

Restructuring Insurance Coverage for Drunk Drivers

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INTRODUCTION

While the gravity and prevalence of drunk driving in the United States are well documented, the actual facts are still startling. Someone is killed due to drunk driving approximately every forty-five minutes.¹ In 2008 alone, there were nearly 11,773 fatalities produced by drunk driving accidents.² At least half of all motor vehicle deaths are a product of intoxication.³ About three in every ten Americans will be involved in an alcohol-related crash at some point in their lives; in 2001, drunk driving accidents injured more than half a million people, an average of nearly one injury every minute.⁴ Nearly one and a half million drivers were arrested in 2006 for driving under the influence.⁵

Despite these alarming statistics, drunk drivers usually are insulated from at least some of the consequences of their actions. This Essay will explore how automobile insurance has protected drunk drivers from civil liability for their criminal conduct. Under the prevailing tort law regime in the United States, tortfeasors are liable for the costs of injuries to victims if they fail to exercise due care. In order to safeguard their assets (and in order to comply with state mandatory insurance laws), drivers must purchase automobile liability insurance. Using the example of Connecticut, this Essay will argue that the availability of such insurance conflicts with important state policies, even if it furthers others.⁶ A recurrent theme in this Essay is that the gap between the criminal and civil consequences of illegal conduct should be narrow, if not nonexistent. This Essay will conclude by proposing that the existing automobile insurance framework be changed so that insurers are authorized to seek reimbursement from drunk drivers for the value of claims paid to tort victims. This proposal would preserve victim compensation while forcing drunk drivers to bear the true costs of their actions.

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¹ Mothers Against Drunk Driving, Statistics, http://www.madd.org/Professionals/Law-Enforcement/Statistics/AllStats.aspx#STAT_1 (on file with the Harvard Law School Library).

² *Id.*

³ Frank A. Sloan et al., *Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving*, 38 J.L. & ECON. 49, 50 (1995).

⁴ Mothers Against Drunk Driving, Victim Services Statistics, <http://www.madd.org/Victim-Services/Victim-Services/Statistics.aspx> (on file with the Harvard Law School Library).

⁵ Mothers Against Drunk Driving, *supra* note 1.

⁶ Connecticut was chosen because of its historical connection with the insurance industry, but the arguments below apply with equal force to the majority of states.

I. WHY AUTOMOBILE INSURANCE COVERS LIABILITY ARISING FROM
DRUNK DRIVING

Automobile insurance is predominantly governed by state law, and coverage provisions and exclusions vary tremendously. Nevertheless, because automobile insurance tends to be advertised and sold in a national market, the state-by-state variations are largely in the details.⁷ Thus, some general observations about automobile insurance may be advanced. First, automobile insurance is mandatory in virtually every state.⁸ Second, policies tend to follow a common format, consisting of (1) the Declaration Sheet, (2) Agreement, (3) Definitions, (4) Part A—Liability Coverage, (5) Part B—Medical Payments Coverage, (6) Part C—Uninsured Motorists Coverage, (7) Part D—Coverage for Damage to Your Auto, (8) Part E—Duties After an Accident or Loss, and (9) Part F—General Provisions.⁹ The balance between providing broad coverage and offering reasonably priced premiums is struck through the use of exclusion provisions, which are grouped in Parts A–D and which must be articulated clearly and unambiguously.¹⁰ Third, and relatedly, the scope of policies is quite broad, and courts view with great skepticism any attempts by insurers to limit coverage.¹¹

The interplay between these three characteristics of automobile insurance is important because, over the past two decades, insurance companies across the United States have experimented with reducing their risk exposure by tinkering with the various exclusions contained within insurance policies.¹² One such proposed exclusion provides that coverage shall not extend to any loss sustained as a result of an insured person's commission of (or attempt to commit) a felony, or as a result of an insured person's involvement in an illegal activity.¹³ However, courts have proven resistant to a robust reading of this exclusion, and by and large, invocation of this exclusion has not caught on. But why should automobile insurance protect at-fault drivers against the consequences of illegal activities? In particular, given the high risk of fatality and injury associated with drunk driving, why should the law shield drunk drivers from civil liability?

Addressing these questions implicates an interesting point of intersection between the public policy exception in contract law, tort theory, and general principles of insurance law. Mapping this intersection both helps to

⁷ See Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQUIRIES L. 165, 171 (2008).

⁸ See Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 362 tbl.1 (2004).

⁹ Johnny Parker, *The Wacky World of Collision and Comprehensive Coverages: Intentional Injury and Illegal Activity Exclusions*, 79 NEB. L. REV. 75, 79 (2000).

¹⁰ *Id.* at 89.

¹¹ *Id.* at 76 n.3, 78.

¹² See *id.* at 78.

¹³ See *id.* at 95 n.73.

explain why automobile insurance has evolved as it has and counsels some suggestions for reform.

American law has long recognized the general rule that contracts, although properly formed in other respects, are unenforceable if found to be contrary to public policy,¹⁴ given the “importance of deterring illegal conduct.”¹⁵ Insurance policies are not treated differently.¹⁶ This rule marks a rare limitation on freedom of contract,¹⁷ permitting courts to “subjugate private ordering to a system of state regulation, override the expressed preferences of private parties, and substitute their own judgment for that of the market.”¹⁸

Where, though, should courts look to determine the public policy of a given jurisdiction? The most obvious and least contested source of statements of public policy is legislation.¹⁹ More often than not, however, statutes or other legislative declarations of public policy prohibit certain conduct but fail to address the issue of the enforceability of contracts involving such conduct. In the resulting disputes, courts must consider whether the policy at issue would be offended by either full or partial enforcement of a contract; accordingly, there is a great deal of room for judicial discretion, and parties may not know a priori whether their contracts will be enforceable. To counteract this uncertainty, some courts have established the rule that if a statute forbids conduct, any contract involving such conduct is unenforceable.²⁰

¹⁴ See, e.g., *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 334 (1853) (“It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions.”). For a scholarly article tracing the history of the public policy defense back to the fourteenth century, see generally Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 77–91 (1928).

¹⁵ *Lewis & Queen v. N.M. Ball Sons*, 308 P.2d 713, 719 (Cal. 1957).

¹⁶ See, e.g., *Bishop v. Nat’l Health Ins. Co.*, 344 F.3d 305, 307 (2d Cir. 2003) (“Under Connecticut law, we interpret an insurance policy as we would a contract”); *L’Orange v. Med. Protective Co.*, 394 F.2d 57, 59 (6th Cir. 1968) (“In Ohio the courts have held that an insurance policy is to be treated as a voluntary contract which is subject to the public policy of the state.”); *Karl v. N.Y. Life Ins. Co.*, 381 A.2d 62, 64 (N.J. Super. Ct. App. Div. 1977) (“[L]ife insurance policies are necessarily subject to the limitation that they not violate public policy”).

¹⁷ Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116–17 (1988).

¹⁸ G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 438 (1993).

¹⁹ See, e.g., *Anne Arundel County v. Hartford Accident & Indem. Co.*, 621 A.2d 427, 432 (Md. 1993) (“[D]eclaration of public policy is normally the function of the legislative branch.”) (citing *Adler v. Am. Standard Corp.*, 432 A.2d 464 (Md. 1981)); *Scott v. Bd. of Trs.*, 540 So. 2d 657, 658 n.1 (Ala. 1988) (“When the legislature of a state has acted on a subject within constitutional authority, public policy is what the statute enacted says or indicates.”) (citing *Higgins v. Nationwide Mut. Ins. Co.*, 282 So. 2d 295 (Ala. 1973)).

²⁰ See, e.g., *Waisbren v. Peppercorn Prods., Inc.*, 48 Cal. Rptr. 2d 437, 447 (Cal. Ct. App. 1995) (“The general rule . . . is that where a statute prohibits . . . the doing of an act, the act is void, and this [result holds] notwithstanding that the statute does not expressly pronounce it so.”) (citing *Severance v. Knight-Counihan Co.*, 29 Cal. 2d 561, 568 (Cal. 1947)); cf. *Hender-*

Even this truncated overview of the public policy exception makes Connecticut's treatment of drunk driving difficult to understand. In Connecticut, criminal penalties for driving under the influence begin relatively lightly and escalate very quickly, as depicted by Table 1 below.²¹ In assessing these penalties, the law considers as a subsequent conviction one that occurs within ten years of a prior conviction for the same offense.

TABLE 1: CRIMINAL PENALTIES FOR DRUNK DRIVING IN CONNECTICUT

Conviction	Jail Sentence	Fine	License Suspension
First	Either (a) up to six months with a mandatory minimum of two days, or (b) up to six months suspended with probation requiring 100 hours of community service.	\$500–\$1,000	One year
Second	Up to two years with a mandatory minimum of 120 consecutive days and probation with 100 hours community service.	\$1,000–\$4,000	Three years (or until age twenty-one if longer)
Third and Subsequent	Up to three years with mandatory minimum of one year and probation with 100 hours community service.	\$2,000–\$8,000	Permanent revocation

In addition, Connecticut has established the crime of assault in the second degree with a motor vehicle. A person commits this offense when, while operating a motor vehicle under the influence of alcohol or any drug, he or she causes serious physical injury to another person as a consequence of the effect of the alcohol or drugs.²² The penalty for assault in the second degree with a motor vehicle is a prison term of up to five years, a fine of up to \$5,000, or both. The separate crime of manslaughter in the second degree with a motor vehicle is defined as the same conduct but with the result of the death of another person.²³ The penalty for manslaughter in the second degree with a motor vehicle is a prison term of up to ten years, a fine of up to \$10,000, or both.

These are serious penalties. On the basis of the statutory framework outlined above, one might conclude rather reasonably that Connecticut has a clear public policy against drunk driving. Such a conclusion would enable insurers to add—with confidence—a standard intoxication exclusion to automobile insurance policies on the assumption that courts would uphold the

son v. Kentwood Spring Water, Inc., 583 So. 2d 1227, 1232 (La. Ct. App. 1991) (“Where a statute imposes a penalty on the doing of an act without either prohibiting it or expressly declaring it illegal or void, generally an agreement founded on or for doing of such penalized act is void.”).

²¹ See CONN. GEN. STAT. § 14-227a(g) (2008) (illustrated by Table 1 above).

²² CONN. GEN. STAT. § 53a-60d (2008).

²³ CONN. GEN. STAT. § 53a-56b (2008).

exclusion in keeping with the state's public policy against drunk driving. And yet, no Connecticut automobile insurance policy reviewed during research for this Essay contained an exclusion for injuries or damage arising as a result of drunk driving. Drivers in Connecticut are fully insurable for any civil liability arising out of torts committed while driving drunk; that is, they are fully insurable for the civil consequences of their criminal behavior. Certainly, motorists may see their insurance rates skyrocket after a drunk driving conviction, but as long as they are insured, their civil liability for drunk driving is covered, notwithstanding their continued exposure to criminal penalties. Explaining why this is so requires a brief digression into the competing theoretical justifications of American tort law.

Tort law often is justified "as achieving fairness in the allocation of losses"²⁴ or as a deterrence measure²⁵ designed to promote desirable or efficient conduct. Insurance, however, threatens to undercut both of these justifications by relieving the tortfeasor of liability, thereby frustrating tort law's fairness goals and diminishing its deterrent effects, as a number of scholars have noted.²⁶ Nevertheless, despite the argument that tort law may be "severely, perhaps fatally undermined" by liability insurance,²⁷ the two continue to coexist—if rather tensely at times. This may be, as Professor Gary Schwartz has contended, because tort law has at least one more theoretical justification, which it shares in common with liability insurance: "The many scholars who unqualifiedly assert that liability insurance is inconsistent with fairness theories of tort law are guilty of ignoring . . . the possibility that compensatory justice is the theory that tort law has in mind—a theory that renders liability insurance not only acceptable but commendable."²⁸

This theory of tort law helps to clarify why liability insurance is available to drunk drivers in Connecticut and elsewhere. Deterring undesirable conduct (here, drunk driving) is merely one goal of tort law; another important goal is compensating victims. Indeed, the deterrence argument seems somewhat of an awkward fit in this context. That is, the availability of insurance may not be causing motorists to drive drunk, and the absence of insurance may not correlate with a reduction in drunk driving incidences. If a driver is not deterred by the criminal penalties associated with drunk driving, he or she may not be deterred by the prospect of civil liability.²⁹ This

²⁴ Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313 (1990).

²⁵ See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

²⁶ See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 239–48 (1970); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 790–92 (1985).

²⁷ John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823 (1967).

²⁸ Schwartz, *supra* note 24, at 335; see also Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 488 (1979) (arguing in favor of a compensation justification).

²⁹ Note, though, that civil liability attaches in full even upon the first instance of drunk driving, whereas criminal penalties begin relatively lightly before escalating rapidly with each

argument is supported by empirical research showing that, at least in binge drinking situations, motorists are clearly not discouraged from drinking and driving by either tort or nontort deterrents.³⁰ Recognizing, then, that deterrence is not the lone focus of tort law—and certainly is not the primary focus in civil drunk driving laws—is an important first step towards reforming automobile insurance. The next step is to understand just how focused automobile insurance law has been on victim compensation.

Automobile tort cases are easily the most common type of personal injury cases,³¹ and some courts have been so solicitous of tort victims—and so intent on compensating them—that they have essentially voided certain exclusions in automobile insurance contracts.³² If a drunk driving exclusion were permitted, many tort victims would be either undercompensated or wholly uncompensated for their injuries since drivers typically have shallower pockets than do insurers. State legislatures have opposed this result: “[S]tatutes that actually require the purchase of auto liability insurance may reveal a legislative attempt to effectuate the principle of compensatory justice by preventing motorists from relying on their limited solvency in order to evade their compensation obligation.”³³ Reading Connecticut automobile insurance law in this light helps to make sense of the fact that intoxication exclusions are permitted in other types of insurance policies. For instance, in a recent case in which a teenage driver had injured only himself in a drunk driving accident, the Second Circuit interpreted Connecticut law to support an intoxication exclusion in a health insurance policy, thereby precluding the driver’s coverage.³⁴ The language of the court’s holding is particularly revealing:

We think it highly unlikely that Connecticut public policy seeks to encourage underage drinking and driving by making minors or their parents exempt from the consequences of their actions when so conducting themselves. As a consequence, we conclude that [the driver’s] conduct falls within [the policy’s] intoxication exclusion and thus the insurer need not provide coverage for the loss incurred.³⁵

As the court implies, Connecticut does have a public policy disapproving of drunk driving, and where—as in health insurance cases—there is no innocent tort victim to be made whole, that policy defeats insurance coverage.

successive drunk driving offense. Thus, the first time someone drives drunk, the potential civil liability may outweigh the potential criminal liability in the driver’s mind.

³⁰ See Sloan et al., *supra* note 3, at 51 (“[Generally] neither tort nor nontort deterrents affected the fraction of bingeing episodes after which the individual drove.”).

³¹ See *id.* at 49–50.

³² See, e.g., *Nationwide Mut. Ins. Co. v. Roberts*, 134 S.E.2d 654, 660 (N.C. 1964) (holding that injuries intentionally inflicted by an automobile driver were covered despite an “intentional injury” exception to the insurance policy).

³³ Schwartz, *supra* note 24, at 328–29.

³⁴ *Bishop v. Nat’l Health Ins. Co.*, 344 F.3d 305 (2d Cir. 2003).

³⁵ *Id.* at 311.

The key variable is the potential risk of injury to people other than the immediate parties to the insurance contract. Thus, the Second Circuit's willingness to entertain an intoxication exclusion in this context is not inconsistent with the general refusal of courts to countenance such exclusions in automobile insurance policies, since the compensatory role of automobile liability insurance distinguishes it from other types of insurance.

Admittedly, this logic is susceptible to criticism since mandatory insurance policies have relatively low coverage minimums, above which at-fault drivers are responsible for the remainder of victims' claims. Connecticut, for instance, requires a bodily injury liability minimum of \$20,000 per injured person, up to a total of \$40,000 per accident, and a property damage liability minimum of \$10,000 in coverage.³⁶ These minimums are far lower than liability can extend, meaning that while tort victims usually are compensated for light injuries, they can remain uncompensated for truly catastrophic injuries if the at-fault driver has the minimum insurance coverage and lacks sufficient assets above that floor. If the primary purpose of automobile liability insurance is the compensation of tort victims, this result is not only backwards, but almost perverse. However, even if the mandatory minimums are inadequate to *fully* compensate tort victims and may require revision, the compensatory justice explanation still rings true.

Taking stock, then, Connecticut—like other states—has two competing public policies in play. On the one hand, there is strong condemnation of drunk driving. On the other hand, there is great support for compensating blameless tort victims. To this point, these public policies have been effectuated largely through different arms of the legal system. Compensation has been accomplished through tort liability rules and insurance law, while the deterrence of drunk driving has been accomplished chiefly through criminal law. Because of this division, insurance policies have not contained intoxication exclusions, and forcing drunk drivers to internalize the costs of their behavior has been consigned to criminal law.³⁷ Drivers—in particular wealthy drivers who have purchased insurance in excess of the mandatory minimum coverage—have been able to use automobile insurance to avoid feeling the full effects of their civil liability, even while they have remained vulnerable to criminal penalties.³⁸

Ideally, though, this sharp divergence between criminal and civil law would not exist; there should be a measure of consistency between the two systems of law. Historically, there was significant overlap between tort and

³⁶ CONN. AGENCIES REGS. § 38a-372-1 (2010).

³⁷ See Sloan et al., *supra* note 3, at 50 (“The emphasis of public policy against reckless driving in general and drunk driving in particular has been on criminal rather than on civil sanctions.”).

³⁸ The distributive justice and socioeconomic implications of this trend are particularly disturbing in light of the continuing correlation between race and economic status in the United States. Developing this argument exceeds the limited scope of this Essay, but it is worth considering whether whites—who, due to greater levels of wealth, may be insured in higher percentages and for higher amounts of coverage—are able to immunize themselves from the full civil consequences of criminal behavior in ways that poorer minorities are not.

criminal law,³⁹ and today, a trend towards convergence is again discernible within the United States.⁴⁰ The point here is not that the two systems should merge—as some scholars have argued⁴¹—but merely that their messages, in the interest of legal holism, should be complementary and not inconsistent. Thus, the challenge is to reform automobile insurance law in order to reconcile the civil and criminal consequences of drunk driving.

II. TOWARD INSURANCE REFORM: REIMBURSEMENT OF DRUNK DRIVING CLAIMS

Automobile insurance reform must, therefore, realize two goals. First, it must protect tort victims' expectations of compensation. Second, it must force drunk drivers to shoulder the actual financial costs of their criminal behavior. One way of accomplishing these goals is by including in insurance policies a provision permitting insurers to seek reimbursement from drunk drivers for payments in satisfaction of victims' claims. This provision would be contained within the standard Insuring Agreement section of Part A—Liability Coverage, which covers damages owed to automobile tort victims. Crucially, the proposed provision is not an intoxication *exclusion*; victims remain compensable up to the coverage limits of the insured driver's policy. However, insurers would be able to seek restitution from drunk drivers in the amount paid out to victims, or in the amount of drivers' assets if less than the amount paid out to victims. A sample provision might read as follows:

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident caused by the use, operation, or driving of the covered auto while under the influence of alcohol. However, we reserve the right to seek reimbursement from the insured for any such payment of damages.

By way of illustration, consider the following scenario. Driver has \$10,000 in assets and automobile insurance coverage of \$40,000. Victim

³⁹ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 44 (1881) (“[T]he general principles of criminal and civil liability are the same . . .”); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996) (noting shared historical commonalities).

⁴⁰ See, e.g., Thomas H. Koenig, *Blending U.S. Criminal and Tort Law for Civil Punishment*, 3 ANNALS FAC. L. BELGRADE INT'L ED. 141, 141 (2008) (“Over the past quarter century the line between criminal and tort law in the U.S. has been collapsing across a broad front.”); Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1611 (2005) (noting “a reversion to a time when tort and crime were united”); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 948–54 (2001) (noting the convergence of administrative, criminal, and civil law).

⁴¹ See, e.g., Koenig, *supra* note 40, at 142 (arguing for the legitimacy of blended tort and criminal remedies).

has a claim against Driver for \$30,000. Under the current system, Insurer pays Victim \$30,000, and Driver is immunized from any payment. Victim is compensated fully, but Driver has not internalized the costs of driving drunk. Under the proposed system, Insurer still pays Victim \$30,000 but then may seek reimbursement from Driver up to that amount, although in this scenario, Driver only can reimburse Insurer for \$10,000 (the limit of Driver's assets). Again, Victim is compensated fully, but Driver has internalized at least part of the financial costs of driving drunk, and Insurer is partially reimbursed. The obvious loser here is the drunk driver, on whom increased compensatory responsibility now devolves. But this allocation of loss consistent with culpability is a marked improvement over the status quo in which the principle of risk sharing dictates that insurers pass along much of the cost of compensating drunk drivers' victims to other policyholders via raised premiums.

In addition, and in contrast to Part A—Liability Coverage, intoxication exclusions *could* be included within Part B—Medical Payments Coverage and Part D—Coverage for Damage to Your Auto without offending the public policy of victim compensation. Because those Parts pertain only to payments by the insurer to the insured party, no compensatory justice interest outweighs the public policy of forcing drivers to internalize the costs of their drunk driving. A sample exclusion in Part B—Medical Payments Coverage might read:

We do not provide Medical Payments Coverage for any insured for bodily injury sustained as a result of operating or driving the covered auto while under the influence of alcohol.

A sample exclusion in Part D—Coverage for Damage to Your Auto might read:

We will not pay for loss or damage to the covered auto sustained as a result of any person's operation or driving of the covered auto while under the influence of alcohol.

One predictable objection to this reform is that it will affect either drivers' decisions to purchase insurance or their decisions about how much coverage to buy. This view is mistaken. Drunk driving is hardly the only risk covered by automobile liability insurance, and drivers will continue to protect against other risks as before.

A second objection is that the ability to seek reimbursement from drunk drivers might limit insurance companies' incentives to litigate or settle victims' claims aggressively. But insurers would have no way of knowing the extent of drivers' assets upfront and, therefore, could not be guaranteed full reimbursement. They would retain an incentive to negotiate aggressively in order to limit their own exposure for any claims in excess of drivers' assets. Thus, insurers' interests should continue to align substantially with drivers' interests.

A third objection is that this reform essentially resurrects the disfavored illegal activity exclusion mentioned above.⁴² This objection, though, overlooks two key points and may be dispatched rather quickly. First, the proposed Part A provision decidedly is not an exclusion per se because victims will continue to be compensated for their losses. This fact should allay the concern expressed by some courts about intoxication exclusions in automobile insurance policies.⁴³ Second, the proposed Part A provision and Parts B and D exclusions are limited in scope to drunk driving and do not purport to cover the whole gamut of illegal activities involving automobiles. There is a difference in kind between drunk driving and running a stop sign or exceeding the speed limit.⁴⁴ In the United States, drunk driving is treated as a matter of abiding public concern and a source of moral opprobrium. As one scholar has argued, "A longstanding grassroots advertising and public education effort has transformed drinking and driving from a peccadillo into a serious wrong."⁴⁵ Clear social policies against drunk driving serve to distinguish it effectively from other illegal activities.

CONCLUSION

The present availability of automobile liability insurance precludes states from using tort law to strongly condemn drunk driving and runs counter to the accepted rule that private parties cannot contract around liability for criminal behavior. Essentially, it forces states to bifurcate the legal system into inconsistent criminal/deterrence and civil/compensation systems. Implementing the reform described above will help to address these concerns by narrowing the wide gap between the criminal and civil consequences of drunk driving. Victims will continue to receive compensation, but the ultimate source of that compensation will shift from insurers to at-fault drivers. Certainly, the proposed reform is not perfect; it has, for example, no practical effects if the drunk driver has zero assets with which to reimburse insurers, and it is not clear exactly how shifting ultimate compensatory responsibility away from institutional actors will affect the negotiation of victims' claims. However, for the most part, it does permit states to effectuate previously conflicting public policies through a more coherent legal system. Significantly, it enables the civil and criminal law systems to speak with one voice about the intolerability of drunk driving and to force

⁴² See *supra* text accompanying note 14.

⁴³ See, e.g., *Ryan v. Knoller*, 695 A.2d 990, 995 (R.I. 1997) (striking down intoxication exclusion clause in automobile rental insurance policy as contrary to public policy of compensating accident victims); *Donegal Mut. Ins. Co. v. Long*, 564 A.2d 937, 943-44 (Pa. Super. Ct. 1989) (same); *Allstate Ins. Co. v. Sullivan*, 643 S.W.2d 21, 22-23 (Mo. Ct. App. 1982) (same).

⁴⁴ See *Sloan et al.*, *supra* note 3, at 50 ("One of the most egregious forms of reckless driving behavior is driving under the influence of alcoholic beverages."). *But see Parker*, *supra* note 9, at 77-78 (grouping together as "traffic violations" illegal activities including drunk driving, speeding, and operating a vehicle with defective equipment).

⁴⁵ *Baker*, *supra* note 7, at 178.

drivers to internalize *all* the consequences of their actions. A reform that imposes the true costs of drunk driving on drunk drivers is worth considering.

