev & Amnon Rapoport, *Provision of Step-Level Public Goods: The Sequential Contribution Mechanism*, 34 J. Conflict Res. 401, 403 (1990); Robyn M. Dawes et al., *Organizing Groups for Collective Action*, 80 Am. Political Sci. Rev. 1171 (1986).

96. See e.g. Gruber, *supra* n. 83, at 184–85.

97. *Cf. id.* at 186–87 (discussing how law facilitates private business improvement districts).

98. However, mandatory participation may be important in some cases, as where mandatory risk pooling is necessary to avoid adverse selection problems. See *supra* n. 76 and accompanying text.

99. I admit to taking literary license with the term "clone" as well as with the mathematical notation taking Epstein to the *n*th power. In fact, people with Epstein's genetic makeup might not share his worldview, and even if they did, grouping them together might not produce exponentially Epsteinian results.

100. Of course, I do not presume that Epstein would agree with everything I say here.

### A. *Reciprocity*

Behind-the-veil negotiators with Epstein's sensibilities would wish to construct a system that preserves incentives while constraining coercion. Epstein suggests that both goals would be achieved by drawing a hard boundary line between governmental action countering force and fraud (which he endorses), and governmental action that simply addresses bad luck (which he does not recommend).<sup>101</sup> I have already suggested that the incentive story is complicated by the fact that uninsurable risks can drive a wedge between inputs and outcomes. More fundamentally, Epstein's preferred substantive limitation is vulnerable to the same criticism that he levels at those who argue for governmental interventions in the name of luck: it is simply unavailable as a matter of political reality. The reasons are obvious—responding to needs generated by processes other than force and fraud are often practical and political imperatives. Thus, attempting to draw a substantive line in the sand at the level of zero redistribution will be unavailing.

If the goal is to place meaningful limits on coercion undertaken in service of redistribution, it may be more helpful to require that policy responses be bundled in ways that limit strategic resort to them. To that end, Epstein<sup>n</sup> might adopt a principle of reciprocity.<sup>102</sup> The notion of reciprocity is one that Epstein has elsewhere embraced. For example, in discussing the appropriate connection between expectations and property rights, he has argued that, as an initial matter, "a framework of basic reciprocity must be adopted in which neither side could claim any special advantage denied to the other."<sup>103</sup> Similarly, Epstein has emphasized the relevance of "reciprocal benefits and burdens" to land use doctrines.<sup>104</sup> In the present context, reciprocity would require that relief from misfortune be conditioned on either a symmetrical future commitment by the assisted person (on her own or through a group with which she is identified), or a history of vulnerability to reciprocal (or nonreciprocal but otherwise comparable) societal obligations.<sup>105</sup> Even though outcomes will inevitably be uneven *ex post*, such an

101. See e.g. Epstein, *supra* n. 5, at 316–18. To say that force and fraud feature prominently in Epstein's thinking would be an understatement. For example, a LEXIS search of law review articles turned up no fewer than 54 articles authored by Epstein that contain the words "force" and "fraud" within two words of each other (search in LexisNexis, "US & Canadian Law Reviews, Combined" library, using the search "'force' w/2 'fraud' and NAME (Richard A. Epstein)" (Oct. 11, 2009)).

102. The notion of reciprocity is, of course, frequently invoked in discussions of fairness and equality. See e.g. Anderson, *supra* n. 16, at 265 ("Social equals live on terms of *reciprocity* with one another, none imposing conditions on others that they would reject for themselves.") (emphasis in original); Honoré, *supra* n. 62, at 540–41 (treating as a necessary condition for a fair system of outcome allocation that it "be reciprocal in that each such person is entitled to apply it to others and they to him"); George P. Fletcher, *Fairness and Utility in Tort law*, 85 Harv. L. Rev. 537 (1972) (discussing and examining the "paradigm of reciprocity" for tort liability and comparing it with the "paradigm of reasonableness").

103. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1386 (1993). Epstein goes on to argue that the content of the reciprocal framework must be constructed by reference to a rule of joint maximization; reciprocity alone would be consistent with many different approaches, not all of which would be welfare-maximizing. *Id.*

104. See e.g. Richard A. Epstein, *Too Pragmatic by Half*, 109 Yale L.J. 1639, 1648 (2000) (book review of Daniel A. Farber, *Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (U. Chi. Press 1999)).

105. This approach seems consistent with the idea of "in-kind compensation" that Epstein has explored in his work on takings. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195–

approach would put people on equal footing going into the game. There will be parity between the risks that an individual can expect to have buffered in her own case and those that she will be required to contribute to buffering in the cases of others.

One kind of reciprocal arrangement would involve pooling risks *ex ante* before anyone knows the specific factors that might increase or decrease their own risks.<sup>106</sup> Where this is impractical and risks have already manifested in harm, coverage of a given harm might be linked to an agreement on the part of the persons assisted to provide reciprocal assistance to others in like circumstances. A governmental coordination mechanism could piggyback on private arrangements to carry out such reciprocal arrangements.<sup>107</sup> Other payback mechanisms might include structuring assistance as loans<sup>108</sup> or, in misfortunes affecting assets subject to later appreciation (such as homes), granting a share of the upside potential.<sup>109</sup>

### B. Reversibility

A second design principle, reversibility, would permit people to customize their risk arrangements except where doing so would be incompatible with efficiency or the principle of reciprocity discussed above. Because such an approach advances autonomy and reduces coercion, one would expect Epstein<sup>n</sup> to support it. Reversibility, as the name suggests, refers to adjustments in either direction from a societal default rule regarding risk. When the law leaves luck unbuffered as a default matter, reversibility would entail meaningful access to risk buffering arrangements. When, on the other hand, the law collectivizes risk through its default arrangements, reversibility refers to the ability to opt out of those insurance arrangements. The sections below discuss these two sides of reversibility in turn.

215 (Harv. U. Press 1985).

106. While true “behind the veil” conditions are unattainable, more limited manifestations of the idea might include insurance that begins early in life or that is pursuant to long-term contracts that survive employment shifts. See Epstein, *supra* n. 75, at 139 (suggesting contractual solutions to the impact of preexisting conditions on job mobility).

107. One advantage of private support networks like families and churches is their potential ability to draw on their members’ good luck to help in financing coverage for bad luck. It is generally problematic for a governmental body or a larger nongovernmental group (consider a charity like the Red Cross) to attempt to recapture windfalls, for reasons relating to information, incentives, and perceptions of unfairness fueled by the human tendency to characterize all good fortune as the result of personal skill. Yet people might well be willing to contribute some of the surplus generated by good luck in order to obtain coverage during bad times within the context of an explicit or implicit reciprocal interaction.

108. Cf. Fennell, *supra* n.88, at 325–28 (proposing a universal family loan program); Bruce Ackerman & Anne Alstott, *The Stakeholder Society* 82–83 (Yale U. Press 1999) (proposing an \$80,000 “stake” to be paid out to young people in early adulthood, with provision for repayment if possible at death).

109. Although the notion of equity sharing for homeowners has been around for decades, the idea of granting the right to upside appreciation in exchange for mortgage forgiveness or assistance has received particular attention in connection with the present housing crisis, even finding its way into one governmental program for loan modifications. See Pub. L. No. 110–289, § 1402(k), 122 Stat. 2800, 2805–06 (2008); see also Ian Ayres & Barry Nalebuff, *An Equity Kicker*, *Forbes* 113, 113 (May 19, 2008); Andrew Caplin et al., *Facilitating Shared Appreciation Mortgages to Prevent Housing Crashes and Affordability Crises* 5–6 (Hamilton Project Discussion Paper No. 2008-12, Sept. 2008) (available at [http://www.brookings.edu/papers/2008/09\\_mortgages\\_caplin.aspx](http://www.brookings.edu/papers/2008/09_mortgages_caplin.aspx)); Eric A. Posner & Luigi Zingales, *A Loan Modification Approach to the Housing Crisis*, 11 *Am. L. & Econ. Rev.* 575 (2009).

### 1. Equalizing Access to Risk-Spreading Devices

A central shortcoming of decentralized responses to misfortune is their patchwork quality and uneven availability. They operate alongside centralized mechanisms for addressing losses that, for whatever mix of reasons, elicit a legal or political response. As a result, whether people who are equally unlucky in suffering a loss of a particular magnitude will receive compensation is itself a matter of luck.

From the point of view of the victim, it is sheer chance whether a harm is produced by an identifiable agent and whether that agent is solvent. One is infinitely luckier (among the class of the already unlucky) to suffer harm at the hands of a wealthy and identifiable someone than to experience harm that is caused by nature, by no one in particular, or by an insolvent agent.<sup>110</sup> For those losses that are not caused by a solvent agent, it is a matter of fortuity whether the loss in question is one that was insurable. While it is not a matter of luck whether or not one chooses to buy insurance, the availability of a given insurance market lies out of the control of the individual. In addition, even those risks that are insurable may be uninsurable as a practical matter for particular individuals if previous bad luck has depleted their funds or worsened their risk profiles in ways that make premiums unaffordable. For those who are faced with uninsurable losses, the question then becomes whether private aid of some sort is available or whether the loss is of a sort that will elicit a political response. On both of these scores, it is largely a matter of luck whether assistance will be forthcoming.<sup>111</sup>

Access to the existing mix of decentralized and centralized luck-response mechanisms is itself too suffused with luck to constitute a coherent approach. But policies designed to equalize access to these mechanisms could transform them into a more workable and fair system. The government might directly offer insurance products that the private market has, for whatever reason, failed to provide. Alternatively, the government might subsidize the development of (or otherwise facilitate the use of) innovative products for managing important risks like those to careers<sup>112</sup> or home values.<sup>113</sup> Governmental support for new forms of private insurance could also help to

110. See e.g. Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *Leg. Theory* 181, 187–88 (2006); Christopher H. Schroeder, *Causation, Compensation and Moral Responsibility*, in *Philosophical Foundations of Tort Law* 347, 350 n. 2 (David G. Owen ed., Cambridge U. Press 1979). For a discussion of the problem of judgment-proof defendants and some responses to it, including mandatory liability insurance and minimum asset requirements for engaging in a given activity, see e.g. Steven Shavell, *Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem*, 36 *RAND J. Econ.* 63 (Spring 2005).

111. Of course, it may not be entirely a matter of luck whether one is able to obtain aid from private sources. People can choose whether or not to participate in particular social networks and whether to identify with a particular family grouping. Their behavior toward others in repeat play over time may well determine whether assistance is forthcoming in the event of need, though such past exemplary behavior is neither always necessary nor always sufficient.

112. Robert J. Shiller, *The New Financial Order: Risk in the 21st Century* 107–18 (Princeton U. Press 2003) (describing “livelihood insurance” that would help to protect people against downturns in their chosen careers).

113. The idea of insuring risks to home values has been around for quite some time; although limited versions of the idea have been implemented, it has yet to enjoy widespread acceptance. See e.g. Matityahu Marcus & Michael K. Taussig, *A Proposal for Government Insurance of Home Values Against Locational Risks*, 46 *Land Econ.* 404 (1970); Maureen A. McNamara, *The Legality and Efficacy of Homeowner’s Equity Assurance: A Study of Oak Park, Illinois*, 78 *Nw. U. L. Rev.* 1463, 1467–68 (1984). See also Andrew Caplin et al., *Home Equity Insurance: A Pilot Project* (Yale ICF Working Paper No. 03-12, May 3, 2003) (available at

ensure that risk-pooling is not just nominally available but actually accessible and affordable. For example, the risk that health insurance premiums may become unaffordable can be addressed through an additional layer of insurance against, say, unfavorable genetic test results.<sup>114</sup> Private risk spreading could also be directly supported through guaranteed loan programs for groups that collectively agree to cover the losses of their members. Mechanisms for delivering meaningful access to liquidity and risk pooling can substitute for other forms of direct governmental assistance, and can do so in a manner that is consistent with the principle of reciprocity.<sup>115</sup>

## 2. Expanding Opt Outs

In order to make choices about risk fully autonomy-preserving, it is necessary not only to allow people to pool risk when they wish to do so, but also to permit them to avoid pooling risk. There are some limits to this principle, however, since risk pooling arrangements have spillover effects and may be essential to fulfilling the conditions of reciprocity. For example, if the point of early risk-pooling is to predate the moment when people learn information about their own risk profile, allowing those who later get “good news” (e.g., through a genetic test) to opt out of the system would defeat the purpose. Nonetheless, it seems that a true Epsteinian would want to afford people the chance to opt out of risk arrangements where doing so is not inconsistent with efficiency or other normative goals.

“Reverse insurance,” which would permit people to undo risk arrangements that are implicitly or explicitly embedded in societal arrangements, has received theoretical attention.<sup>116</sup> A simple example will illustrate the basic idea. Products liability law allows people to recover punitive damages that, by design, exceed the losses that they have suffered. Assuming that the expected cost of these damage awards is factored into the price of products, it is as if people are required to purchase a lottery ticket that will pay off if they happen to get hurt.<sup>117</sup> Presumably, many people would prefer to forgo the lottery ticket and enjoy cheaper products, yet the law does not currently offer any way for them to achieve this result. More broadly, there is no way to sell one’s “unmatured” tort claims—that is, the right to recover in the event that one is harmed in the future.<sup>118</sup> While there are some obvious (and not so obvious) concerns associated

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[http://ssrn.com/abstract\\_id=410141](http://ssrn.com/abstract_id=410141)). For a recent discussion of how state and local governments might manage home value risk more systematically, see Lee Anne Fennell & Julie Roin, *Controlling Residential Stakes*, 77 U. Chi. L. Rev. (forthcoming 2010) (draft available at <http://ssrn.com/abstract=1452887>).

114. For a discussion of this approach, see Alexander Tabarrok, *Gene Insurance*, in *Entrepreneurial Economics: Bright Ideas from the Dismal Science* 47 (Alexander Tabarrok ed., Oxford U. Press 2002).

115. See e.g. Fennell, *supra* n. 82, at 1516–18.

116. See e.g. Calabresi, *supra* n. 15, at 219–20 (“reverse insurance” for restoring exposure to losses); Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. Leg. Stud. 203 (2002) (“anti-insurance”); see also Robert Nozick, *Anarchy, State, and Utopia* 77 (Basic Books 1974) (discussing arrangements that amount to reverse insurance); Kades, *supra* n. 34, at 1496–1500 (discussing a form of “reverse insurance” that would spread windfalls).

117. See Craswell, *supra* n. 63, at 2230; see also Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 211–12 (Yale U. Press 2008) (making a parallel argument about punitive damages in malpractice awards, explaining that “patients are effectively forced to buy a kind of lottery ticket, one that might be worth anything from millions of dollars to nothing”).

118. The idea of permitting sales in unmaturing tort claims has received significant scholarly attention. See e.g. Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 Va. L. Rev. 383 (1989); Robert Cooter &



with freer markets in reverse insurance,<sup>119</sup> it would seem that Epstein<sup>n</sup> would wish to examine in each context whether any good reason exists to force people into risk pools.

#### CONCLUSION

Epstein's views on luck, like his views on everything else, are provocative and powerfully argued. His ideas challenge readers to rethink their premises and to justify or abandon their most deeply held preconceptions. In this essay, I have tried to convey not only the endpoint that I (however provisionally) have reached in thinking through Epstein's approach to fortuity, but also a sense of the intellectual engagement that Epstein's work invariably prompts. I hope others will be motivated to join in the conversation, which is sure to be ongoing.

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Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *New Directions in Liability Law* 174, 183 (Walter Olson ed., The Acad. of Political Sci. 1988); Charles J. Goetz, *Commentary on "Towards a Market in Unmatured Tort Claims": Collateral Implications*, 75 Va. L. Rev. 413 (1989); Stephen D. Sugarman, *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business* 201–09 (Quorum Books 1989); Alan Schwartz, *Commentary on "Towards a Market in Unmatured Tort Claims": A Long Way Yet to Go*, 75 Va. L. Rev. 423 (1989). For discussion of some existing smaller-scale mechanisms through which risk is taken on in exchange for a lump-sum payment, see Lee Anne Fennell, *Unbundling Risk* (unpublished manuscript on file with Author).

119. See e.g. Fennell, *supra* note 118; Jennifer Arlen, *Contracting Out of Malpractice Liability: Medical Malpractice and the Cost of Choice*, U. Pa. L. Rev. (forthcoming) (draft available at <http://ssrn.com/abstract=1448846>).