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UNCOMPENSATED TORTS

Rick Swedloff*

Victims of intentional torts suffer more than $460 billion of damages each year. Unlike those injured by negligence, however, those injured by intentional acts often have no practical remedy. They cannot recover from judgment proof defendants, and no other part of the compensatory system provides a significant remedy. Thus, victims of the most egregious torts go uncompensated. This failure to compensate magnifies certain inequities. Victims are likely to be hit twice by these bad acts: once by the victimization itself and once because they have few financial resources to aid them on their road to recovery.

This Article explores the possibility of filling the compensatory gap. It begins by mapping and considering the structural reasons for the compensatory gap. It then offers three possible solutions, including mandating liability insurance for intentional bad acts, enhancing existing compensation funds, and creating a market so that individuals can insure against noneconomic losses. Although the Article ultimately offers a sobering and perhaps pessimistic view of the possibility that any of these proposals will be enacted, it suggests that there are significant and important reasons for these redistributive programs. Creating remedies may express and confirm our shared societal values about the abhorrence of intentional torts and the importance of noneconomic damages. Forcing the government to invest in compensation may encourage it to devote additional resources to crime prevention. And, to the extent that the private insurers are part of the solution, those insurers may become additional, powerful lobbyists on behalf of crime reduction.

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*Assistant Professor of Law, Rutgers School of Law – Camden. I would like to express my profound thanks to Tom Baker, Jay Feinman, Kimberly Ferzan, David Hoffman, and Allan Stein for reading earlier and often multiple drafts of this paper. I would also like to thank Kristopher Berr, Kara Borski, Alexander Rubenstein, and Andrew Russell for their research assistance.

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INTRODUCTION 723
I. MAPPING THE COSTS.....727
II. THE FAILINGS OF THE COMPENSATORY SYSTEM.....734
A. The Illusory Promise of Tort.....735
1. Liability Insurance as an Element of Tort.....736
2. Intentional Torts and Liability Insurance 739
3. The Quest for Coverage 741
B. Gaps in the First Party Insurance Regime 744
C. Limitations of the Victims' Rights Movement.....749
1. Victim Restitution 750
2. Victim Compensation Funds 754
III. CREATING REMEDIES (AND THE REMEDIES NOT CREATED).....758
A. Liability Insurance for Intentional Torts 759
1. Outline of the Program.....759
(a) Adverse Selection, Null Selection, and Compulsory Insurance 761
(b) Controlling the Fear of Moral Hazard.....762
(c) The Moral Mistake.....766
2. Tort's Expressive Function 767
3) Political Reality.....768
B) Enhanced Compensation Funds 771
C) A Market for First Party Insurance.....774
1) Supplying Insurance for Noneconomic Injuries.....775
2) Creating Demand for Noneconomic Loss Insurance...777
3) Benefits and the Need for Subsidization 783
CONCLUSION 786

INTRODUCTION

Tort law serves to regulate antisocial conduct and to provide compensation for those who have been injured by others.[1] One might think that in light of these goals, the more egregious the conduct, the more necessary the regulatory function and the more deserving the compensation. Intentional torts like assault and battery would thus take primacy over negligence in the pantheon of tort, because the tortfeasor deliberately—rather than negligently—injured an innocent victim. But tort law on the ground fails most victims of intentional tort. It creates no deterrence and provides no compensation.

Imagine the following: Three brothers walk by your doorstep on a winter evening. The first gets struck by lightning. The second slips and falls on a patch of ice that you negligently failed to clear from your walk. The third you hit with a shovel. All three are seriously injured; perhaps each is paralyzed or suffers severe brain injuries. Each requires medical attention, loses wages and earning potential, and endures significant pain and suffering. To say that the brothers have each lost some enjoyment of life would be an understatement. These three brothers, however, are not similarly situated with respect to their potential remedies, because they have been injured in vastly different ways.

It is relatively easy to see that the first brother cannot obtain a remedy through tort. Tort requires fault. The first brother cannot sue you, because you have done nothing wrong. You did not cause the lightning strike. It is bad luck, a misfortune, an act of god. The brother cannot sue the universe. Who would stand in defense or pay the judgment? Likewise, if this brother was injured in a single car accident, he couldn't sue himself; and if he cut his left hand while

1. *See, e.g.*, John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003) (stating that from a practical standpoint, "the ad hoc legislation undertaken within tort cases is inherently capable of promoting only two goals: deterrence of antisocial conduct and compensation for those who have been injured."). As Goldberg notes, this functional account is the underpinning of the Restatement approach to tort law and the law applied in many courtrooms. *Id.* It has, of course, yielded theoretical ground. The two most visible opposition theories are brought from the perspective of law and economics and corrective justice. *See id.*; MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 14–16 (2010).

slicing bagels, his left hand could not sue his right. Someone else must be at fault to justify a remedy in tort. And the first brother's accident is certainly not your fault.[2]

But what may be surprising is that the third brother is also without a remedy in tort. While tort provides the appropriate causes of action—assault and battery—it is unlikely to provide a real mechanism for obtaining a remedy. Certainly the third brother could sue.[3] Assuming he could prove that you were unjustified in the attack, he would likely win. But how much could he recover? What assets do you have to satisfy the judgment? Like most people, you likely do not have sufficient assets to pay significant judgments. And the one asset usually available to fill this void—liability insurance, insurance that you purchase to cover your responsibility for harms you inflict on others—will not, and likely cannot, cover intentional acts.

Tort serves only the middle brother. The first brother has no cause of action, and thus no remedy. He simply hasn't suffered a tort. The third brother has a cause of action, but no remedy. He can't squeeze money from a judgment-proof tortfeasor after the fact. Assuming he can prove negligence, the second brother has both a cause of action and a likely source of recovery. This compensatory gap is at the core of this paper. Why doesn't tort provide a remedy for the third brother? Why aren't those who are harmed intentionally equally deserving of compensation as those harmed by negligence? Why aren't those who act intentionally subject to tort law's deterrent function? What can be done to fill this gap? And why hasn't some other part of our compensatory system stepped in to provide compensation to those who have been injured by the intentional acts of others?

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2. Admittedly, there are those who critique tort on a distributive basis and believe that there should be compensation for acts of God. *See, e.g.*, Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181, 186 (2006) ("[A]ny scheme of accident law must . . . assure . . . compensation for victims who suffer comparable losses to bodily integrity, regardless of the source of that loss."). That debate, however, is beyond the scope of this paper.

3. While he can sue, he may find it difficult to find a lawyer willing to bring the case. See *infra* Part II.A.1 for a complete discussion of this point.

The losses suffered by victims of intentional torts are significant. One way to think about the scope of these losses is to consider the civil cost of crime. Torts such as battery, assault, false imprisonment, and conversion stand at the boundary between criminal and civil law. These civil counterparts to criminal law provide causes of action for victims of physical violence, abuse, intimidating and threatening behavior, and theft. Thus, crime statistics can serve as a useful proxy for mapping intentional torts. According to an influential study commissioned by the Department of Justice, crime creates more than $460 billion in private and social costs each year.[4] Over three quarters of this amount, some $355 billion, is attributable to noneconomic losses like pain, suffering, and loss of enjoyment of life.[5] Rape victims who can't sleep at night, gunshot victims who are permanently handicapped, assault victims with chronic back pain, and burglary victims who feel unsafe in their homes have all suffered noneconomic damages.[6] In total, the losses attributable to crime are more than the gross domestic product of every state except California, Texas, New York, Florida, Illinois, Pennsylvania, New Jersey, and Ohio.[7] The losses are more than the GDP of every country except the largest thirty nation states, more than the GDP of Pakistan, Belgium, Nigeria, Sweden, or Hong Kong.[8] Were the noneconomic portion alone translated into gross domestic product,

4. *See* MARK A. COHEN, THE COSTS OF CRIME AND JUSTICE 46–47 (2005). Cohen's 2005 estimate is in 2003 dollars, and is based on 2002 victimization rates. It is an update of an earlier study by Ted R. Miller, Mark A. Cohen, and Brian Wiersema. *See* TED R. MILLER ET AL., U. S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1 (1996), *available at* https://www.ncjrs.gov/pdffiles/victcost.pdf.

5. COHEN, *supra* note 4, at 47. Cohen attributes approximately $105 billion of the cost of criminal victimization to "tangible" costs and the remainder—$355 billion—to "intangible losses such as pain, suffering, and lost quality of life." *Id.*

6. The ALI divides noneconomic tort into four broad categories: (1) tangible physiological pain at the time of the injury and during recuperation, (2) mental anguish and suffering felt both before and after a physical injury, (3) emotional distress and long-term loss of love and companionship from the injury or death of a close family member, and (4) loss of enjoyment of life by victim of a tort. *See* 2 AM. LAW INST., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 199–200 (1991).

7. *See* GEORGE K. DOWNEY & GERARD P. AMAN, U.S. DEP'T OF COMMERCE, BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE ESTIMATION METHODOLOGY (2006), *available at* http://www.bea.gov/regional/pdf/gsp/GDPState.pdf.

8. *See* Cent. Intelligence Agency, *Country Comparison: GDP (Purchasing Power Parity)*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Sept. 26, 2011).

the losses would be the fifteenth most prosperous state in this country and the thirty-fifth biggest economy in the world.

There are well-documented criticisms about tort law as a mechanism for compensation.[9] One could almost certainly design a more efficient and equitable system.[10] But even if tort is flawed as a mechanism of recovery, one could reasonably believe that losses of this scale would not be systematically ignored by the tort system. A compensatory gap of this magnitude presents a profound challenge to the purpose of tort. It suggests that tort law is neither serving the deterrence nor the compensation function.

The government may pick up some of the deterrence slack through criminal enforcement, but it has not created a significant mechanism for compensation, leaving millions without remedy. Nor has any other part of the compensatory system rushed in to fill this void. Again, given the size of the loss, one might think that insurance companies could (profitably) find a way to distribute the risk of these harms. Or, one might think that the government would step in to help compensate victims of crime. This simply hasn't happened. Individuals typically cannot purchase first party insurance to cover their own noneconomic losses.[11] And, while the government provides some compensation through criminal victim restitution and victim compensation funds, these programs are inadequate (as presently constructed) to provide complete remedies.

This Article considers the structural barriers to creating the remedies for these uncompensated torts. Other articles have noted that tort law fails to compensate victims of intentional torts.[12] This

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9. *See, e.g.*, Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307, 307 (2008) (collecting sources).

10. Economists express concerns about the amount of money provided through tort and the costs of the tort system. And from a corrective justice standpoint, there are concerns that tort neither provides similarly situated victims similar compensation nor provides those with more severe injuries more money. *See id.* at 309 (providing a brief overview of the literature).

11. This is true whether the injury is caused by an act of God, through someone else's negligence, or as a result of an intentional act.

12. *See, e.g.*, Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 66 (David M. Engle & Michael W. McCann eds., 2009); Hazel Glenn Beh, *Tort Liability For Intentional Acts of Family Members: Will Your Insurer Stand By You?*, 68 TENN. L. REV. 1 (2000); Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219 (1969); James M. Fischer, *The Exclusion From Insurance*

Article, however, considers not just the failure of tort, but also the failure of the entire compensatory system to create remedies for victims of intentional bad acts. It then considers three ways the government might subsidize insurance regimes to create compensation. The Article ultimately takes a somewhat pessimistic view of the possibility of creating a more complete compensation regime. Nonetheless, it includes a plea to take this gap seriously. Intentional torts magnify the inequities of society. Victims of intentional torts are disproportionately poor and young. These groups are likely hit twice by crime: once by the victimization itself and once because they have few financial resources to aid them on their road to recovery.

The Article proceeds as follows. Part I addresses the scope of the problem by looking at the kinds and amount of losses victims suffer each year. Part II draws on conventional economic theory and behavioral insights into litigation and insurance decisions to explain why the current compensation system, including tort and social and private insurance, fails victims. Part III concludes with a grim perspective on three possible solutions to creating compensation for these uncompensated torts. While each of the solutions proposed could provide real remedies or risk spreading opportunities for victims, there are significant barriers for each.

I. MAPPING THE COSTS

What if a crime victim could identify his criminal and haul him before the bar of civil justice? This isn't a particularly far-fetched hypothetical—most crimes, after all, are also intentional torts, compensable through civil law. Of course, as will be discussed below, this is only hypothetical, because victims cannot recover from (mostly) judgment proof criminals. But, assuming criminals could pay, how much could victims hope to recover?

Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy In Search of a Justification, 30 SANTA CLARA L. REV. 95 (1990); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001).

As with any negligence or strict liability tort, the victim could hope to recover obvious financial losses associated with the crime, including the losses from property theft or damage, lost wages and loss of earning potential, and the costs of medical care. These losses are typically thought of as a victim's economic losses.[13] Likewise, a victim could hope to recover his noneconomic losses—those losses that are difficult to count or itemize—like pain, suffering, or loss of enjoyment of life. In the context of criminal victimization, these noneconomic losses might also include avoidance behaviors such as moving to a new neighborhood, changing travel patterns, or refusing to walk outside at night.[14] Taken together, the economic and noneconomic losses represent the damages victims could hope to recover in tort.

Not all scholars, however, count all of these costs as costs of crime. For example, some scholars would not count losses from stolen property as economic losses, because society has not lost out on the value of the property.[15] The theft merely represents a transfer of wealth from victim to thief. To these scholars, a loss would only accrue if, for example, the property were destroyed during commission of a crime, because no one could take advantage of the value of the property.[16] This is likely counter-intuitive to most crime victims who acutely feel the injury from the theft and want compensation for the cost of replacing the stolen car regardless of whether someone else is enjoying the use of the car. Other scholars would not include noneconomic damages as a cost of crime, because they are intangible, difficult to calculate, and generally disfavored and mistrusted.[17] These concerns, however, do not make victims' pain or suffering disappear, minimize their fear and anxiety, or

13. *See* COHEN, *supra* note 4, at 9; MILLER ET AL., *supra* note 4, at 1.

14. COHEN, *supra* note 4, at 9.

15. *Id.* at 22–23.

16. *See id.* at 23. Cohen differentiates between "social costs"—those that "reduce the aggregate well-being of society"—and "external costs"—those that "are imposed by one person on another, where the latter person does not voluntarily accept this negative consequence." *Id.* Cohen claims that all external costs should be counted, regardless of whether economists would count the loss as a social cost. *Id.* at 25.

17. *See id.* at 23.

eradicate the loss of enjoyment of life felt by victims of crime. That said, this is not the time for a full debate about the propriety of these awards. At bottom, this paper takes account of the value of thefts and noneconomic damages, as well as economic damages because these categories of loss would be compensable through the civil system (were it truly available to victims of crime).[18] Just as plaintiffs could recover for medical bills or lost wages, so too could they sue for the value of stolen property and for their noneconomic damages. In fact, it is necessary to count these losses to make a crime victim whole.

Not all of the costs of crime are included, however. Just as there is an end to the zone of responsibility in tort, beyond which a tortfeasor is not responsible for the costs created (whether because the people harmed are outside the zone of danger or are unprotected bystanders), so too must there be an end to the accounting of the costs of crime in this Article. Consistent with the civil remedy perspective above, the Article limits costs at the boundary of potential tort recovery for the victims of the crime. Other social costs are not included.[19]

This Article relies heavily on a highly influential study commissioned by the Department of Justice in 1996 to determine these costs.[20] That study by Ted Miller, Mark Cohen, and Brian Wiersema—and updated in 2005 by Cohen—is the most comprehensive analysis of the civil costs of crime to date and is

18. There are other good reasons for counting these intangible costs and the lost property. For example, society has an interest in preventing these involuntary transfers (thefts) and the pain, suffering, and lost enjoyment of life. Thus, if a given policy is subject to a cost-benefit analysis, these costs must be considered. *See id.* at 24.

19. Of course, many people suffer as a result of criminal activity. Friends and family of the victim can suffer from loss of the victim's companionship and services (e.g., housework, bill paying) or be directly traumatized if they witness the victimization. *See* COHEN, *supra* note 4, at 75. Even those who do not know the victim suffer both directly and indirectly from criminal activity. For example, increased crime may induce additional expenditures in the criminal justice system through increases in manpower for police or prosecution and increased costs for courts and prisons. These costs are borne generally through additional tax payments or through opportunity costs from the taxes already paid. Further, even if a victim has most of his medical costs covered through insurance, society pays through increased premiums. Additionally, like victims, other members of society can suffer indirect avoidance costs because of a fear of crime, and whole neighborhoods might suffer indirect economic costs if consumers choose to stay away from local restaurants or stores because of a fear of crime. *See id*. at 9–13, 26. The article does not include estimates of increased costs to the criminal justice system, increased insurance payments, or avoidance behaviors by individuals (other than the victim) or society generally.

20. MILLER ET AL., *supra* note 4.

especially useful given the methodologies used to calculate crime.[21] According to these sources, victims of crime suffer a total of $460 billion worth of damages each year.[22] Of that, less than a quarter is attributable to tangible, economic losses; the remainder is attributable to noneconomic losses.[23] What follows is a more in depth breakdown of this $460 billion number. I first look at the amount of injury caused per victimization by type of crime. This gives a sense of the amount of injury caused by each case of murder, rape, child abuse,

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21. *Id.*; COHEN, *supra* note 4. This study aggregates a number of different methodologies to calculate the costs of crime. For fatal injuries, the researchers based their estimates on conventional willingness to pay estimates. *See* MILLER ET AL., *supra* note 4, at 14. The researchers "assessed the market for safety by examining the increased demand for smoke detectors as prices dropped, the demand for safer cars, and the differential in worker pay due to different levels of risk exposure." *Id.* Although there is some debate about the propriety of these methods for estimating the value of a statistical life for fatal injuries and the value of noneconomic damages for nonfatal injuries, these are reasonably conventional methodologies and are quite useful to the project here. Statistical life values are commonly used in policy discussions and in civil trials. And, if anything, the estimates used by these researchers are conservative. For example, they used an estimate of $2.7 million for a 38-year-old male. COHEN, *supra* note 4, at 60. "[M]ore recent estimates place the statistical value of a life for the average worker in the U.S. between $3 and $9 million." *Id.* (citing Kip Viscusi, *The Value of life in Legal Contexts: Survey and Critique*, 2 AM. L. & ECON. REV. 195 (2000)).

For nonfatal injuries, the researchers took a more directly applicable approach for this Article. They used settlements and jury awards from the relatively small universe of cases victims who were able to sue a third party for derivative liability to estimate the noneconomic portion of nonfatal injuries. *See* MILLER ET AL., *supra* note 4, at 15. Recognizing that:

> Since cases brought to trial are not necessarily representative of crime cases, the researchers [did] not apply the pain and suffering estimates directly. Instead, they estimated the functional relationship between the out-of-pocket costs of crime . . . ; [demographic] characteristics of the victim . . . ; severity of injury; and the jury's award for pain and suffering.

Id. The researchers then took this "functional relationship," and applied it to actual distribution of crime victims. *Id.*

Lest one think that these third party suits are the key to the compensation gap, consider that the Department of Justice estimated that in 2008, after years of declining crime rates, United States residents still experienced 4.1 million assaults and over 200,000 rapes or sexual assaults. *See* MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., CRIMINAL VICTIMIZATION, 2008, at 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf. In total, the Department of Justice estimated that United States residents experienced 4.9 million violent crimes (including rape, sexual assault, robbery, and both aggravated and simple assault) and 16.3 million property crimes (including personal theft, household burglary, theft, and motor vehicle theft). *Id.* After surveying the entire United States, the researchers only got data from jury awards and settlements in 1,106 assault survivor cases, 361 rape survivor cases, and 606 burn survivor cases. *See* MILLER ET AL., *supra* note 4, at 15. These numbers are quite small compared to the estimated total number of victimizations. *See also infra* notes 58–70 and accompanying text for a discussion of derivative liability for intentional torts.

22. COHEN, *supra* note 4, at 46.

23. *See* COHEN, *supra* note 4, at 44; MILLER ET AL., *supra* note 4, at 9 tbl.2. These estimates, as well as the ones that follow, are in 1993 dollars and are based on the 1996 study by Miller, Cohen, and Wiersema.

robbery, and other crimes. (Figures 1 and 2). I then show some estimates for the aggregate amount of loss by each category of crime (Figure 3). This graph shows that given the number of victimizations each year, certain categories of crime are more costly (e.g., nonfatal rape and sexual assault) than others (e.g., arson deaths).

On a per victimization level, fatal crimes create the most significant losses. This, of course, should not be surprising. Miller, Cohen, and Wiersema estimate that on average, each fatal crime creates between $2.7 and $3.2 million of losses.[24] Over two-thirds of those losses (nearly $2 million per fatal injury) is attributable to noneconomic damages.[25] Nonfatal crimes have somewhat lesser impact per victimization. For example, the researchers estimate that each victim of child abuse suffers $60,000 of damages.[26] If the child abuse includes sexual abuse, each child suffers close to $100,000 of harm.[27] Each adult victim of rape or sexual assault suffers approximately $87,000 of damages.[28] And each victim of arson suffers approximately $38,000 of damages.[29] It is easy to see that noneconomic damages vastly outweigh the economic losses for most categories of fatal and nonfatal crime. Figures 1 and 2 summarize this information.

24. COHEN, *supra* note 4, at 42–43 tbl.3.1 (citing MILLER ET AL., *supra* note 4).

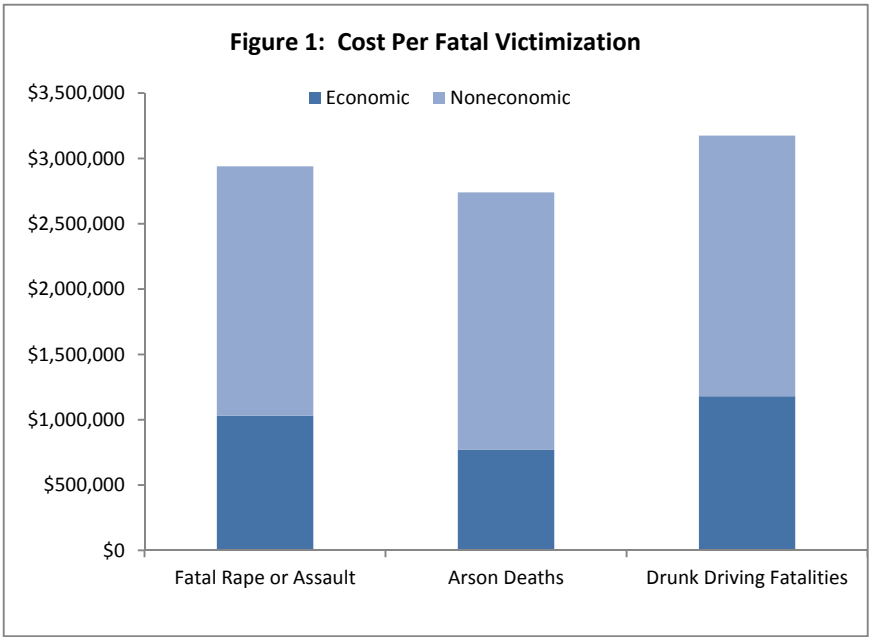
25. It is, of course, quite strange to consider the pain and suffering of someone who is dead. Instead it is easier to think of these awards as an insured's willingness to pay to avoid the risk of death. *See* COHEN, *supra* note 4, at 36.

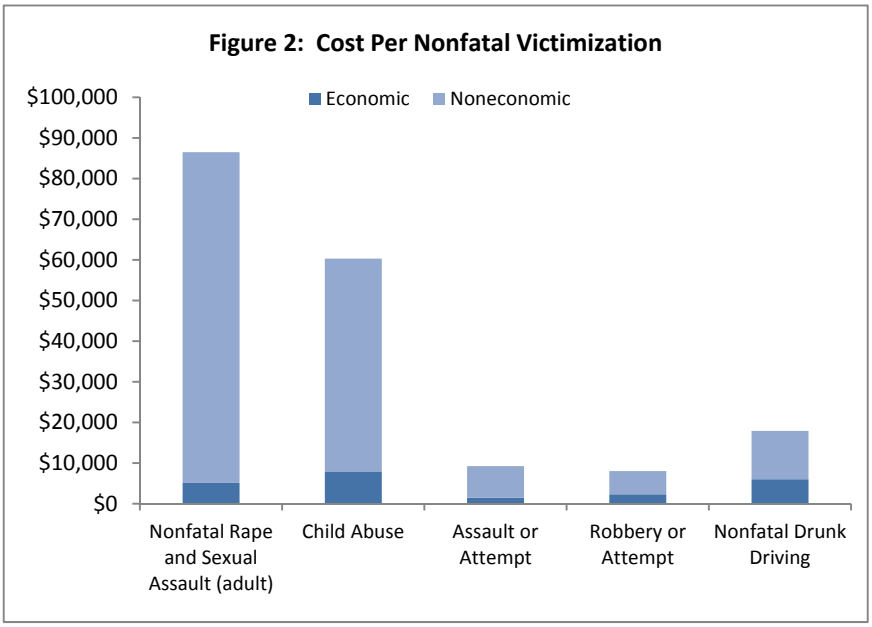
26. *Id.* at 42–43 tbl.3.1.

27. *Id.*

28. *Id.*

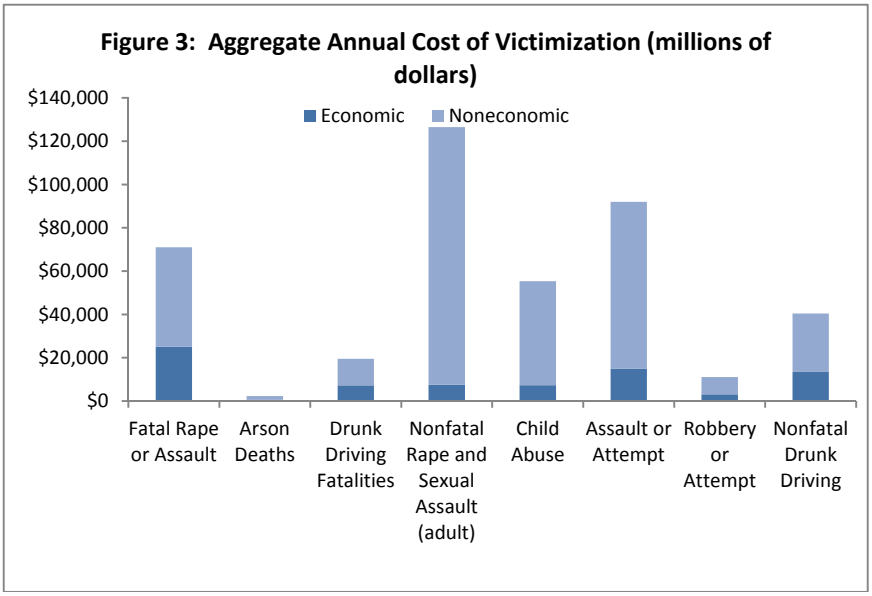
29. *Id.*





On a per category basis, the graphs look a bit different. This information is useful if one were to think about targeting

governmental responses to eliminating categories of crime. For example, each year more people are victimized by rape and sexual assault than are killed through arson. Thus, rape and sexual assault have a greater impact on society than arson. Each year, rape and sexual assault create losses of approximately $127 billion ($119 billion of which are noneconomic losses); fatal crimes and other assaults each create approximately $93 billion of harm ($60 and $77 billion of noneconomic harm respectively); followed by child abuse at $56 billion ($48 billion of noneconomic losses) and drunk driving at $41 billion ($27 billion of noneconomic losses).[30] Figure 3 shows the breakdown of those costs:



In sum, victims of crime suffer significant damages. Were these damages monetized in tort lawsuits, they would total approximately $460 billion and provide compensation for over 21 million victimizations each year.[31] The tort system, however, cannot provide

30. *See* COHEN, *supra* note 4, at 45–46 tbl.3.3; MILLER ET AL., *supra* note 4, at 17 tbl.5.

31. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., CRIMINAL VICTIMIZATION, 2008, at 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf. This survey is "an annual data collection conducted by the U.S. Census Bureau for the Bureau of Justice

remedies for most of those injured by crime, because most criminals do not have assets sufficient to cover even small tort judgments. I return to this problem in Section II.

II. THE FAILINGS OF THE COMPENSATORY SYSTEM

In the last part I discussed the cost of the injuries suffered by the victims of intentional tort each year. In this part, I discuss why the compensatory system[32]—including tort, public insurance (like Medicaid and Medicare), and private insurance—fails to create the compensation needed. While the compensatory system may help those injured by negligence or product liability, it often fails to cover those injured by someone else's intentional acts.

This section explores the three primary ways U.S. residents could obtain compensation for, and distribute the risk of harm from, intentional torts: tort lawsuits; first party insurance—insurance an individual (the first party) purchases from the insurer (the second party) to cover his own losses; and government sponsored compensation programs for victims of crime—victim compensation funds and victim restitution. With some changes, each of these sources could provide compensation for victims of intentional torts, but at present none of these sources alone or in combination provides real, complete remedies.

Statistics." *Id.* at 7. The NCVS is a national survey that asks questions about the number of victimizations in a year of a representative, random sample of persons age 12 or older in the United States. *Id.* Significantly, these estimates exclude two important categories of crime: crimes against children under 12 and fatal crimes. Nonetheless, because the survey includes data about both reported and unreported crimes, it is often seen as the most reliable information available about criminal victimization.

32. The term "compensatory system" is borrowed from Ellen Pryor and is meant to include a number of potentially overlapping regimes that often provide some means of recovery to those who have been injured. Ellen S. Pryor, *Part of the Whole, Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307, 309 (2008). As Pryor notes, "[t]he injuries that give rise to tort cases usually implicate not just tort law but other strands of our society's compensatory fabric—Medicare and Medicaid, Social Security disability, workers' compensation, private medical insurance, and private disability insurance." *Id.*

A. The Illusory Promise of Tort

No one expects that tort can create compensation for all injuries. Of course, many losses simply lie where they fall. But tort is a significant part of the compensation system[33] and is supposed to provide remedies where one person causes significant injuries to another. Given the amount of damages caused by intentional acts both on the individual and aggregate level, one would think that tort would be responsive to these acts. But there are a number of reasons why tort law fails victims of intentional torts. First, and not surprisingly, many criminal offenders are never identified or apprehended; and thus cannot be brought before a criminal (let alone a civil) court.[34] But even if intentional tortfeasors are identified, caught, and brought before the civil bar, the tort system would likely still fail the victims.

This failure can be explained by one thing: liability insurance. Liability insurance (or third party insurance) is insurance that you purchase to cover your responsibility for harms you inflict on others. Although liability insurance can cover negligent acts, it will not, and likely cannot, cover intentional (that is, criminal) acts. This part first discusses why liability insurance matters in tort suits; then discusses why liability insurers will not, and cannot, cover intentional acts; it concludes with a discussion of the ways the tort system has tried to adapt to the lack of insurance coverage, and yet likely still fails most victims of crime.

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33. *See* Kenneth S. Abraham, *Twenty-First Century Insurance and Loss Distribution in Tort Law*, *in* EXPLORING TORT LAW 81, 90–91 (M. Stuart Madden ed., 2005) (estimating (a) that the compensation system costs approximately $1.7 trillion annually and that approximately 10% ($175 billion) of those costs are the result of the tort system; and (b) that the compensation system provides benefits (rather than costs) in the amount of $1.1 trillion annually, of which about $80 billion or 7% is paid to tort victims); Pryor, *supra* note 32, at 311–12 (estimating that on an annual basis tort pays out $80 billion, workers compensation pays $55.3 billion, Social Security Disability pays $85.4 billion, Medicare pays $48.8 billion, Medicaid pays $66.7 billion, and other social insurance programs pay somewhere close to $3 billion annually).

34. *See infra* note 112 and accompanying text.

1. Liability Insurance as an Element of Tort

Even if criminals are identified and caught, there is a simple reason that few victims ever proceed in civil court. Most criminals are too poor to satisfy tort judgments.[35] But this explanation is over-inclusive. After all, few tortfeasors (whether negligent or intentional actors) have sufficient, available assets to satisfy a significant tort judgment.[36] For example, a combination of state and federal law protects over 75% of income from garnishment.[37] Likewise, state laws and the high transaction costs associated with attaching and selling real and personal property often shield from attack a judgment debtor's home equity, automobiles, and interest bearing accounts.[38] To the extent that the defendant has any personal wealth, she may protect it through trusts and other investment vehicles.[39] Thus, most tortfeasors are effectively judgment proof; but there are still suits against individuals sounding in negligence. The difference between a

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35. *See infra* note 100.

36. *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) ("[M]any Americans are 'judgment proof': They lack the sufficient assets (or sufficient collectible assets) to pay a judgment in full (or even in substantial part).").

37. Federal law protects a significant portion of any judgment debtor's wages from garnishment. *See* Gilles, *supra* note 36, at 625. Under the Consumer Credit Protection Act, garnishment may not exceed the lesser of 25% of an individual's disposable weekly income or earnings in excess of thirty times the federal minimum hourly wage. *See id.* (citing 15 U.S.C. § 1673(a) (2000)). Some states impose a higher minimum threshold for garnishment, effectively shielding more of an individual's income from attachment. *See id.* at 626. At a minimum, federal law Social Security, disability, and health insurance transfers may not be used to satisfy most judgments, including tort judgments. *See id.* at 624 (citing 42 U.S.C. § 407(a) (2000) ("[N]one of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.")). In addition, "many states exempt state welfare payments, unemployment compensation, disability benefits, and workers' compensation from collection." *Id.* at 624. As Gilles appropriately notes, "the effect of these federal and state provisions is that garnishment offers the successful tort claimant only a stream of relatively small payments in most instances." *Id.* at 626. This small stream is unlikely to entice most lawyers to garnish wages.

38. All states have some form of protection for personal property. *See* Richard M. Hynes, et al., *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19, 23–24 (2004). Additionally, as Gilles details, there are significant barriers to collecting on nonexempt home equity and other personal property, including the inefficiencies of foreclosure, the relatively small amount of equity in homes, the ability of homeowners to protect themselves by further reducing their equity post suit via home equity loans, and the high transaction costs of writs of execution on personal property. *See* Gilles, *supra* note 36, at 632–34.

39. Even to the extent that the wrongdoer is relatively wealthy and has significant income and wealth beyond the protections detailed above, the wealthy can protect significant assets in trusts. Gilles, *supra* note 36, at 635–41.

suit for negligence and one for intentional tort is access to liability insurance. Negligent acts are covered by liability insurance; intentional acts are not.

Liability insurance is typically the easiest and most available asset to satisfy a judgment. Access to insurance proceeds impacts the value of the underlying claim, and ultimately the ability to bring the claim. According to the standard economic account of litigation behavior, potential plaintiffs decide whether to bring suit based on the expected valuation of a claim.[40] Plaintiffs bring suit when they expect to win (financially or otherwise) more than it will cost to bring suit.[41] Likewise, contingency attorneys, who often represent plaintiffs in personal injury suits, must decide whether to take a claim based on subjective valuations of whether a claim will be profitable. Profitability of a claim depends on both the expected monetary value of the claim and what it will cost to obtain that claim. A claim that is likely to go to trial is only profitable if the expected value of the claim is high; whereas claims that are likely to settle quickly may be profitable even with a low expected value. Liability insurance affects both the expected value of the claim and the amount it will cost to obtain the recovery.

In theory, lawyers and parties value the claim in the shadow of the law.[42] That is, participants in litigation are supposed to predict what

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40. The standard account, sometimes called the Landes-Posner-Gould model, was developed in the early 1970's. *See* John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

41. In addition to financial compensation, a plaintiff could sue for any number of noneconomic reasons—to exact punishment, to feel vindicated, to give voice to her injuries, to obtain injunctive relief, or to otherwise enforce property rules. Plaintiffs cannot reasonably be expected to predict all of the benefits and costs of litigation, especially the nonmonetary components of litigation. *See generally* Rick Swedloff, *Accounting for Happiness in Civil Settlements*, 108 COLUM. L. REV. SIDEBAR 39 (2008), http://www.columbialawreview.org/assets/sidebar/volume/108/39_Swedloff.pdf. Nor can they be expected to predict properly the probability of winning or losing a lawsuit at the outset of suit. Nonetheless, this model provides a helpful way to think about decision-making in the litigation process and highlights that it is not free to process a tort claim.

42. *See generally* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). As Mnookin and Kornhauser noted in the context of divorce:

> Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain

they will win at trial to determine what their claims are worth. But lawyers on the ground can't limit themselves to the expected value of a trial judgment. They have to think about the expected value that they can collect after obtaining a judgment. As one tort lawyer succinctly reported: "I was taught on my first day of practice there are three things: liability, damages, collectability. I need collectability first. I need damages second. I'm a good lawyer, I'll prove liability."[43] In other words, the law's shadow is irrelevant to settlement negotiations and decisions to litigate if a defendant has no assets.

This is where liability insurance comes into play. Liability insurance, to the extent it covers the tortious act, reduces the risk of an empty judgment. It provides cash, certainty and a reduced time horizon for payment.[44] Lawyers and plaintiffs alike are unlikely to want to wait for their fees to be paid through garnishment, wade into the murky waters of collection actions, or risk time and money on uncertain rewards.[45] Garnishment and collection lower the probability of recovery and the delays decrease the value of the recovery, because plaintiffs and attorneys have to wait for disbursements.[46]

> claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.

Id.

43. Tom Baker, *The View of an American Insurance Law Scholar: Six Ways That Liability Insurance Shapes Tort Law*, 12 CONN. INS. L.J. 1, 4 (2005).

44. *See id.* at 4–5 ("Given the extent of consumer debt, the availability of bankruptcy to discharge civil liabilities, and the existence of limited but important exceptions to the assets that must be liquidated in a bankruptcy proceeding, the practical reality of tort litigation in the United States is that liability insurance is the only asset that plaintiffs can count on collecting.").

45. A judgment is not self-executing. It is little more than a declaration that a plaintiff is entitled to payment. If a defendant refuses to pay, the plaintiff must take significant additional steps to recover on his judgment. This can be risky, time-consuming, and costly (in terms of cash outlays and opportunity cost). *See* Gilles, *supra* note 36, at 617 (citing MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY 30 (2000)).

46. Access to liability insurance may have another role to play in reducing costs involved in a claim. Insurance companies are repeat players in settlement negotiations, and they have incentives—beyond those of normal litigants—to settle claims quickly and without trial. *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1542–45 (2010). For many claims, insurers may want to settle quickly, because of reputational and public relations interests, express and implied contractual duties, and common law duties to settle. *Id.* Additionally, insurance companies are likely to prefer claims to settle quickly and predictably so that they can create fiscal predictability. *But see* JAY

Despite this, Tom Baker has found that in cases of intentional conduct, drunk driving, or where serious injury or death is at issue, lawyers are often tempted to seek noninsurance assets from tortfeasors.[47] They call these assets "blood money." It is "real money" from "real people"—"money paid directly to plaintiffs by defendants out of their own pockets."[48] And yet, despite the fact that attorneys may seek blood money in these cases, they rarely collect anything but insurance proceeds (assuming they can characterize the conduct in such a way as to fall within the policy limits).[49]

In sum, liability insurance is often the biggest asset a putative tortfeasor owns and/or the easiest to collect post judgment. When tortfeasors lack such insurance or the insurance will not cover the tortious act, the predicted profitability and expected value of a suit go down. This makes it difficult, if not impossible, for lawyers and victims to bring suit and seek financial (or other) remedies through litigation.

2. *Intentional Torts and Liability Insurance*

As discussed above, liability insurance appears to be a necessary precondition to tort suits. But liability insurance will not or cannot cover intentional acts. First, most liability insurers explicitly write intentional acts out of coverage by (a) limiting the definition of covered acts to those that are "neither expected nor intended from the standpoint of the insured"[50] and (b) specifically excluding injuries or losses "expected or intended from the standpoint of the insured."[51]

Second, even if insurers wanted to cover damages flowing from the intentional acts of their insureds, public policy may preclude

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FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010) (arguing that insurers employ a number of techniques to avoid settling or paying, including lengthening the litigation process and otherwise making it more expensive to bring claims).

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

48. *See id.* at 276, 298–301.

49. *Id.* at 300–01. See also *infra* Parts II.A.2–3 for a more complete discussion of these issues.

50. *See* Fischer, *supra* note 12, at 105.

51. ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 63A, at 384 (2d ed. 1996).

coverage. As noted by one leading treatise, "[i]t is a fundamental requirement in insurance law that the insurer will not pay for a loss unless the loss is 'fortuitous,' meaning that the loss must be accidental in some sense."[52] Courts may hold that liability insurance cannot cover the intentional acts of an insured, because human volition takes these acts out of the realm of fortuity and accident. In other words, courts may imply an exclusion in insurance policies for acts that are not fortuitous or accidental from the standpoint of the insured.[53]

Given the long-standing policy of insurers to write intentionality out of coverage explicitly, there is little current law on whether courts would bar coverage as part of an implicit, public policy ban.[54] That is, courts have not had to consider a question of whether public policy would allow coverage for intentional bad acts, because insurers exclude those acts explicitly from coverage. Nonetheless, courts have expressed serious concerns that allowing coverage for intentional bad acts will encourage wrongdoing, undermine the punitive aspects of tort, and transgress the moral norms against allowing bad actors to indemnify their misdeeds. As an Illinois appellate court wrote:

> An agreement to indemnify against intentional misconduct would, as a general rule, be contrary to public policy and unenforceable . . . . Violent criminals should not be permitted to profit from their own intentional misconduct. Furthermore, exclusions for intentional acts are necessary to help insurers set

52. *Id.* § 63, at 382.

53. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 5.3(f), at 493 (1988) ("Losses which are intentionally caused by an insured generally are not covered by liability insurance, and this rule applies even when there is no clause in the applicable insurance policy that expressly excludes coverage for injuries intentionally inflicted . . . ."); 451 1 ROBERT H. JERRY, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.05(2(a)) (Francis J. Mootz, III ed.); JERRY, *supra* note 51, § 63, at 382–83 ("The public policy underlying the fortuity requirement is so strong that if the insurance policy itself does not expressly require that the loss be accidental courts will imply such a requirement.").

54. KEETON & WIDISS, *supra* note 53, § 5.3(f), at 493 n.1 ("There is a relative dearth of direct authority for an implied exception of this nature, in part because of the fact that liability policies almost uniformly include express [exclusions for intentional acts].").

> rates and supply coverage. If a single insured is allowed through intentional acts to consciously control risks covered by the policy, the central concept of insurance is violated.[55]

The Supreme Court of Oregon stated the punishment rationale more starkly: "[P]unishment rather than deterrence is the real basis upon which coverage should be excluded. A person should suffer the financial consequences flowing from his intentional conduct and should not be reimbursed for his loss, even though he bargains for it in the form of a contract of insurance."[56]

In short, courts and policy makers express fears about adverse selection, moral hazard, and the moral implication of liability insurance. These are a similar set of fears that are often attributed to insurers. As I will discuss in Section III below, these fears may be overstated in most contexts. Thus, both the explicit and implicit bans on coverage are somewhat unfounded. For now, though, it is enough to understand that the bans exist as both a matter of contract and, in many jurisdictions, common law.

3. *The Quest for Coverage*

Victims, courts, and policy-makers have, in some instances, attempted to work around the fact that individual defendants have no collectable assets and lack liability insurance for intentional wrongdoing. They have generally employed three strategies to create coverage: underlitigating, expanding the scope of derivative or vicarious liability, and twisting the meaning of "intent" in insurance contracts. While the number of suits employing such strategies is likely very small compared to the total number of intentional torts,[57] the proliferation and prevalence of these strategies highlight the fact that insurance is the key to liability. That is, rather than suggesting

55. Lincoln Logan Mut. Ins. Co. v. Fornshell, 722 N.E.2d 239, 242 (Ill. App. Ct. 1999) (citations omitted).

56. Isenhart v. Gen. Cas. Co., 377 P.2d 26, 28 (Or. 1962).

57. *See generally supra* note 21.

the legal system is adapting to the remedial gap, these workarounds suggest the opposite—the system is deeply flawed.

To get around the fact that liability insurance will not cover intentionally caused harms, plaintiffs may "underlitigate" their claim. They "plead and prove negligence rather than or in addition to intentional tort" as a means of avoiding intentional tort exclusions in liability insurance policies.[58] Think back to the hypothetical in the introduction. Rather than claim that you intentionally swung the shovel that hit him in the head, the third brother could plead that you negligently swung the shovel; swung the shovel purposefully, but without the requisite intent to cause harm; or lacked the mental capacity to form intent.[59] Each of these alternative counts could, if proven, be covered by a liability insurance policy. But the pleader need not win on the lesser claim to be successful. The goal of underpleading is to involve the insurer in the dispute. Simply by pleading counts that are plausibly covered by the insurance policy, the plaintiff triggers the insurers' duty to defend and creates incentives to settle.[60] Even in cases of questionable coverage, triggering the duty to defend can help plaintiffs access insurance funds in three ways: (1) insurers may want to settle for nuisance value (anything under the insurer's anticipated cost of defense or out of a concern that a failure to settle might create bad faith liability); "(2) the carrier might wrongfully refuse to defend and be 'estopped' from contesting coverage; and (3) the insurer might defend but fail to adequately reserve its rights to contest coverage, thus finding itself estopped from later contesting coverage."[61]

Plaintiffs, courts, and policy-makers have created another way to avoid the ban on liability insurance; they have increased the scope of

58. Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997). According to Pryor, plaintiffs use underlitigation strategies throughout a lawsuit: in the pleadings, in presentation of proof, in instructions submitted to jury, in settlement agreements, and in arguments and proof presented in a suit between the insurer and the insured over coverage. *Id.* at 1729.

59. *Id.* at 1721–22 (providing examples of underlitigated claims).

60. *See id.* at 1729. The duty to defend arises when "the plaintiff's pleadings make allegations that, if true, would create liability that is covered by the policy." *Id.* at 1730. When the duty arises, the insurer must provide the insured with litigation insurance. *Id.*

61. *Id.* at 1736.

derivative and vicarious liability. For example, many states have enacted parental liability statutes, such that "parents are responsible for the torts of their children without qualification as to the nature of the tort or limitation on the amount of damages."[62] Courts have likewise expanded the scope of common law doctrines to create liability for the negligent supervision of children and for liability of a spouse's misconduct.[63] As to the latter, courts are increasingly willing "to characterize a wife's indifference to her husband's criminal tendencies as an affirmative act, particularly when involving claims of child sexual molestation."[64] Courts are likewise increasingly willing "to sustain negligence claims against spouses on failure to warn grounds for acts of pedophilia by their mates."[65] This goes along with premises liability—in which family members could be liable for acts in their home, or bar owners for acts in their bar.[66] In each of these cases, the individual insured is liable for the intentional tort of another. In these situations courts typically allow coverage because the harm is "is appropriately viewed as a fortuitous occurrence from the point of view of the insured, as well as the victim."[67]

The last strategy relates to the construction of insurance contracts. When confronted with the fact that a plaintiff will have no compensation, courts have stretched the meaning of intent to create coverage where the plain language of a policy might suggest otherwise.[68] Specifically, courts have narrowly construed the meaning of what is "expected or intended" from the standpoint of the insured. "As a general rule, courts do not allow insurers to avoid coverage where the insured's conduct, though intentional, was not intended to cause injury."[69] Additionally, some courts allow coverage when the insured intended some injury, but not the specific injury

62. Beh, *supra* note 12, at 4.
63. *Id.* at 4–19.
64. *Id.* at 15.
65. *Id.* at 15–16.
66. *Id.*
67. KEETON & WIDDIS, *supra* note 53, § 5.4(d)(5), at 527–28.
68. *See* Fischer, *supra* note 12, at 96, 127.
69. *Id.* at 96.

that ultimately occurs.[70] For example, even if you intentionally swung the shovel, the third brother may argue that you did not intend to cause injury or cause the specific injury that occurred. This phenomenon fits hand-in-glove with the underpleading strategy described above.

It is difficult to know how often these strategies are successfully employed to create insurance coverage and thus compensation. Likewise, it is difficult to know how often plaintiffs cannot utilize one of these strategies and thus receive no compensation from an otherwise judgment-proof defendant.[71] However, it seems relatively clear that these strategies are not covering all victims of intentional torts, nor could they. The need to resort to these workarounds suggests that insurance coverage is important and unavailable in a number of situations; tort is failing to compensate some victims of intentional torts; and that plaintiffs, courts, and policy-makers are warping tort doctrine and the meaning of insurance contracts in an attempt to create compensation for innocent victims of intentional torts.

B. Gaps in the First Party Insurance Regime

Another significant part of the compensatory fabric is first party insurance, insurance an individual purchases to protect against his own explicit losses. First party insurance is supposed to protect communal welfare by protecting against catastrophic losses and can fill in where the tort system cannot provide remedies.[72] For instance, one can obtain first party insurance to protect against events that are no one else's fault, like fires, floods, or medical emergencies. By purchasing first party insurance, individuals give up some portion of their income in exchange for financial security. The insured spreads

70. *See id.* at 133–34.

71. *See generally* Pryor, *supra* note 58, at 1723 (stating that "empirical answer[s]" are not available to describe the "operation of the tort liability system"); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

72. *See generally* Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26, 26 (1941) (summarizing the state of the law regarding intentional torts and insurance).

the risk of harm ex ante and obtains compensation ex post in the event of significant losses.

But this too is a hollow story for victims of intentional torts. First, most people do not purchase sufficient first party life insurance,[73] health insurance,[74] or other first party insurance in high-risk, low-probability situations.[75] Further, even if individuals demanded sufficient first party insurance to adequately compensate losses from intentional torts, they could not spread the risk of the largest category of losses: noneconomic losses. While first party private or public health insurance may cover some losses related to injuries, unemployment, disability, and property damage (like stolen automobiles or homes burned by arson, among others), the coverage is limited to the economic losses—the value of the services provided and the property lost. That is, first party insurance generally only covers monetary or fair market losses such as the fair market value of medical services, damaged or stolen property, or lost wages. Although there is no legal obstacle to doing so—unlike the implicit ban on providing liability insurance for intentional acts—insurers will likely not provide coverage for noneconomic losses, such as pain and suffering.[76] Insurers are said to assert two reasons that they will not sell insurance for noneconomic injuries: adverse selection and moral hazard.

At this point, I lay out the conventional wisdom with respect to adverse selection and moral hazard. In Part III.C., I will revisit these claims and provide responses.

Adverse selection refers to the "[theoretical] tendency for high-risk people to be more interested in insurance than low-risk people."[77]

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73. *See* Kyle D. Logue, *The Current Life Insurance Crisis: How the Law Should Respond*, 32 CUMB. L. REV. 1, 3 (2001).

74. *See* Tom Baker & Peter Siegelman, *Tontines for the Invincibles: Enticing Low Risks into the Health-Insurance Pool with an Idea from Insurance History and Behavioral Economics*, 2010 WIS. L. REV. 79, 81 (showing that young people are likely to opt out of health insurance).

75. *See infra* notes 204–06 and accompanying text.

76. This can also present problems in the property context, especially when the destroyed or stolen property holds value to the owner beyond market value. For example, a wedding ring, family heirloom, or personal computer may all hold value to the insured beyond the market value of the property. An insurance company, however, will not insure that extra value.

77. TOM BAKER, INSURANCE LAW AND POLICY 6 (2d ed. 2008).

This is caused, in part, because insurers cannot distinguish between, and thus set different premium rates for, good risks and bad risks. This makes insurance more enticing for bad risks. Consider the simple example offered by Howard Kunreuther and Mark Pauly: suppose in a fire insurance context that some homes have a low probability of suffering damage, say 1 in 10, and some homes have a high probability of suffering damage, say 3 in 10.[78] Suppose further that the loss would be $100 for each group. If there are an equal number in both risk classes, the actuarially fair premium is $20. For the high-risk group, this is a bargain, because their expected loss is $30 ($100 * .3). The low risks, however, only have an expected loss of $10 ($100 * .1),

> so they would have to be extremely risk averse to be interested in paying [$]20 for coverage. If only the poor risks purchase coverage, the insurer will suffer an expected loss of - [$]10, (i.e. [$]20 - [$]30), on every policy it sells, due to an inability to distinguish good from bad risks.[79]

As the example highlights, adverse selection is really a problem of information asymmetry: the insured presumably knows more about his own riskiness than the insurer.[80] Under this account, "[w]hen an insurer [cannot] distinguish among potential insureds, a disproportionately high percentage of applications for insurance will usually come from the less desirable applicants because they get a better bargain."[81] Economists typically predict that adverse selection will lead to dire consequences for insurers and insureds alike. Good risks will exit the insurance market because the product is too

78. Howard Kunreuther & Mark Pauly, *Insurance Decision-Making and Market Behavior*, 1 FOUND. & TRENDS MICROECONOMICS 76, 100 (2005).

79. *Id.*; *see also* Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629 (1976) (developing this theory more formally).

80. *See generally* George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty, and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (summarizing economic models where "'trust' is important"); Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004) (arguing that the problem of adverse selection is overstated).

81. KEETON & WIDDIS, *supra* note 53, § 1.3(c), at 14.

expensive, leaving only the bad risks behind.[82] This creates a "death spiral," where the "average quality of those insureds remaining falls and prices rise in a vicious circle . . . ."[83]

The conventional wisdom posits that there is just this kind of information asymmetry and adverse selection problem in the market for first party insurance for noneconomic injuries. The problem is simply illustrated. The pain one individual feels from a broken leg may be vastly different from another. Some amputees will feel phantom pain—pain from the missing limb—for long periods, while others will feel none. Given that injuries are individuated, insurance companies are said to believe that they do not have the data they need to set individual rates. While insurers could likely determine the probability that an individual will suffer noneconomic damages over the lifetime of the insurance policy and also determine the average size of an award for any given injury, they could not verify whether any individual actually feels a given injury and cannot distinguish between those likely to suffer more or less when selling the insurance. That data is squarely locked inside the brains of the insureds.

In theory, if the insurer charges an actuarially fair premium—that is, a premium that accurately reflects the probability of an injury in the period the premium covers and the average amount of damage suffered—that takes into account both those who suffer more and those who suffer less, only those who suffer more will purchase insurance. Those who suffer less would not be interested in paying premiums to recover significantly less than their expected harm.[84] As with all adverse selection problems, insurers may fear that this will cause insurance rates to spiral upwards, pushing better and better risks out of the market.[85]

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82. *See* Siegelman, *supra* note 80, at 1224.

83. *Id.*

84. *See* Kunreuther & Pauly, *supra* note 78, at 100.

85. *See supra* notes 82–83 and accompanying text. This same fear is not present in the third party insurance context because insurers anticipate that their insureds will be no more likely to injure someone who suffers significantly than someone who suffers only minimally.

The moral hazard problem is likewise reasonably clear. Moral hazard, broadly speaking, is the concern that, "if people are insured against a particular harm, they will be less likely to avoid that harm, may even suffer it purposely, and may exaggerate their losses once they suffer it."[86] The first two are examples of ex ante moral hazard: "the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance."[87] The last is an example of ex post moral hazard: "the increase in claims against the insurance policy beyond the services the claimant would purchase if not insured."[88]

Insurers fear ex post moral hazard—that their insureds will claim more damages than their actual loss because they have insurance. In fact, insurers may assume that once injured, their insureds will claim the maximum they can claim for noneconomic losses, no matter what their actual injuries are. Consider it from the perspective of an insurer and think of how an insurance contract for first party noneconomic insurance would work. First, an insurer would have to determine which events would trigger coverage. If the intent is to cover as many injuries as possible, the triggering event cannot be limited to physical injuries, for certainly victims of harassment, assault, or defamation face potentially significant injuries. Yet there must be some limit. Insurers should not have to compensate for the mental anguish that an insured feels over an argument with a friend or a negative employment evaluation. But even after the insurer adequately limits the triggering event, the insurance company still may find it difficult to assess damages. Once the insured can demonstrate that the trigger has taken place, the insurance company has to assume that the insured will claim up to the policy limits for each event. Unlike a claim for property loss or property damage, where an adjuster can inspect the damage or verify receipts, an insurance company has no

86. Wriggins, *supra* note 12, at 161.

87. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1547 (1987).

88. *Id.*

real way of knowing whether the insured's claims to noneconomic damages are legitimate.[89]

In sum, first party insurance serves an important function in the compensatory system. It allows individuals to invest current dollars to protect against future catastrophic loss. First party insurance, however, will only cover economic losses. This means that in the context of intentional torts, potential victims can purchase insurance to cover medical bills arising from injury, unemployment or disability insurance to cover lost wages, or property insurance to cover stolen goods. Unfortunately, first party insurance has two significant limitations. First, many people are underinsured—they don't have sufficient insurance to cover all of the economic losses associated with crime. Moreover, no matter how much coverage an individual has, insurance won't cover the largest portion of losses associated with crime, noneconomic losses. In the context of intentional torts, this leaves some $355 billion uncovered each year. For example, each of the 200,000 annual victims of rape will suffer over $80,000 of noneconomic damages. Each of the 4.1 million victims of assault will suffer close to $8,000 of noneconomic damage.[90] And so on. Conventional wisdom posits that first party insurance cannot cover these losses. There is, however, no legal barrier to doing so and as I will show in Section III, the commonly asserted economic and moral reasons are likely overstated or easily worked around.

C. Limitations of the Victims' Rights Movement

In the 1970s, an alliance of feminist scholars and groups advocating that the government take a tougher stance on crime joined together in what came to be seen as the victims' rights movement.[91] This movement proposed a number of reforms to the criminal justice system to make the system "more sensitive to victims' needs and

89. This is likely also a fear in the third party liability insurance context, where insurers assume that some injured parties will overclaim because the tortfeasors have adequate insurance to cover the losses.

90. *See* COHEN, *supra* note 5, at 42–47; RAND, *supra* note 21, at 1.

91. Edna Erez & Julian Roberts, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 277, 279 (Robert C. Davis et al. eds., 3d ed. 2007).

concerns."[92] One of the primary planks of this movement was a notion that the government ought to take an active role in creating remedies for victims of crimes.[93] The movement argued that the government had to step in because civil remedies were inadequate *and* the state had a duty to protect its citizens based on the sociological belief that society was responsible for crime.[94] Without a doubt, the victims' rights movement has had significant successes, including getting wide acceptance for victim restitution programs and victim compensation funds. But these outgrowths of the movement are deeply flawed as a means of providing financial remedies.

1. Victim Restitution

Under a victim restitution program, a judge may order a convicted criminal to compensate his victims for the losses resulting from the commission of a crime.[95] Because these orders are part of sentencing, the government—not the victim or a private attorney—must establish the amount of the loss and collect the penalties.[96] This provides a significant advantage over the civil system because the victim can

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92. *Id.*

93. *Id.* There were also nonfinancial goals of the victims' rights movement. For instance, these groups also have advocated to give a significant voice to the victims and to create greater victim satisfaction with the criminal justice system. Those goals are not necessarily undermined by a failure to create financial remedies.

94. *See generally* Arthur J. Goldberg, *Preface* to Symposium, *Governmental Compensation to Victims of Violence*, 43 S. CAL. L. REV. 1 (1970); LeRoy L. Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446 (1972) [hereinafter Lamborn, *Propriety*]; LeRoy L. Lamborn, *Remedies for the Victims of Crime*, 43. S. CAL. L. REV. 22 (1970) [hereinafter Lamborn, *Remedies*]. *But see* ROGER E. MEINERS, VICTIM COMPENSATION 1–5 (1978) (rebutting those arguments).

95. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 27 (2001), *available at* http://www.gao.gov/new.items/d01664.pdf. *See also, e.g.*, 18 U.S.C. § 3663 (2006).

96. There are some concerns about the constitutionality of restitution requirements. For example, some have argued that a retroactive application of a mandatory restitution statute violates the Ex Post Facto Clause, while others argue that it violates the Sixth Amendment right to a jury trial. *See* Irene J. Chase, Comment, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463 (2001); Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005); Melanie D. Wilson, *In* Booker*'s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379 (2006). These arguments are beyond the scope of this Article. The focus here is on the efficacy, not the constitutionality, of restitution.

avoid the costs associated with obtaining a judgment and pursuing collection actions. Despite this advantage, victim restitution still cannot provide real financial remedies to innocent victims. There are four significant drawbacks to victim restitution programs.[97]

First, victim restitution statutes typically only target the economic portion of loss. Most restitution statutes allow restitution for medical expenses, lost wages, counseling expenses, funeral expenses, lost or damaged property, or other direct out-of-pocket losses.[98] In some states, courts have taken an expansive view of these categories. For example, some states have ordered that restitution cover travel expenses as a part of the costs of a funeral or reasonable attorneys fees to close the victim's estate.[99] These are, however, still limited remedies. States do not allow restitution to cover noneconomic losses like pain, suffering, or loss of enjoyment of life.

Second, and more importantly, even if restitution covered all losses, having a restitution order does not guarantee that a victim will actually be able to collect any money. Most criminal defendants have few collectable assets.[100] Consider the experience of the federal government. Congress passed the first federal restitution statute in 1982 as one of several legislative responses to the victims' rights movement.[101] That statute explicitly authorized courts to impose

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97. Nearly every state and the federal government have some form of a victim restitution program. *See* Office for Victims of Crime, U.S. Dep't of Justice, *Ordering Restitution to the Crime Victim*, LEGAL SERIES BULL., no. 6, Nov. 2002, at 1, https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin6/ncj189189.pdf.

98. *See id.* at 2. *See generally* 18 U.S.C. § 3663(b) (laying out appropriate categories for restitution).

99. *See* Office for Victims of Crime, U.S. Dep't of Justice, *supra* note 97, at 3.

100. Most incoming inmates have limited earning capacities even prior to being arrested. In 2002, 29% of incoming inmates reported being unemployed at the time of their arrest. *See* DORIS J. JAMES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., PROFILE OF JAIL INMATES, 2002, at 9 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf. Additionally, even including those who were previously employed, 59.1% of incoming inmates made less than $1,000 in the month before their arrest. *See id.* Out of that 59.1%, 76% made less than $600 in the month before they were arrested. *See id.* Moreover, the average inmate's earning capacity drops 10–20% upon release. *See* THOMAS MACLELLAN, NAT'L GOVERNOR'S ASS'N, NGA CTR. FOR BEST PRACTICES, THE CHALLENGES AND IMPACTS OF PRISONER REENTRY 2 (2004), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/REENTRYBACKGROUND.pdf.

101. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1255 (codified as amended at 18 U.S.C. § 3664 (2006)); *see also* Matthew Dickman, Comment, *Should Crime Pay? A Critical Assessment of the Mandatory Victim Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009).

restitution as a part of sentencing, but placed significant limitations on the court's discretion to make such an order.[102] In particular, courts had to consider "the financial resources of the defendant, [and] the financial needs and earning ability of the defendant and the defendant's dependents."[103] Fourteen years later, disappointed with the compensation provided by the 1982 statute, Congress took the discretion out of the hands of the judges.[104] Under the 1996 Mandatory Victims Restitution Act (MVRA), Congress required the courts to order restitution for any crime of violence, drug crime, or consumer product tampering regardless of the offender's ability to pay.[105] But this broad expansion of restitution orders has done little to create new compensation for victims. Instead, all that has increased is the size of the uncollected debt. In the years since the passage of the MVRA, annual unpaid criminal debt has increased every year.[106] In fiscal year 2009, courts ordered $7.5 billion of restitution to victims of crime, of which only $380 million was collected.[107] This is a yield of only 5%.

This is not surprising. As detailed by the General Accounting Office (GAO), most of this debt is simply uncollectable because it "involves criminals who may be incarcerated or deported or who have minimal earning capacity" and because "state laws . . . may limit the type of property that can be seized and the amount of wages that can be garnished."[108] Even when defendants should have money available to pay restitution, as with financial fraud, offenders often find ways to effectively shield assets.[109] This, of course, mirrors the

102. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1248.

103. Dickman, *supra* note 101, at 1688 (quoting Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. at 1255).

104. *Id.* at 1691.

105. *See* 18 U.S.C. § 3663A(c) (2006).

106. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 8 (2004), *available at* http://www.gao.gov/new.items/d04338.pdf.

107. EXEC. OFFICE FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2009, at 92 tbl.8b (2009), *available at* http://www.justice.gov/usao/reading_room/reports/asr2009/09statrpt.pdf.

108. U.S. GEN. ACCOUNTING OFFICE, *supra* note 95, at 10; *see also supra* notes 36–45 and accompanying text.

109. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED

reasons that plaintiffs' attorneys won't proceed in tort against a defendant without liability insurance or other collectable assets. Here, there is an additional problem. After the offender has completed supervised release or probation, courts have no real power to enforce the restitution order.[110]

Third, although the federal government requires victim restitution, many state and local courts do not require restitution. For example, in 2004, in the seventy-five largest jurisdictions, courts ordered restitution in only 14% of murder cases, 16% of rape and sexual assault cases, 15% of aggravated assault cases, and 24% of burglary cases.[111] But these figures still overestimate the number of offenders made to pay, because fourth, most offenders will never face a restitution order. The police do not catch most offenders, and those who are apprehended often settle with plea bargains that do not include restitution.[112]

In short, victim restitution provides one significant advantage over tort: the government, rather than the victim, obtains the judgment and attempts to collect. The government can do this without concern as to whether the offender has funds to satisfy a judgment (a luxury private victims and attorneys likely cannot afford). Further, because the government can seek restitution as a part of the criminal proceeding, it avoids the costs of a separate civil proceeding. This could save the victim the time and expense of establishing liability and trying to collect damages (tasks private attorneys would likely be unwilling to do). But this does not change the underlying reality. Many offenders are never caught or ordered to pay restitution. Those who are ordered to pay are only required to pay economic damages and are unlikely to be able to do even that. Defendants with no assets or shielded assets cannot, or will not, compensate victims with real losses. Thus, victim restitution does not, and likely cannot, provide an adequate remedy to victims of crime.

RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 11 (2005), *available at* http://www.gao.gov/new.items/d0580.pdf.

110. *Id.* at 11–12.

111. ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 346 (7th ed. 2010)

112. *Id.* at 344.

2. *Victim Compensation Funds*

Victims of crimes have another way to obtain financial relief: victim compensation funds.[113] Victims can generally apply to these funds for compensation for some losses that result directly from criminal victimization. These funds offer one significant improvement over either tort or victim restitution. To even entertain the thought of obtaining a remedy through tort or restitution, the tortfeasor has to be identified, caught, and found liable (or guilty). Victim compensation funds, however, have no such requirement. Despite this substantial advantage over both tort and restitution, victim compensation funds likewise come up short.

Victim compensation funds are underutilized and underfunded. In 2002, compensation programs paid a total of only $454 million to a total of 157,700 claimants. These are paltry numbers compared to the estimated $460 billion price tag for crime and 23 million victimizations.[114] This represents less than 0.7% of victimizations and less than 0.001% of the estimated annual costs of crime.

In large part, this gap can be explained by the limitations governments place on most victim compensation funds. Like victim restitution, almost no state or territory covers expense for noneconomic losses.[115] Most funds will only cover economic costs

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113. In 1964 New Zealand created the first comprehensive governmental compensation system in the common law world. *See* Lamborn, *Propriety*, *supra* note 94, at 449. In this country, like victim restitution, these funds came in vogue in the 1970s and 1980s as part of the victims' rights movement. By 1978 nearly one-third of the states had adopted and many other states and the federal government were considering similar victim compensation legislation. *See* Nancy Plunket Johnson & James Walker Johnson, Comments, *Compensation for Victims of Violent Crimes*, 26 U. KAN. L. REV. 227, 227 (1978). Today every state in the nation and the federal government offer some compensation benefits to victims of crime. *See generally Frequently Asked Questions: Benefits*, NAT'L ASSOC. OF CRIME VICTIM COMP. BDS., http://www.nacvcb.org/index.asp?bid=16 (last visited Oct. 4, 2011).

114. *See* SUSAN HERMAN & MICHELLE WAUL, NAT'L CTR. FOR VICTIMS OF CRIME, REPAIRING THE HARM: A NEW VISION FOR CRIME VICTIM COMPENSATION IN AMERICA 24, 33 n.20 (2004), *available at* http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=38573 (citing FED. BUREAU OF INVESTIGATIONS, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 2002 UNIFORM CRIME REPORTS (2003), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2002/toc02.pdf).

115. *See Frequently Asked Questions: Benefits*, *supra* note 113. Hawaii, Tennessee, and the Virgin Islands all allow some compensation for some form of noneconomic loss. *Id.* In these jurisdictions, awards range from $550 to $5,000. Hawaii explicitly describes its awards as "symbolic" and not intended to truly compensate the loss. HERMAN & WAUL, *supra* note 114, at 22. In Tennessee, payments for noneconomic losses are restricted to victims of sexual assault. *Id.*

such as medical or dental expenses, lost wages or loss of support, mental health counseling, and funeral and burial costs.[116] Indeed, over 40% of the expenses paid by compensation funds were for medical or dental expenses; 25% were for lost wages or loss of support; and 15% went to the cost of mental health services.[117] Even with these payments, victim compensation funds still come up pretty small. Most compensation funds cap the size of awards, such that the average maximum is between $25,000 and $35,000.[118] "Few victims, however, receive awards close to the maximum. The average award per claim in 2002 was $2,900."[119] This likely fails to cover even the economic portion of the loss. More importantly, these awards fail to cover over three quarters of the estimated harm—the noneconomic losses. The fact that victim compensation funds will pay for mental health or counseling services is, of course, a step toward alleviating some of the noneconomic damages incurred. But less than $68 million is spent on mental health aid, a laughably small sum compared to the $355 billion of noneconomic losses.[120]

Moreover, it may be that victim compensation funds are underutilized because crime victims don't know that they are entitled to make claims. According to the Urban Institute, 56% of compensation administrators claim that eligible victims do not apply for funds because they are not aware of their rights.[121] More research in this area would be helpful to see if increasing victims' awareness of the funds would yield additional claims by additional victims.

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116. *See OVC Fact Sheet: Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIMES, http://www.ojp.usdoj.gov/ovc/publications/factshts/cvf2010/intro.html (last visited Oct. 4, 2011). While there is significant variation on the types of expenses compensated from state to state, these are the most commonly covered expenses. *See Frequently Asked Questions: Benefits*, *supra* note 113.

117. HERMAN & WAUL, *supra* note 114, at 22 fig.5.

118. There are both overall caps and caps for each sub-award. There is some variation in the maximum award, but the average maximum is $25,000. *Frequently Asked Questions: Benefits*, *supra* note 113; *see also* HERMAN & WAUL, *supra* note 114, at 24.

119. HERMAN & WAUL, *supra* note 114, at 24.

120. *See supra* note 5 and accompanying text; *see also* HERMAN & WAUL, *supra* note 114, at 22 fig.5, 23–24. Herman and Waul posit that approximately 15% of victim compensation awards go toward mental health aid, which amounts to $68 million out of a total of $454 million victim compensation claims paid nationwide.

121. *See id.* at 29.

Lastly, some of this underutilization has to do with preconditions for compensation. To qualify for compensation, typically a victim must report the crime to the police (usually within 72 hours of the crime), file a timely claim with the compensation program (usually ranging from one to two years after the crime), cooperate with the police and prosecutors, sustain costs or losses not covered by other collateral sources (such as private insurance, public insurance, or restitution), and not be implicated in the crime.[122] Many of these preconditions are both important and obvious. For instance, it may make sense to precondition compensation on cooperation with the police.[123] Nonetheless, the reporting requirement affects whether these funds are available to victims of crime, because many victims don't report the crimes to the police.[124]

Even if compensation funds received more applicants and wanted to provide additional compensation for noneconomic injuries and above statutory caps, it is not clear that they could so. State compensation funds are funded by both state and federal sources. All of the federal funding and most of the state funding is generated from offender fines and other penalties levied against offenders.[125]

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122. *See id.* at 20–21; *Frequently Asked Questions: Benefits*, *supra* note 113.

123. Early proponents of these programs believed that the requirement that victims report the crime would reduce the incidence of crime. *See, e.g.*, Goldberg, *supra* note 94, at 2 ("By requiring victims to report crimes promptly as a prerequisite to compensation, such a program could help law enforcement authorities apprehend criminals. This requirement could reduce the crime rate in many ways: first, prompt apprehension would remove from society criminals who would otherwise remain at large to commit further crimes; second, the very prospect of more effective law enforcement would deter the would-be violators from committing criminal acts.").

124. The Department of Justice's Bureau of Justice Statistics estimates that in 2002 only half of the violent victimizations (2.7 million out of 5.4 million) and 40% of nonviolent victimizations (7.1 million out of 17.5 million) were reported to police. HERMAN & WAUL, *supra* note 114, at 26 tbl.4 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002 STATISTICAL TABLES tbls.1, 91, 75, 78, 77, 83 & 87 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus02.pdf). For a more significant discussion of the survey methods used by the Department of Justice to make these estimates, see RAND, *supra* note 31.

125. The Crime Victims Fund was established in October 1984 as a part of the Victims of Crime Act, 42 U.S.C. §10601 (2006). Deposits for the Crime Victims Fund come from "federal criminal fines (with some exceptions); the proceeds of forfeited appearance bonds, bail bonds, and collateral; special forfeitures of the collateral profits of crime proceeds retained in a an escrow account for more than 5 years; and newly created penalty assessments on federal misdemeanor and felony convictions." STEVE DERENE, NAT'L ASS'N OF VOCA ASSISTANCE ADM'RS, CRIME VICTIMS FUND REPORT: PAST PRESENT AND FUTURE 2 (Mar. 2005), *available at* http://www.navaa.org/CVFReport/CrimeVictimsReport.pdf. States are somewhat more diverse in their funding sources, but the majority of state funding also comes

It is not clear that alone or together these federal and state sources could come close to reaching the $460 billion price tag. Federal funding presently provides 40% of the benefits paid from state victim compensation funds, while states provide the remaining 60%.[126] At no time have the federal Crime Victims Fund and the matching state programs come close to the approximately $460 billion worth of injury or even the $355 billion of noneconomic injury caused by crime. The amount of money deposited annually into the Crime Victims Fund has fluctuated wildly since 1993. In the past ten years, the deposits have hit a high of $1.746 billion in fiscal year 2009 and a low of $361 million in fiscal year 2004.[127] But even if the Crime Victim Funds paid out all of its deposits from 2009 with the states providing the full 60% match (an additional $2.91 billion), crime victim funds would only have $4.66 billion to distribute.[128] While this is a significant amount of money, it is still only 1% of the estimated harm of crime annually.

Without significantly more funding, there is no way to close the compensation gap. It is not clear that fines and penalties alone can provide enough funding to provide significant remedies. To provide

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from fines and penalties levied against offenders. "Three-quarters of states fund their programs solely with fines and penalties levied against offenders. Six states rely on a combination of tax dollars and offender fines, while only seven states depend entirely on general revenue for the state portion of funding." HERMAN & WAUL, *supra* note 114, at 23.

126. DERENE, *supra* note 125, at 12. "For example, if a state spends $1 million in state funds to compensate crime victims for their losses, it will receive a federal grant of $600,000 to supplement its efforts." HERMAN & WAUL, *supra* note 114, at 23.

127. *OVC Fact Sheet: Crime Victims Fund*, *supra* note 116; *see also* HERMAN & WAUL, *supra* note 114, at 23. These significant fluctuations are related to a relatively few cases in which the government imposed large fines (over $100 million) and those fines were entirely or substantially paid off. *See* DERENE, *supra* note 125, at 3. In an eight-year period from 1996 to 2004, $5.2 billion was deposited in the Crime Victims Fund. Payments from only twelve defendants made up 45% ($2.3 billion) of those deposits. *Id.* at 3–4. Five of those twelve defendants stemmed from just two federal investigations. In an effort to curb the fluctuations and create a stable source of support for state programs, Congress instituted an annual cap on funds available for distribution. *See id.* The 2010 fiscal year cap is $705 million. *About OVC: Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIMES, http://www.ojp.usdoj.gov/ovc/about/victimsfund.html (last visited Feb. 8, 2012).

128. By statute, the Crime Victims Fund must also provide grants, *inter alia*, under the Children's Justice Act to improve investigation and prosecution of child abuse in American Indian and Alaska Native communities; to U.S. Attorneys' offices to fund "victim-witness coordinators;" to fund FBI victim-witness specialists; to fund the Federal Victim Notification System; and discretionary grants. *See generally OVC Fact Sheet: Crime Victims Fund*, *supra* note 116. Thus, as presently constructed it could not pay out all of its deposits.

additional funding, federal and state governments would likely have to create a dedicated payroll tax (as the federal government does with social security) or tap general revenues. It is not clear that governments will be willing to do so. I return to these questions in Part III.B.

III. CREATING REMEDIES (AND THE REMEDIES NOT CREATED)

As discussed above, intentional torts impose significant private costs. Tort fails to compensate victims for those losses in all but a few cases (where the tortfeasor is very wealthy or where the victim can under-plead her claim to trigger insurance coverage). While victims may have some insurance to cover some tangible, out-of-pocket costs, this first party insurance is likely inadequate to meet all of an insureds' needs. Thus, victims are likely paying out-of-pocket for at least some portion of their economic injuries. More importantly, some $355 billion of noneconomic losses cannot be compensated through first party insurance or otherwise.

In this section I discuss the opportunities for, and barriers to, using insurance as a means of closing the remedial gap. I make three proposals. The first is a plan to create liability insurance for intentional acts. The second is to enhance victim compensation funds to close the compensation gap. The third is to create a market for first party insurance for noneconomic damages. Each of these ideas could create compensation for otherwise uncompensated torts, but each requires government support and shared sacrifice to work. This section first describes the features of the proposals and then evaluates the barriers. Ultimately, I am somewhat pessimistic about any of these proposals gaining sufficient political support to be enacted. Nonetheless, I suggest that legislatures should take this compensatory gap seriously for three basic reasons. First, the current system leaves millions who would otherwise be compensated without remedy.[129]

129. There may be distributive reasons to create remedies for victims of misfortune, as well as mischief, but this is not the paper to distinguish between mischief and misfortune. *See generally* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune (Annual McGill Lecture in Jurisprudence and Public Policy)*, 41 MCGILL L.J. 91 (1995). My focus is on closing the remedial gap for intentional torts.

This undermines important expressive functions of tort law. Second, crime prevention is a core governmental function. It may be the case that some of these proposals will force the government to internalize the costs created by a failure to prevent crime. Third, to the extent these proposals include a private insurance element, these firms may be a powerful crime-prevention lobby.

A. Liability Insurance for Intentional Torts

1. Outline of the Program

The first idea is to create remedies through liability insurance for intentional torts. In short, states (or the federal government) would require that everyone purchase liability insurance against intentional torts. Liability insurance could either serve as a source of compensation or serve to justify the investment in civil litigation.

This proposal parallels an earlier proposal by Jennifer Wriggins to protect victims of domestic violence, and would require a number of features to create a viable insurance pool without undermining the deterrence and corrective justice functions of tort.[130] First, as a means of combating adverse or null selection, the federal government or the states would require everyone to purchase insurance to cover liability for his or her own intentional malfeasance.[131] Second, insurers must be allowed to recover (in subrogation) from policyholders the amounts insurers paid out under the plans.[132] Third, all policyholders must purchase a required minimum amount of "uninsured assailant" insurance.[133] This "uninsured assailant" coverage would function like

130. *See* Wriggins, *supra* note 12 (proposing a "Domestic Violence Torts Insurance Plan").

131. Wriggins likewise proposed a mandatory component to spread the risk of adverse selection. Under Wriggins's plan, regulators had to compel auto insurance plans—which are mandatory in most states—to include a "required minimum amount of coverage for domestic violence torts, so that if a policyholder is sued for such a tort, the automobile policy would cover the claim to the minimum." *Id.* at 152. Wriggins hypothesized that reaching all drivers would include a sufficient number of insureds to create a manageable risk pool. *Id.* at 151. It is not clear that auto insurance is pervasive enough—especially in urban areas—to cover criminal actors to create sufficient remedies.

132. *Id.*

133. Tortfeasors could actively avoid coverage, deciding the insurance is too expensive, the risk of sanction for not purchasing the insurance is too low, or the sanction itself is too low. It could also be that some individuals are not required to purchase the insurance because of hardship or because they are

uninsured auto insurance, and allow a victim to make claims against his or her own policy when the defendant did not have liability insurance.[134] Fourth, insurers would have to exclude from coverage victims who are also implicated in the crime. That is, those who are jointly engaged in violence should not be able to recover under their insurance policy. Lastly, and importantly, there would have to be reasonably tight regulation of pricing to ensure consumer access. While insurance companies typically set premiums based on the probability that the insured will suffer or create a loss and the expected magnitude of that loss, such an approach is likely to make private insurance unaffordable for assailants and victims.[135] If the poor are more likely to commit crime, then the insurer would have to charge them more for insurance.[136] Further, if the poor are more likely to be victims of crime, then the insurer may also have to charge more for the uninsured/underinsured component of the product. This might mean that the insurance itself becomes prohibitively expensive.[137]

Each of these requirements is meant to deal with the primary objections to creating liability insurance for intentional torts: adverse

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foreign citizens, among other reasons.

134. Wriggins, *supra* note 12, at 153–54. As in the auto insurance context, the uninsured/underinsured insurance would function as a hybrid of both first and third party insurance. It is like first party insurance in that the "insurance benefits are paid by the insurance company to the persons who are identified as insureds in the policy terms." KEETON & WIDISS, *supra* note 53, § 4.9(e)(1), at 399. But, like third party insurance, it "is fault-based," and the insureds only receive coverage "when they are legally entitled to recover damages from an uninsured [perpetrator]." *Id.*

135. Of course, insurers also take into account administrative costs and an acceptable profit. *See* Kunreuther & Pauly, *supra* note 78, at 71–72. For now, however, it is easier to simply consider the probability and magnitude of loss as the key determinants in setting premiums.

136. The more likely the insured is to suffer or create a loss, the greater the risk, and the higher the premium. *See* KEETON & WIDISS, *supra* note 53, §1.3(a)(1), at 8 n.1 ("A prediction concerning potential loss, partly reasoned from things known and partly predicated on guesswork, is generally understood as the 'risk' that is the basis of the computation of a premium that an insured pays to the insurer to acquire insurance."). Typically, insurance companies attempt to price policies individually by classifying risks according to relevant categories. For example, an insurance company will likely charge an eighteen-year-old young man more for auto insurance than a fifty-five year-old woman, because teenage boys are more likely to get into accidents than middle-aged women. Further, someone who has a history of getting into accidents will likely pay more in premiums than a demographically similar person who has a clean driving record. Indeed, risk classification such as this can help alleviate moral hazard problems by forcing individuals to consider internalizing some portion of the harm created through anticipation of higher future premiums.

137. Alternatively, the government would have to subsidize the payments for the poor.

selection, moral hazard, and moral discomfort. Beyond that, these requirements deal with the specific problems associated with a distributive model such as this by creating coverage and making that coverage affordable. What follows is a brief discussion of how the features of this proposal deal with the common objections.

(a) Adverse Selection, Null Selection, and Compulsory Insurance

Insurers may be concerned that only those who are most likely to commit intentional torts would purchase the insurance.[138] This would mean that the insurance pool would include more bad risks—those who will commit torts and thus incur liability—than good risks—those who will not. In this event, premiums would rise to cover the costs, forcing more good risks out of the insurance pool on the assumption that as a good risk he or she can self-insure against a loss that can be easily prevented (by not committing intentional torts). According to this theory, the bad risks, then worse risks, will remain in the pool and create a death spiral for the insurance product.[139]

Even this gloomy picture isn't the likely scenario for intentional torts. Rather, the real problem is that neither good nor bad risks will want to purchase liability insurance for intentional torts. Good risks obviously have no use for the insurance product. Why pay premiums for an eventuality that the potential purchaser can avoid with near certainty? They can simply choose not to commit intentional torts. Even the most risk averse in this group would see little need for this type of insurance. What is strange is that even the bad risks—those who will commit intentional torts—also have little use for the product. Liability insurance is meant to protect the insured from liability to a third party. As it stands now, there is almost no chance of civil liability, and the government rarely recovers on its restitution claims. As such, there is little actual financial liability for intentional

138. Indeed, insurers and policy makers consistently express concern about adverse selection in the design and regulation of insurance markets. *See* Siegelman, *supra* note 80, at 1226–31 (detailing how policy makers and courts "deploy" concerns about adverse selection "to trump other concerns that might inform policymaking or legal analysis").

139. *See supra* notes 80–83 and accompanying text.

tortfeasors and there is no reason for an intentional tortfeasor to purchase insurance to cover his intentional acts.

Thus, null selection—not adverse selection—is the real problem for liability insurance for intentional torts. That is, no one would purchase the insurance. But the compulsory nature of this product eliminates the adverse and null selection problem. If everyone has to purchase the insurance, insurers will have a sufficiently diverse insurance pool to keep prices low.[140]

(b) Controlling the Fear of Moral Hazard

All insurance raises concerns about moral hazard, and liability insurance—whether it covers negligence or intentional acts—is no exception.[141] In the context of liability insurance, it is easy to understand why insurance could create moral hazard. The conventional economic view of tort law is that liability, or the expectation of liability, creates incentives for a potential tortfeasor to

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140. There is some support for the proposition that the fear of adverse selection is overemphasized. Siegelman, *supra* note 80, at 1225. Adverse selection is really a problem of information asymmetry—the insured, in theory, knows more about herself than the insurance company. In most contexts, however, there is little empirical support for the proposition that insureds have more and better information than insurance companies about their propensity for risk or propensity to encounter a loss under the insurance policy. *See id.* at 1241–52. To the contrary, insurance companies are quite good at using the public data they have to predict risk. *See id.* at 1245–53. Insurers have access to a significant amount of public information, like age, experience, work history, and medical background. They also have complex statistical models and years of experience collecting, managing, and using the data they collect. This makes it possible for an insurer to properly price many risks, including the risk that a potential insured will suffer a property loss, get in a car accident, or incur medical expenses.

Even though insureds obviously have information to which the insurer is not privy, simply having private information does not create information asymmetry. To outpredict an insurance company, a potential insured would have to accurately understand the private data, understand its importance, and weight it correctly in a complex risk algorithm. *See id.* at 1241. Most insureds are likely unable to do that because they typically encounter systematic biases that make it difficult to accurately predict their propensity for risky behavior or price their own risks. *See id.* at 1245.

That said, it is not hard to imagine that adverse selection could be a problem in the context of intentional torts. Even if most people don't know their riskiness with respect to negligent driving or mortality, it is not hard to imagine that people know whether they are likely to commit an intentional tort. And even if insurance companies can use actuarial data (such as criminal record, age, or gender) to predict a significant number of intentional torts, there is no doubt that an information asymmetry could exist in this market.

141. *See* BAKER, *supra* note 12, at 72 ("Moral hazard—the tendency for insurance to reduce the incentive to prevent loss—is a longstanding concern in all kinds of insurance, and liability insurance is no exception."); *see also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996); Wriggins, *supra* note 12, at 161.

take the optimal amount of care.[142] Liability insurance is thought to disrupt the relationship between liability and harm prevention because the insurer, rather than the tortfeasor, pays for liability. That is, insurance eliminates the deterrence function of tort, and creates moral hazard.[143]

In this respect, though, liability insurance for intentional torts is no different than any other liability insurance product. Insurance could affect the behavior of both potential tortfeasors and potential victims in both the intentional tort and negligence context, as well as the behavior of someone who has life insurance, homeowners' insurance, and almost every insurance product extant. But, for a variety of reasons, the fear of moral hazard associated with insurance for intentional torts is likely exaggerated. And, to the extent that we create such insurance (especially with the features proposed here), it might create better deterrence signals than the present tort system.

First, it is unclear that tort currently sends significant deterrence signals to people thinking of committing intentional torts. The notion that civil liability sends deterrence signals depends, in no small part, on potential tortfeasors believing that there will be financial repercussions from tort if they harm another. It is not at all clear that intentional tortfeasors, especially repeat offenders, have that belief. There are few civil lawsuits for intentional acts against individuals who commit intentional torts.[144] Without lawsuits, tortfeasors do not face actual or expected liability, do not internalize the expected external costs, and have no incentive to take additional care. In short,

142. In economic terms, a potential tortfeasor will take precaution to avoid tort liability when it is cost effective to do so. Tort liability forces tortfeasors to internalize (or at least consider the danger of internalizing) tort liability. If tort liability is higher than the cost of the precaution, tortfeasors will invest in precaution (or so the theory goes). In other words, tort liability serves as a deterrent to potential tortfeasors.

143. Most of the following discussion focuses on the behavior of the tortfeasor. There may also be a fear that potential victims will not take precaution to avoid harm if they can fully recover. This seems to be an unlikely concern in the area of intentional torts. Most people likely want to avoid the kinds of injuries at issue here—those severe enough to cause enough noneconomic injury (given that most individuals can obtain first party insurance for economic damages). Further, insurance companies can structure policies to avoid full compensation. Insurers can force the injured party to bear some portion of the costs through deductibles or higher premiums for successive losses. This should minimize moral hazard issues for victims.

144. *See supra* Part II.A.

creating liability insurance will not eliminate existing financial disincentives for intentional bad behavior, because there are no such disincentives now.

Second, liability insurance will not remove the most significant deterrence signal—the threat of criminal sanctions. Most intentional torts are also criminal acts, with corresponding criminal punishments like incarceration, restrictions on liberty such as probation, and fines. Criminal sanctions can also negatively impact one's reputation, standing, and future economic outlook.[145] And, while it may be true that some intentional tortfeasors face civil liability, the financial burden likely adds only a modicum of additional disincentive to this already significant list.[146]

Third, rather than eliminating deterrence from tort law, insurance may actually create a means to place financial responsibility on wrongdoers. With liability insurance in place, the civil tort system can spring into action. Intentional tort lawsuits become economically viable and attractive to plaintiffs and contingency fee lawyers. As such, victims can get both blood money and insurance proceeds from tortfeasors.[147] "Even a small blood money payment is more than the zero payment that would be assessed when a plaintiff cannot bring a tort action because there is no liability insurance policy [in place] that makes the claim worthwhile for a contingent fee lawyer."[148] Thus, there will be some financial deterrent signal sent to potential tortfeasors.

This doesn't eliminate the possibility that some defendants—those who are wealthy enough to compensate their victims—may escape significant blood money payments that they would otherwise have to pay in the absence of insurance. For these defendants, insurers

145. *See supra* note 100.

146. *See* BAKER, *supra* note 12, at 72 ("Given almost any prospect of criminal law enforcement involving imprisonment, the presence or absence of liability insurance seems likely to affect only slightly the expected cost of crime . . . ."). Said differently, the expected cost of crime is mostly made up of the anticipated cost of the criminal sanction. Most intentional tortfeasors likely consider civil liability a very small additional cost of the intentional act, because (a) the cost of civil liability (should it be imposed) relative to the cost of criminal punishment is small, and (b) the likelihood of any civil liability being imposed at all is miniscule.

147. For a discussion of "blood money," see *supra* notes 48–49 and accompanying text.

148. BAKER, *supra* note 12, at 74.

themselves may be best able to send the proper deterrence signals. Insurers have a number of methods to help deal with the problems created by moral hazard. For example, insurers can raise deductibles, and thus force additional blood money from defendants. Insurers can raise the price of a policy based on bad actions, or encourage good behavior by promising to lower the price of the policy for extended periods of good behavior.[149]

More importantly, if given the right to subrogate claims against their own insureds, the insurer can eliminate this fear altogether.[150] Subrogation allows an insurer "to 'stand in the shoes' of its policyholder for purposes of collecting from a tort defendant what it paid on the policyholder's behalf."[151] For example, where an insured is injured in an auto accident because of a third party's negligent driving, the insurer could first compensate the insured and then sue the negligent driver to recover for its payment to the insured. Typically an insurer may not assert subrogation rights against its own insured.[152] But allowing an insurer to subrogate the claim of the third party against its own insured would provide necessary compensation to the victim and deterrence signals to the insured (when possible).[153] The insurer would pay the victim under the policy. The insurer would

149. Given that everyone will have to purchase coverage, insurers may be limited in how much they can differentiate risks. For example, it may be unwise to allow an insurer to charge an actuarially fair price for a repeat violent offender. It is unlikely that such a person could afford the full premium. Charging less may provide some minimal deterrence and keep the offender in the pool.

150. *See* BAKER, *supra* note 12, at 73; Wriggins, *supra* note 12, at 165.

151. BAKER, *supra* note 77, at 331–32; *see also* JERRY, *supra* note 51, § 96(a), at 600 ("Subrogation is an equitable right that enables one who is secondarily liable for a debt and who pays it to succeed to the rights, if any, that the creditors hold against the debtor.").

152. JERRY, supra note 51, § 96(f), at 692. The basis of this rule may be that "allowing the insurer subrogation against its own insured would allow the insurer to pass the loss from itself to its own insured, thereby avoiding the coverage that the insured purchased." *Id.* In cases where the insured causes intentional harm, the public policy concerns prohibiting subrogation against an insured need not apply. *See generally* Ambassador Ins. Co. v. Monets, 388 A.2d 603, 606 (N.J. 1977) (advocating an indemnify and subrogate approach); BAKER, *supra* note 12, at 73 n.9.

153. As the leading case on this approach states:

> In subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act, is honored. The insurer's discharge of its contractual obligations by payment to an innocent injured third person will further the public interest in compensating the victim.

Ambassador Ins. Co., 388 A.2d at 606–07.

be subrogated to the victim's claim against the insured, and the insurer would try to collect from whatever assets the insured might have. This is likely preferable to the victim bringing the suit. As repeat players in litigation, insurance companies are more likely to be able to proceed inexpensively in a subrogation action and have a better chance of obtaining blood money from an intentional tortfeasor. Thus, the insured will more likely feel the deterrent sting of financial penalties if he has assets to cover all or part of the judgment.[154]

(c) The Moral Mistake

Many people express repugnance at the idea of insuring for intentional torts. The general concern is that the money provided by insurance is a windfall for a bad actor and bad person.[155] These moral concerns are easily swept aside.

Liability insurance protects not just the well being of the insured, but also the well being of the victim. It does so by indemnifying the former and creating remedies for the latter. It is a mistake to focus on the indemnification of the "bad actor" to the exclusion of the compensation of the innocent victim. Because there is no real means to obtain a remedy in the absence of insurance, denying coverage to the bad actor denies payment to the victim. It is likewise a mistake to think about liability insurance payments as a benefit to or windfall for the insured. Liability insurance payments are to the victim, not to the tortfeasor. The benefit goes to the victim.

One might argue, "This is a windfall to the tortfeasor, because he does not have to pay out of pocket." Without insurance, however, most tortfeasors will never have to defend a lawsuit, let alone pay blood money. Thus, insurance does not provide a windfall for the average tortfeasor. Moreover, under the pay and subrogate approach

154. BAKER, *supra* note 12, at 73 ("Under this . . . approach, the liability insurance contract would provide coverage for the tort, and the liability insurance company would manage the moral hazard by subrogation—that is, by going after the insured to recoup the money paid to the victim.").

155. *See generally* BAKER, *supra* note 12 (describing this very common view).

described above, it is unlikely that insureds will avoid financial responsibility should they have the ability to pay.

2. *Tort's Expressive Function*

Tort law has important expressive functions, including providing commentary about acceptable social norms and influencing future behavior.[156] Even if the criminal law fills the deterrence gap created because victims cannot bring civil suits, a failure to compensate innocent victims may still have significant negative effects. Tort law's failure to compensate may serve to enforce a notion that intentional torts—or, at a minimum, the losses associated with intentional torts—are an acceptable status quo.[157] In other contexts, such as workplace injuries and automobile accidents, legislatures have used insurance mechanisms to create compensation schemes where tort law would otherwise fail victims.[158] Yet for victims of intentional torts, "there is no meaningful, let alone comparable, compensation system. This disparity sends the message that some injuries [or the associated losses] are more worthy of compensation than others."[159] That is, by failing to compensate, society may be suggesting that intentional torts are unimportant. Further, as discussed above, noneconomic damages make up a significant portion of the injury caused by intentional torts. A failure to compensate these losses may suggest a belief that noneconomic damages are unimportant, exaggerated, or imagined. A mandatory liability insurance program would create remedies for uncompensated torts, justify investment in civil litigation, and send important messages about the impropriety of intentional bad acts and the propriety of noneconomic damages.

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156. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) ("[T]he law's 'statement' about, for example, the impropriety of monetary exchanges may be designed to affect social norms and in that way ultimately to affect both judgments and behavior.").

157. *See* Wriggins, *supra* note 12, at 148.

158. *See id.* at 150–51.

159. *Id.* at 151.

3) Political Reality

As the previous parts showed, (a) there are significant benefits to creating a mandatory liability insurance program, and (b) the commonly expressed objections to creating liability insurance for intentional torts are either overstated, correctable through insurance mechanisms, or both. Yet, such a product is likely to meet significant opposition. It has been ten years since Wriggins made her far more modest proposal.[160] In that time there has been no movement toward compulsory liability insurance for domestic torts. This is not surprising. It is not clear that there is a powerful constituency to advocate for insurance to cover losses associated with domestic violence torts, let alone all intentional torts. Even to the extent that crime victims elicit compassion or have a lobby, the redistributive nature of this compulsory insurance regime will likely meet fierce opposition, and moral arguments about indemnifying bad actors will likely color the debate.

First, legislators and voters are likely to rally against any compulsory insurance program as an inappropriate intrusion into private contract decisions. Consider, for instance, the recent reaction to the Patient Protection and Affordable Care Act (PPACA), which requires every resident to purchase health insurance or pay a penalty.[161] PPACA aims to create greater access to care and limit emergency costs.[162] Much like the proposal for intentional tort liability insurance, PPACA requires everyone to purchase insurance as a means to control adverse selection by forcing healthier individuals into the insurance pool. The hope is that the healthiest can

160. *See generally id.*

161. *See* Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (as amended by the Healthcare and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010)).

162. Proponents of this plan argue that the compulsory nature of PPACA will help limit costs of the healthcare system by increasing preventative care and reducing emergency room expenditures. *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, ABRAHAM'S INSURANCE LAW & REGULATION 31 (5th ed. 2010) ("[T]his mandate helps to limit the number of uninsureds, which itself has larger benefits in terms of both increasing preventative care and improving emergency room service. But the key purpose of the individual mandate is to prevent adverse selection.").

subsidize the sickest. Indeed, the penalty for failure to purchase "minimum coverage" is called a "shared responsibility payment."[163]

In this way, PPACA is highly redistributive, moving wealth from the healthy and young to relieve the increasing burden of healthcare costs from the working poor—those whose incomes are high enough to exempt them from government healthcare, but who lack steady employment or employment with benefits.[164] This latter group likely cannot afford to self-insure against catastrophic medical loss and could not necessarily afford independent coverage before the mandate.[165] Without coverage, this group purportedly fails to use preventative care and overuses high-cost emergency services. Thus, a secondary effect of the insurance might be to lower healthcare expenditures overall.

Of course, PPACA met fierce opposition. The 2010 midterm elections were notable, to say the least, for anti-incumbent, anti-Democrat political rhetoric. One significant plank in the platform against incumbent Democratic legislators was the new healthcare bill. In part, one suspects that it was precisely the redistributive nature of mandatory health insurance that was at the heart of the opposition. But other compulsory health insurance programs—like Medicare and Medicaid—are also redistributive. Current workers subsidize the healthcare costs of the elderly, sick, and poor. So it may be that the major opposition is not just to the redistributive portion of the insurance program, but to the requirement that individuals actively contract with private insurers.

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163. *Id.* at 29.

164. In 2007, even before the most recent recession, the government estimated that one-seventh of the population—or close to 45 million persons—were without insurance. *Id.* at 5. But this number undersells the problem. According to one study, "80% of the families who turned to bankruptcy after a medical problem in 1999 had some form of health insurance." *Id.* at 10 (citing Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001)). Many who did not resort to bankruptcy likely saw their life savings depleted and debt soar. *Id.* (citing Robert W. Seifert & Mark Rukavina, *Bankruptcy Is the Tip of a Medical-Debt Iceberg*, 25 HEALTH AFF. 89 (2006)).

165. Healthcare costs have risen from 7.2% of GDP in 1970, to 12.3% in 1990 and 16.2% in 2007. ABRAHAM & SCHWARCZ, *supra* note 162, at 6 (citing BOB LYKE, CONGRESSIONAL RESEARCH SERVICE, HEALTH CARE REFORM: AN INTRODUCTION (Apr. 14, 2009)). The Congressional Budget Office predicts that without changes in the law, healthcare spending could rise to as much as 25% of GDP in 2025. *Id.*

In either event, one could expect the same opposition to a mandatory insurance program to provide liability insurance for intentional tortfeasors. People will likely resist participation both as a reaction against a requirement that they contract and the highly redistributive nature of the insurance program. Those who believe that they will neither commit intentional torts nor suffer a criminal victimization likely will not want to subsidize those who will by paying significant premiums for insurance they may never need.[166] Moreover, unlike Medicare and Social Security, this product will likely not be viewed as an earned benefit.[167]

It may be that the redistributive arguments and the contracting arguments are only the surface concerns. What may be lurking beneath is a concern about insurance indemnifying bad actors—people who commit intentionally heinous acts. It may be, in other words, that the moral repulsion argument is driving some of this discussion. Even after hearing that bad actors will never face civil liability for the reasons discussed above, many are still resistant to the proposal and the thought of helping bad actors with liability

166. To the extent that the intentional tort liability insurance was federally mandated, it could face constitutional challenges as with PPACA. States and scholars alike have argued that neither the Commerce Clause, the tax power, nor the Necessary and Proper Clause authorize Congress to require individuals to purchase insurance from a private company or pay a penalty tax. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate To Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND., Dec. 9, 2009, *available at* http://www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional. *But see* Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482 (2010); Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 27, 27 (2010), http://yalelawjournal.org/images/pdfs/889.pdf; Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 38 (2009).

One could expect similar arguments should Congress pass a law requiring individuals to purchase intentional tort insurance. In fact, these arguments might be stronger in the case of intentional tort insurance given that the underlying concern of such insurance seems less economic than the concerns underlying health care insurance. A full discussion of these issues is beyond the scope of this Article, but two points are necessary. First, it is not clear what the outcome of the arguments regarding the constitutionality of PPACA will be. Second, it would be reasonably easy to work around these concerns by either having the states mandate the coverage or having the government create a public, rather than a private, insurance regime. Indeed, there are no such constitutional concerns regarding Medicare or Social Security.

167. *See generally* Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*, 41 AKRON L. REV. 557 (2008).

insurance.[168] These claims may make it difficult, if not impossible, to move toward a mandatory liability insurance program, especially in the current political climate.

B) Enhanced Compensation Funds

Given the barriers to creating private liability insurance for intentional tortfeasors, it may be easier to fix the remedial gap through more public means. For example, victim compensation funds could provide more complete remedies directly to the victims of crime. To do so, victim compensation funds must have the ability to provide more compensation for more categories of loss. This requires additional funding from the state and federal governments. In the end, it is not clear that this approach would garner any more support than the liability insurance proposal above.

To create complete remedies, legislatures would have to eliminate existing damage caps and provide awards for noneconomic damages.[169] With these additional features, awards from victim compensation funds could roughly approximate a damage award a victim could expect to receive in tort. Although that level of award would be a remarkable break from current tradition, it would not be unprecedented. It would mirror the approach to compensation taken by the U.S. Congress in creating the September 11th Victim Compensation Fund of 2001 (hereinafter the "9/11 Fund").[170] The 9/11 Fund provided a virtual "blank check," to a Special Master to provide compensation for victims of the terrorist attacks of September 11, 2001.[171] The ultimate compensatory awards included

168. Indeed, I am struck by the general aversion to this proposal (this is by no means an empirical claim), even among colleagues and peers who are especially sympathetic toward the plight of crime victims.

169. As detailed in Part II.C.2, *supra*, most victim compensation funds will not provide compensation for noneconomic losses and provide limited awards for economic loss.

170. Air Transportation Safety and System Stabilization Act (ATSSSA), Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001) (codified at 49 U.S.C. § 40101 (2006)).

171. Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 197 (2004). Under the authorization statute, the Special Master has an affirmative duty to determine "the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." *See* ATSSSA, § 405(b)(1)(B)(ii). In considering the "individual circumstances," the Special Master must determine the "financial needs or

both individuated economic awards and presumptive awards for noneconomic injuries. In crafting the individual economic awards, the Special Master took account of the income of the deceased and the injury sustained, and then reduced the award by compensation received from collateral sources.[172] The noneconomic awards, on the other hand, were scheduled to provide some ease of award and horizontal equity.[173] One could imagine a similar approach to crime victimization.

Enhancing victim compensation funds could have a number of salutary effects. Crime fighting is a core governmental function, but there may be little incentive for politicians to invest the resources necessary to curb crime in the highest crime areas. As Saul Levmore and Kyle Logue note, while "governments . . . might be dismissed by the electorate in the event of failed wars [and] unchecked epidemics, [the same government] might survive perfectly well even though a minority of the population continues to live in fear of crime and suffers greatly from it."[174] That is, elected officials may not be responsive to criminal victimization because the burdens of crime fall disproportionately on a small group. Victims may not be organized or politically savvy, the media may not report on victimization in a way that elicits sympathy, or the population may have become numb to reports of criminal activity.[175] One way to incentivize the government

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financial resources of the claimant or the victim's dependents and beneficiaries." 28 C.F.R. § 104.41 (2011). As one court noted, the authorization statute provides a virtual "blank check" for compensation. *See* Schneider v. Feinberg, 345 F.3d 135, 141–42 (2d Cir. 2003).

172. In granting awards for economic loss, the Special Master had to consider "any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law." *See* ATSSSA, § 402(5).

173. In the case of noneconomic loss, rather than allow "case-by-case determination[,] . . . the regulations provide for a flat rate noneconomic loss award of $250,000 per victim, plus an additional $100,000 for the spouse and each dependent." Goldscheid, *supra* note 171, at 199 n.163; *see also* 28 C.F.R. § 104.44 (2011).

174. Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—And Crime*, 102 MICH. L. REV. 268, 318 (2003).

175. *Id.* at 319 ("[T]o the extent that a large part of the population need not share the fear that these victims bear, crime losses may be undervalued by local and state authorities, and are certainly undervalued by federal government officials."); *see also infra* notes 215–223 and accompanying text (showing that crime disproportionately affects the poor and young).

to do a better job at fighting crime is to force the government to internalize the costs created by crime. If the government is made to pay for "crime, or for losses suffered where there are high crime rates, [it] might do a superior job at fighting crime, or budgeting the resources necessary to do so."[176]

Despite the laudable crime reduction and compensation goals, such a plan is unlikely to pass. Compensation funds would ultimately function as public insurance akin to the private liability insurance plan described above in Section III.A. To meet the annual price tag of crime, governments would have to raise additional revenue through taxation. Current funding sources—fines and penalties levied against offenders—only meet less than 1% of the estimated annual losses.[177] There is likely little political will to raise this additional revenue or make these additional expenditures.[178] Those who will have to foot the bill for this program are politically powerful and likely to oppose such a redistributive tax. Criminal victims are marginalized members of society and unlikely to elicit the compassion necessary to create these funds.

Second, unlike the fund created after 9/11, there is no galvanizing event to create a political sympathy. Likewise, there is no need to protect a vulnerable industry. The 9/11 Fund awards were not simply symbolic or even restorative in nature. The government feared that the airlines would be crippled by litigation related to the terrorist attacks, which would place the entire economy in further peril.[179] Thus, the awards had to be attractive enough that victims would forgo tort lawsuits. These same concerns are simply not present in the case of crime victims. There are essentially no lawsuits against

176. Levmore & Logue, *supra* note 174, at 318.

177. *See supra* note 125.

178. As Levmore and Logue explain, "the current absence of a strong federal crime-insurance . . . program is likely attributable to failures of the political process—in the sense that the parties most likely to benefit from such a regime are least likely to overcome collective-action problems to lobby for its enactment." Levmore & Logue, *supra* note 174, at 313.

179. *See generally* Schneider v. Feinberg, 345 F.3d 135, 139 (2d Cir. 2003) (stating that the 9/11 Fund remedies were designed to replace tort remedies and "'preserve the continued viability of the United States air transportation system' from potentially ruinous tort liability in the wake of the attacks").

tortfeasors and victims cannot successfully sue the government for more or better policing.

Third, it may be that the early successes of the victims' rights movement reached their zenith. There is seemingly little political desire to create additional remedies. In part, this may be because the victims themselves are marginalized. It may also be that the additional losses to be covered are disfavored. People may not support more complete remedies for noneconomic damages, because they think the losses are imagined, exaggerated, or incommensurable. As such, some may think there is no reason to provide additional financial remedies.

Thus, this proposal is also unlikely to gain significant attention from legislatures.[180]

C) A Market for First Party Insurance

There is another way to create remedies for victims: allow people to self-insure to a greater extent against the losses created by intentional torts. Insurers already cover some of the losses. For example, most life insurance policies will pay beneficiaries the death benefit regardless of "whether the insured dies of natural causes or is murdered."[181] Likewise, most property insurance will cover crime-related losses, including theft and damage to property.[182] But this self-insurance regime suffers in at least two respects. First, existing coverage will not cover noneconomic losses. The conventional wisdom posits that insurers will not sell and purchasers will not buy insurance for noneconomic injuries. This part challenges these assumptions and explores what it would take to create supply and

180. Legislatures and insurers may further fear two moral hazard problems associated with this proposal. First is the concern that individuals would not avoid criminal victimization if provided full compensation. This concern is discussed *supra* note 143. There is another moral hazard concern that might be more troublesome—if the compensation funds reduce payments based on collateral income (as from property insurance or healthcare insurance), potential victims may choose to purchase less insurance than is otherwise reasonable. This concern could be dealt with through regulation and individuation of awards. Administrators could determine what a presumptive, reasonable amount of first-party insurance is, and put the burden on the victim to explain why he or she has less coverage.

181. Levmore & Logue, *supra* note 174, at 315.

182. *See id.* ("Standard property policies tend to cover crime-related property losses, which means that such policies do not generally contain crime exclusions, although there are exceptions.").

demand (and thus a workable market) for first party insurance for noneconomic loss. Second, there is already significant underinvestment in first-party insurance. Given the added expense of insurance for noneconomic damages, it is not likely that those most in need would purchase adequate coverage. Thus, this part concludes by considering the case for the government subsidizing private insurance for noneconomic losses.

1) Supplying Insurance for Noneconomic Injuries

Insurers allegedly won't sell insurance for noneconomic damages out of concerns about ex post moral hazard and adverse selection.[183]

The fear with respect to ex post moral hazard is that insureds will claim the maximum loss regardless of the actual injury suffered. Given the intensely personal nature of noneconomic loss, insurers may claim that there is no real way to verify the amount of loss.[184] This problem, however, is not insurmountable; there may be simple ways around the moral hazard barrier. For instance, insurance companies could set a schedule of payments for different types of loss, such that any triggering event would qualify for a set amount of noneconomic compensation, much like the schedule attached to the payments from the 9/11 Fund.[185] This would avoid the problem of ex post moral hazard because insurers would simply assume a maximum loss for each triggering event. Alternatively, insurers could treat these claims the way they treat uninsured or underinsured claims: by making the insurer an adverse party to the insured. This proposal may raise a significant specter of bad faith—pitting the insurer against the insured in every claim. Together with a modified schedule of

183. *See generally supra* Part II.B.

184. These fears are largely abated in the third-party insurance market because insurance companies can establish rates based on the probability of accidents and the probability of damage awards. Insurers can determine the actual value of the noneconomic loss through an adversarial system. Whether through litigation or bargaining, the insurer can take a stand if it believes that the claim for noneconomic damages is too high. In the first-party context, the same adversarial stand may expose insurers to bad faith liability.

185. *See supra* note 173.

damages, however, it might serve to reduce some concerns about ex post moral hazard.[186]

The fear with respect to adverse selection is that insurers cannot distinguish between risks, and will thus have to charge rates that are fair across the entire population. As a result, insurers may fear that only bad risks—those who suffer more and suffer more often—will be attracted to the insurance. But it is unclear how significant the adverse selection problem is. Insureds may not have sufficient private information to predict better than insurers whether and how much they will suffer. To the contrary, insurers are quite adept at utilizing public information to classify risks.[187]

In fact, this might be a situation where the best risks (the least likely to suffer or to suffer the least) are most likely to purchase insurance. This advantageous or propitious selection occurs because those who are risk-averse in their behavior are also likely risk-averse with respect to their financial decisions.[188] Risk-averse individuals are likely to both take precaution against accidents and purchase insurance to hedge against the potential loss. Those who are risk-seeking will neither take precaution nor hedge against the loss.[189] Here, it is possible that those who are most fearful of suffering a noneconomic loss may, in fact, be the ones who most assiduously avoid it, even after purchasing the insurance.

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186. Insurers may still fear an ex ante moral hazard problem—that insureds will not take enough precaution to avoid the risk of harm. Given the severity of the harm, it seems unlikely that insureds will fail to avoid intentionally tortious acts that cause noneconomic damages. Further, insurers may be able to control this problem by threatening to raise premiums when insureds suffer losses.

187. *See* Siegelman, *supra* note 80, at 1243–45; *see also supra* note 140.

188. David DeMeza & David C. Webb, *Advantageous Selection in Insurance Markets*, 32 RAND J. ECON. 249, 250 (2001); David Hemenway, *Propitious Selection*, 105 Q.J. ECON. 1063, 1064 (1990). "Propitious selection, as its name suggests, implies that insurance is most attractive to the lowest-risk individuals among those eligible to buy it, not to those with the highest risks." Siegelman, *supra* note 80, at 1266.

189. Siegelman details the empirical evidence for propitious selection, including the fact that those who purchase life insurance have a lower death rate than those who do not; fewer credit cards with insurance are stolen than those without; and the fact that those who purchase collision insurance for rental cars are more likely to wear seatbelts. *See* Siegelman, *supra* note 80, at 1270–71 (citing DeMeza & Webb, *supra* note 188; Hemenway, *supra* note 188). I do not claim that this is proof of either propitious selection generally or with respect to noneconomic damages specifically. I mean only to suggest that there are significant reasons to doubt the impact of adverse selection.

Thus, there may be ways around, or reasons to doubt, the commonly held concerns about supplying insurance for noneconomic damages.

2) Creating Demand for Noneconomic Loss Insurance

Even if insurers agreed to indemnify individuals for noneconomic losses, there might not be a workable market. To create a market, there must be both supply and demand. Conventional wisdom is that individuals do not want insurance for losses.[190] There are, however, some reasons to doubt this conventional wisdom, or, at a minimum, believe that there may be ways around the lack of demand.

Consumers demand insurance because they prefer a certain income to an uncertain income with the same expected return.[191] That is, people would likely prefer to have a 100% chance to make $50,000 to a 50% chance of making either $100,000 or $0. Most people make this choice because they are risk-averse.[192] They suffer more from a loss of $50,000 than they enjoy a gain of $50,000.[193] Even if an individual has a steady job and certain wages, income could still be uncertain. For example, investments are uncertain, life activities like driving or home-ownership could create liability, which itself introduces income uncertainty for income or wealth, and malicious or

190. *See, e.g.*, Robert Cooter, *Towards a Market in Unmatured Tort Crimes*, 75 VA. L. REV. 383, 392 (1989) (arguing that "a rational person would insure only against that pain and suffering that curtailed earnings"); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1546–47 (1987) (stating that "individuals . . . do not voluntarily insure for non-pecuniary losses").

191. *See generally* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 50 (5th ed. 2008) ("A person is said to be risk-averse if she considers the utility of a certain prospect of money income to be higher than the expected utility of an uncertain prospect of equal expected monetary value.").

192. Risk aversion, in turn, can be explained by the diminishing marginal return of money. Diminishing marginal utility simply means that "the more money you have, the less additional happiness you would get from another dollar." RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 11 (7th ed. 2007). Said differently, it is generally true (although not true for some) that $10,000 will bring more happiness to someone making $50,000 than it will to someone making $500,000. Because most people experience less utility from each additional dollar gained, most people are risk-averse.

193. Steven Croley & Jon Hanson, *The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1795 (1995) ("Because an individual gets less satisfaction from the next unit of a given economic resource than from the last, the individual would forego acquiring that next unit of the resource to avoid the risk of sacrificing the last."). There are, of course, people who are risk-neutral or risk-seeking. Gambling, skydiving, and rock climbing are all examples of risk seeking behavior.

negligent acts of others could create losses or otherwise change income.

Insurance provides a mechanism to control these uncertainties. In purchasing an insurance policy, the individual "give[s] up a certain amount of income (the insurance premium)" and in exchange, the insurer bears the risk of the uncertain event.[194] "The risk-averse person considers himself better off with the lower certain income than facing the uncertain higher income."[195] In choosing how much insurance to purchase, the conventional model predicts that individuals will equalize "marginal utilities over time and over possible states of the world."[196] The insurance consumer does this by transferring dollars out of the pre-accident world until "the marginal utility of the last dollar transferred in the pre-accident world equals the marginal utility of that dollar in the post-accident world."[197]

Scholars have claimed that people will choose not to transfer money out of a pre-accident world to insure against a noneconomic interest in the post-accident world.[198] According to this theory, people won't spend money on insurance premiums to provide financial remedies for pain, suffering, or loss of enjoyment of life, which are inherently nonmonetary injuries. But it is not clear to what extent this is true. For example, there is some evidence that individuals will purchase the same amount of insurance for economic losses as for noneconomic losses.[199] Ronen Avraham ran a series of experiments in which participants were asked to make insurance

194. COOTER & ULEN, *supra* note 191, at 52.

195. *Id.*

196. Croley & Hanson, *supra* note 193, at 1795.

197. *Id. See also* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 24 (1986) ("People pay a few of their last earned dollars to avoid the risk of losing their first-earned dollars.").

198. Some scholars have argued that the lack of an insurance market for noneconomic damages is evidence that tort victims would not choose to have damages for pain and suffering ex ante. *See, e.g.*, Cooter, *supra* note 190, at 392; Priest, *supra* note 190, at 1546–47. They then use this to justify caps on those damages. To the extent there is empirical evidence for the premise of this argument, the conclusion depends on a rational decision *not* to purchase insurance for noneconomic damages. As the remainder of this section argues, the barriers to purchase may be related ultimately to the decision not *to sell* insurance, and to behavioral biases and heuristics that prevent the cold, rational analysis required by the crowd arguing against noneconomic damages based on insurance demand.

199. *See* Ronen Avraham, *Should Pain-And-Suffering Damages Be Abolished From Tort Law? More Experimental Evidence*, 55 U. TORONTO L.J. 941 (2005).

decisions about different products (padding for roller skates, a portable saw, a facial cream, a computer monitor, a trampoline, and tires for a new car). Each product was associated with a different kind of physical injury including migraine headaches and brain injuries. The participants were asked to state how much they would pay, over the price of each product, for insurance to cover both the economic and noneconomic losses related to the injuries. Avraham found that the 89% of the participants "treated both types of insurance the same—either they bought them both or they bought neither. Moreover, on average . . . the majority of participants treated both types of insurance *exactly* the same—that is, they paid *exactly* the same amount of money for both types of insurance."[200]

Despite the fact that Avraham found some modest evidence of a demand for insurance for noneconomic injuries, that demand has not produced a functioning market. This may be because there is, in fact, no supply. Without a supply, there is often no demand, especially in the insurance context. Individuals are more likely to buy insurance if they know others who have purchased a similar policy. Market penetration of an insurance product often determines whether any given individual will purchase the product.[201] This could be true for a number of reasons. It may be a result of social norms—if many people in a community have a certain kind of insurance, others will want to have it as well. It may be that potential purchasers fear "embarrassment that one does not have protection when one learns that others do."[202] Or it may be that individuals "think (correctly or incorrectly) that their friends have similar preferences to them and have already gone to the trouble of gathering information—so it makes sense to copy them. In this sense friends and neighbors reduce the search costs of obtaining information on the risk and the policy terms."[203] In any case, where as here, there is no functioning market, latent demand likely will not rise to the surface.

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200. *Id.* at 944.
201. *See* Kunreuther & Pauly, *supra* note 78, at 96.
202. *Id.*
203. *Id.*

Moreover, while Avraham's study suggests that there is some demand for insurance for noneconomic losses, it does not help evaluate whether, and under what circumstances, people would demand the insurance outside of a controlled laboratory environment. There are reasons to believe that potential purchasers will underestimate the likelihood of injury and fail to price noneconomic injuries properly or otherwise consider the injuries incommensurable. These biases may hamper development of demand for insurance for noneconomic injuries.

First, in other insurance contexts, individuals tend not to purchase insurance for high-risk, low-probability events.[204] Individuals tend not to buy insurance against earthquakes, floods, hurricanes, or major medical events even when the government subsidizes the insurance such that the premiums are less than the expected loss.[205] In both experimental settings and surveys, insurance purchasers act as if low probability results are unlikely to occur at all. The purchaser assumes that with respect to low probability events "nothing seriously bad will happen to me."[206] It may be that potential consumers consider events that cause noneconomic loss so improbable as to assume they will never suffer this kind of loss.

It may be that people consider low probability events to be no probability events because "people prefer not to think about negative events or ones that they fear."[207] Significant noneconomic loss like loss of enjoyment of life associated with paralysis certainly falls in this category. That is, insurance purchasers (like all humans) have limited memories and limited computational skills, and therefore must use mental shortcuts to assist in some decision-making.[208] The

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204. *See id.* at 92 ("When it comes to protecting oneself against events that may have a major financial impact, but a low probability of occurrence, individuals often do not take out insurance.").

205. *See id.*

206. *Id.* at 79. S*ee also* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193, 1245 n.230 (1994) ("When asked about their insurance decisions, subjects in both the laboratory and survey studies indicated a disinclination to worry about low-probability hazards." (quoting Howard Kunreuther & Paul Slovic, *Economics, Psychology, and Protective Behavior*, 68 AM. ECON. REV. 64, 67 (1978))).

207. Kunreuther & Pauly, *supra* note 78, at 92.

208. *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman, Paul

types of events associated with insurance decisions are prime candidates for heuristics, because they are unpleasant to think about.[209] Thus, insurance purchasers may presume that low probability events are actually no probability events simply to avoid thinking about the horrible consequences.

Second, even to the extent that consumers correctly predict the probability of an accident, insurance purchasers may not be able to properly price the magnitude of a noneconomic loss. In part, this may be related to the fact that most individuals have little experience with the kinds of loss that would cause significant pain, suffering, emotional distress, or loss of enjoyment of life. Thus, as with predictions about the probability of the loss, insurance purchasers' predictions about the amount of noneconomic loss are likely to be inaccurate.[210] But the problem of lack of experience is exacerbated precisely because consumers are being asked to predict future emotional states.

Research has shown that people typically overestimate how long and much their future emotional states will change in response to life events—like winning the lottery or sustaining an injury.[211] This overestimation could lead potential insurance purchasers to conclude

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Slovic & Amos Tversky eds., 1982). *See also* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

209. Kunreuther & Pauly, *supra* note 78, at 79, 92.

210. They likewise can't predict the amount of economic losses either. As Ellen Pryor observed, insurance consumers likely can't guess the amount it would cost to obtain physical, emotional, or vocational rehabilitation; retrofits to a home or car; adapted transportation; or any of the other myriad economic means to cope with and adapt to a disability. *See* Ellen S. Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 111 (1993).

211. For overviews of affective forecasting, see Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 165–81 (2005); George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 85 (Daniel Kahneman et al. eds., 1999); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 345 (2003). There are a number of reasons for this overestimation. For example, when asked to predict how an event will impact their happiness, individuals focus on the event to the exclusion of the rest of their life circumstances that may mitigate the impact of the event. Further, individuals may not have familiarity with the event prompting the emotional experience and thus may not be able to predict with any precision how it would really impact their lives. Even if some individuals have some experience with the event, most cannot properly draw on past emotional experiences as a guide because they systematically misremember emotional experiences. This ultimately distorts their ability to predict future emotional experiences. *See* Blumenthal, *supra* at 174.

that no amount of money could compensate or alleviate their pain and suffering after incurring a serious disability. That is, ex ante, the consumer may believe that serious disabilities are incommensurable, and money will not help ex post. If this is true, purchasers may further believe that there is no reason to spend money on insurance for pain and suffering, because an insurance payment will not maximize the marginal utility of money. Consider it this way: if you believe that no amount of money in the future is going to abate your pain and suffering after an accident, why would you take dollars away from your present self and invest them for your future disabled self?

A functioning market might change some of these decisions. If insurers sold the product, it is possible that there would be sufficient market penetration and uptake throughout communities. But it is hard to know exactly because insurers don't sell insurance for noneconomic loss. Avraham's study does not eliminate the concern that people will not purchase insurance for noneconomic injuries because they underpredict the likelihood of suffering a noneconomic loss and overpredict the impact of such a loss.[212] Participants in the studies were given information about both the probability of an accident occurring and the magnitude of the expected damages.[213] Moreover, by pricing the injuries, the studies may have made it seem like there was in fact a substantial market for insurance for noneconomic damages and that noneconomic injuries are commensurable with money. In other words, the study stripped away a number of the barriers that may inhibit demand for this type of insurance from flourishing. While this makes for good experimental design, more data is necessary before we could determine whether demand would flourish outside of an experimental setting.

212. *See* Avraham, *supra* note 199.

213. *See id.* at 958, 965 ("Participants were informed the probability of an accident occurring and of the magnitude of the expected damages so that they had enough information to calculate the expected loss . . . .").

3) Benefits and the Need for Subsidization

Insurance covers some losses related to crime (the noneconomic losses) and there is a potential to create a market for the uncovered noneconomic losses. Creating this additional coverage comes at a price; it likely requires government intervention. First, as described above, individuals often fail to buy actuarially fair insurance for economic losses that are high loss, low probability events. This alone suggests a need to subsidize the insurance. Second, most people are underinsured for even their economic losses, and will not recoup significant property or healthcare losses.[214] As described above, given the nature of the injury, the barriers to first party insurance may be exacerbated in the context of noneconomic losses. It may be further exacerbated in the context of intentional tort, where the victims are disproportionately poor and young.

For example, the poor are far more likely to be victims of crime than are the wealthy. Someone living in a household earning under $7,500 a year is far more likely to be victimized than someone living in a household earning over $75,000 a year.[215] Across all income levels there are over 21 victimizations per 1,000 persons over the age of 12 each year.[216] The incidence more than doubles when looking at only those living in households that earn under $7,500 a year.[217] In those households, there are over 50 victimizations per every 1,000 persons over the age of 12.[218] In contrast, there are fewer than 15 victimizations per 1,000 of those living in households earning more than $75,000.[219] Figure 4 displays these statistics:

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214. Most people "tend to purchase inadequate coverage for a variety of contingencies." Levmore & Logue, *supra* note 174, at 316. Levmore and Logue hypothesize that this underinvestment may be a result of a "disinclination to dwell on unpleasant eventualities." *Id.*; *see also supra* notes 73–75.

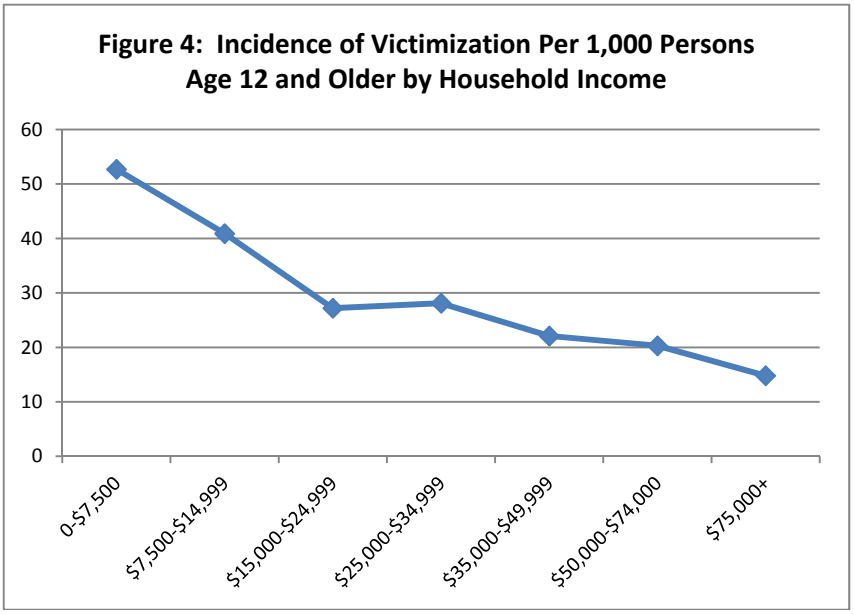
215. BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES tbl.14 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf. This data is taken from the National Crime Victimization Survey (NCVS).

216. *Id.*

217. *Id.*

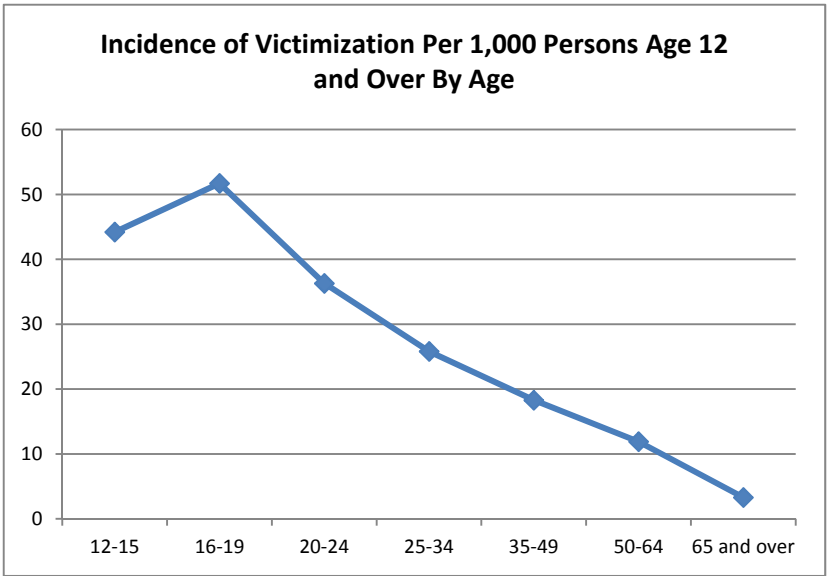
218. *Id.*

219. *Id.*



Likewise, victimization is distributed toward the young. The incidence of victimization for someone aged 16-19 is twice as high as someone aged 25-34.[220] In 2007, there were over 50 victimizations for every 1,000 persons aged 16-19.[221] For people only ten years older, the numbers look significantly better. Out of every 1,000 persons aged 25-34, there were approximately 25 personal and violent victimizations.[222] The likelihood of victimization continues to fall as individuals get older. Figure 5 displays these disparities.[223]

220. *Id.* at tbl.9.
221. *Id.*
222. *Id.*
223. BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES tbls.2 & 3 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf. This data is taken from the National Crime Victimization Survey (NCVS).



In short, the young and the poor are the most victimized segments of our society. Neither group can (or is likely to) save for the proverbial rainy day. As Levmore and Logue note,

> Inner-city property owners, including businesses and homeowners, self-insure far more than their counterparts in affluent areas, in part because of availability problems . . . . As far as life insurance is concerned, it simply is not possible for low-income earners to purchase significant insurance coverage, even though the value of their lives to their families can be substantial in economic terms.[224]

Purchasing insurance to cover economic losses—let alone insurance to cover noneconomic losses—may be more of a luxury than the poor can afford or the young believe they need. And given the problem in the context of economic losses, it would be surprising if a working market for insurance for noneconomic losses would garner significant demand among many who need it most. Therefore

224. Levmore & Logue, *supra* note 174, at 317.

losses, including work disruptions and noneconomic losses, are likely to have a greater impact.

One way to alleviate some of these problems would be to have the government subsidize some portion of the premiums for crime insurance. Some of the same reasons that justify enhanced victim compensation funds could justify government subsidies in this arena. First, it would create more compensation for victims of crime. Second, it would force the government to internalize some portion of the costs of crime victimization. Unlike compensation funds, this approach would create an additional lobbying group to advocate for crime prevention—the insurance industry. Insurers would have an incentive to reduce the number of victims of crime. "[J]ust as auto insurers compose a powerful political force in this country for increased auto-safety standards, so too" insurers providing coverage to victims of crime "would have an interest in encouraging lawmakers to adopt effective crime-reducing measures."[225]

This approach, however, suffers like the others. There is likely no political lobby to create such a subsidy. Moreover, insurers have shown little interest over the years in creating such a market. Thus, as with the two proposals above, there are significant barriers to this approach.

CONCLUSION

Each year victims of intentional torts suffer significant losses. Those losses, however, are not compensable through the civil system. Victims simply cannot recover from judgment-proof defendants. And, liability insurance, the fuel that makes the litigation engine go, won't cover intentional acts. Without coverage, the tort system fails. This sad fact undermines both the deterrence and compensation functions of tort law. While the criminal system picks up some of the deterrence slack, victims are often left without remedy. And no other part of the compensation system steps in to fill this void.

225. Levmore & Logue, *supra* note 174, at 319.

I have proposed three ways to close this remedial gap and create financial compensation for those injured through intentional torts. Each proposal requires significant government intervention and each would have significant redistributive effects. Thus, especially in an era of tight budgets, each proposal is likely to meet stiff opposition. There may be, however, very good reasons to support these redistributive efforts (beyond the compensation created). Creating remedies may express and confirm our shared societal values about the abhorrence of intentional torts and the importance of noneconomic damages. Forcing the government to invest in compensation may encourage it to devote additional resources to crime prevention. Further, to the extent that the private insurers are part of the solution, those insurers may become powerful lobbyists on behalf of crime reduction.

Admittedly, this Article offers a sobering and perhaps pessimistic view of the possibility of enacting these proposals, but there are significant reasons to support a regime that compensates for the harms that fall to victims of intentional torts.