CIVIL RECOURSE INSURANCE: INCREASING ACCESS TO THE TORT SYSTEM FOR SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE

Merle H. Weiner*

INTRODUCTION 958

I. SURVIVORS LACK ACCESS TO THE CIVIL LEGAL SYSTEM 964
A. The Uncollectability of Substantial Judgments Deters Legal Counsel from Representing Survivors 964
1. Liability Insurance Exclusions 967
2. Uncollectable Assets 970
3. Insufficient Damages 971
B. Survivors Lack Other Ways to Pursue a Tort Claim Against the Perpetrator 974
1. Alternatives to Contingent-Fee Arrangements 974
2. Alternatives to Intentional Tort Suits Against the Perpetrator 980

II. SURVIVORS NEED ACCESS TO THE CIVIL LEGAL SYSTEM 984
A. It's Not About Compensation 985
1. The Simpson/Goldman Example 985
2. Empirical Research 988
3. But What About Compensation? 991

---

* Philip H. Knight Professor of Law, University of Oregon. I appreciate the insightful feedback I received either in conversation or on a draft of this Article from Kenneth Bischel, Jonathan Cardi, Ann Cosimano, Ann Freedman, Caroline Forell, Edward Frees, Jennifer Freyd, Ibrahim Gassama, Sally Goldfarb, Volker Knoop, Laura Lette, Tom Lininger, Jennifer Middleton, Ann MacDonald, Kasia Mlynski, Kathryn Moakley, Norbert Rollinger, Jennifer Trinks, Dom Vetri, and Jennifer Wriggins. I also thank my students in Gender-based Violence and the Law and Advanced Torts for asking thoughtful questions and giving useful comments. I am grateful to Rowan Bond, Joel Drew, Kaitlyn Lindaman, and Mackenzie Lang and to the University of Oregon librarians for their helpful research assistance. Finally, I am indebted to the students on the *Arizona Law Review* for their fabulous work editing this Article.

B. The Tort System's Purpose Is to Provide Those Things Survivors Want and Need 995
1. Civil Recourse Theory 996
a. Accountability 996
b. Revenge 998
c. Empowerment 1004
2. Deterrence 1006

III. EARLIER PROPOSALS TO ADDRESS SURVIVORS' NEEDS THROUGH INSURANCE 1009
A. Liability Insurance 1009
1. Feasibility 1010
2. Is it Best for Survivors? 1015
B. Loss Insurance 1017
1. Feasibility 1019
2. Is it Best for Survivors? 1020

IV. CIVIL RECOURSE INSURANCE 1021
A. Described 1021
B. Viability of Proposal 1026
1. The German Example 1027
2. Modeling Viability 1034
a. Price 1035
b. Demand 1043
c. Supply 1048
i. Moral Hazard 1050
(a) The Insured 1050
(b) The Insured's Lawyer 1054
ii. Adverse Selection 1055
C. The Government's Role 1057
1. The Constitutional Argument for Governmental Action 1057
2. The Policy Argument for Governmental Action 1059
3. The Political Feasibility of a Market-Based Insurance Solution 1062
4. Potential Governmental Interventions to Establish and Enhance the Market 1063
a. Insurance Vouchers 1064
b. Federal Civil Recourse Insurance 1065
c. Reinsurance 1066
d. Mandatory Insurance 1066
D. A Potential Drawback: Exposing Survivors to Harm from Insurers 1067

CONCLUSION 1071

INTRODUCTION

The #MeToo movement has exposed the ubiquitous unwanted sexual behavior that women and some men experience. Survivors (or victims, as I

occasionally say) experience indignities in their workplaces,[1] schools,[2] neighborhoods,[3] and homes.[4] No space is safe. Survivors' injuries fall along a spectrum from annoyance and inconvenience,[5] to severe injury and pain,[6] to death.[7] Many of the acts—including groping, threats of physical harm, and rape—fall squarely within the parameters of traditional tort law: battery, assault, false imprisonment, trespass, and intentional infliction of emotional distress.[8] The

---

1. Douglas Schwartz, *60% of U.S. Women Say They've Been Sexually Harassed Quinnipiac University National Poll Finds; Trump Job Approval Still Stuck Below 40%*, QUINNIPIAC U. POLL 1 (Nov. 21, 2017), https://poll.qu.edu/images/polling/us/us11212017_uyt067.pdf/ (finding that among women who have been harassed, 69% experienced it at work, 43% in social settings, 45% on the street, and 15% at home).

2. Victoria Banyard et al., *Unwanted Sexual Contact on Campus: A Comparison of Women's and Men's Experiences*, 22 VIOLENCE & VICTIMS 59–60 (2007) (finding 19.6% of females and 8.2% of males experienced unwanted sexual contact in college); *see* Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000 to 2015*, 19 TRAUMA VIOLENCE & ABUSE 76, 90 (2018) (citing studies and noting "[t]he prevalence of completed forcible rape, incapacitated rape, unwanted sexual contact, and sexual coercion measured on college campuses widely varies in the United States").

3. *See* HOLLY KEARL, UNSAFE AND HARASSED IN PUBLIC SPACES: A NATIONAL STREET HARASSMENT REPORT 6 (Alan Kearl ed., 2014) (finding 41% of all women and 16% of all men age 18 and up had experienced physically aggressive forms of harassment, including for women, sexual touching (23%) and being forced to do something sexual (9%)).

4. U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 4 (2013) (reporting that 55% of rape or sexual assault victimizations from 2005–2010 occurred at or near the victim's home); Schwartz, *supra* note 1, at 1.

5. Daniel W. Drezner, *Commentary: #MeToo, One Year Later*, INDEONLINE (Oct. 13, 2018), https://www.indeonline.com/article/20181013/OPINION/181019496 (noting that women in the workplace face "threats [that] can range from possible sexual assault to the accumulation of minor slights and inconveniences").

6. *See* Complaint at ¶ 936, Doe 1 v. U.S. Olympic Comm., No. 1:19-cv-00737 (D. Colo. Mar. 12, 2019) (alleging Larry Nassar's actions caused the plaintiffs "discomfort, bleeding, urinary tract infections, bacterial infections" and they "continue to suffer pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, fright, grief, humiliation, and enjoyment of life" as well as "loss of earnings and earning capacity" and the plaintiffs need "treatment, therapy, counseling, and hospitalization to address the mental anguish and despair caused").

7. Krystal A. Sital, *There Are More Skeletons in the Closet: Domestic Abuse and #MeToo*, ELLE (Oct. 23, 2018), https://www.elle.com/life-love/a23927744/there-are-more-skeletons-in-the-closet-domestic-abuse-and-metoo/ (citing research that "93% of the 1800 women murdered by men in single victim/single offender cases during 2016 . . . were murdered by someone they knew").

8. Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 U. KAN. L. REV. 695, 696, 697–703 (2014); Nikki Godden, *Tort Claims for Rape: More Trials, Fewer Tribulations?*, *in* FEMINIST PERSPECTIVE ON TORT LAW 163, 163 (2012); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 555 (1991); *see also* Anita Bernstein, *Rape Is Trespass*, 10 J. TORT L. 1, 23–24 (2018); Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183 (1995). *But see* Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 539–40 (2013) (arguing that tort law is inadequate for much workplace sexual harassment).

behavior sometimes also violates state statutes that provide for civil liability, including punitive damages.[9]

Occasionally survivors sue their perpetrators, but most do not.[10] The high-profile lawsuits against Harvey Weinstein, Larry Nassar, and Jeffrey Epstein mask this important fact,[11] although scholars have repeatedly recognized it. In 2018, Jennifer Wriggins noted, "there is almost no tort litigation" against domestic violence perpetrators;[12] Martha Chamallas made the identical point with regard to

---

9. *See, e.g.*, CAL. CIV. CODE § 1708.5(b) (2019) (establishing the tort of sexual battery that can afford a plaintiff "damages, including, but not limited to, general damages, special damages, and punitive damages"); N.J. REV. STAT. § 2C:25-29(13)(b)(4) (2017) (allowing a court to order damages as part of domestic violence restraining order proceeding); *see also* Ashley Hahn, Comment, *Toward a Uniform Domestic Violence Protection Civil Protection Order Law*, 48 SETON HALL L. REV. 897, 908 (2018) (noting that only New Jersey's statute lists pain and suffering and punitive damages as available relief, but that California, Minnesota, and West Virginia have general "restitution" provisions that may allow recovery for "costs associated with the abuse").

10. *See* Godden, *supra* note 8, at 163 ("[C]ivil cases of rape remain relatively rare. . . ."); Tom Lininger, *Is it Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1568–71 (2008) (noting that there were only 587 published court opinions of sexual assault survivors suing their perpetrators in tort since the 1970s in the National Crime Victim Bar Association database); *cf.* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 13, 19 (1996) (noting that approximately 5% of civil cases in 1985–1986 and 1990–1991 involve allegations of "unlawful force," but only 27% of the defendants in these cases were individuals, and the rest were governments or businesses).

11. *See* Allyson Chiu, *Harvey Weinstein Reportedly Reaches $44 Million Settlement Over Sexual Misconduct Lawsuits*, WASH. POST (May 24, 2018), https://www.washingtonpost.com/nation/2019/05/24/harvey-weinstein-reportedly-reaches-million-settlement-compensate-accusers-creditors/; Stephanie Pagones, *Epstein Victims, Attorneys File Civil Suits Against Estate*, FOX BUS. (Aug. 30, 2019), https://www.foxbusiness.com/business-leaders/epstein-victims-attorneys-file-civil-suits-against-estate; Mitch Smith & Anemona Hartcollis, *Michigan State's $500 Million for Nassar Victims Dwarfs Other Settlements*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html.

12. Jennifer Wriggins, *Domestic Violence and Gender Equality: Recognition, Remedy, and (Possible) Retrenchment*, 49 U. TOLEDO L. REV. 617, 626–27 (2018) [hereinafter Wriggins, *Domestic Violence and Gender Equality*]; Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122, 135 (2001) [hereinafter Wriggins, *Domestic Violence Torts*] ("Domestic violence has created a massive epidemic of uncompensated intentional torts."); Carey, *supra* note 8, at 718 ("Domestic violence tort claims represent a negligible percentage of all legal actions."); Chamallas, *supra* note 8, at 536 & n.52 ("[D]omestic violence tort claims are still exceedingly rare." (noting only 34 reported domestic violence tort cases in 2003 compared to roughly two million injuries per year)).

sexual assault perpetrators, calling these claims "still quite rare."[13] One author estimated that fewer than 1% of all sexual assault survivors pursue a tort suit.[14]

This Article explains why survivors of gender-based violence[15] often do not sue their perpetrators and then proposes a solution.[16] While a tort suit offers what survivors want most from the legal system—accountability, revenge, empowerment, and deterrence—survivors generally cannot find lawyers to take their cases. Most plaintiffs' lawyers require the prospect of a substantial collectible judgment, something these cases frequently do not offer even when survivors are successful. This reality creates a justice gap and exposes survivors to further harm as plaintiffs' lawyers reject them as clients at a time when they need support.[17] "Civil recourse theory," which has gained traction over the last 20 years as an important justification

13. Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 45 (2018); Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 S.M.U. L. REV. 55, 63 (2006) (noting the "relatively few" tort actions "filed by sexual assault victims against alleged rapists" among the 2000 to 2004 state supreme court cases); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2205 n.39 (2000) ("A rape victim's losses are rarely compensated."). Tort law is such an insignificant remedy for most survivors that Deborah Tuerkheimer omitted any mention at all of the civil legal system in her article about the insufficiency of formal reporting channels, although she discussed the criminal justice system, university adjudicatory proceedings, and workplace processes. *See* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1151–66 (2019).

14. Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 32 (2015) (noting the lack of "robust data on the percentage of rape and sexual assault victims who pursue civil litigation" but citing data suggesting "that this figure is no larger than one percent").

15. I use the term "gender-based violence" because the survivors of domestic violence and sexual assault are typically female and the perpetrators are typically male, although males can be survivors and females can be perpetrators, and same-sex violence exists as well. This is the umbrella term used internationally to encapsulate both types of violence. *See, e.g.*, *What is Gender-Based Violence?*, EUR. INST. FOR GENDER EQUALITY, https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence (last visited Nov. 24, 2019). This Article does not discuss the differences in the victim populations, although there may be significant differences, including, but not limited to, the following: the willingness of a survivor to sue the perpetrator; the survivor's preference for legal remedies other than a tort suit (such as a restraining order or a divorce); the need to assert the tort remedy in another civil legal action—e.g., a divorce action; and the survivor's ability to purchase the insurance recommended in this Article (a domestic violence victim may have little economic autonomy). While these differences may affect who purchases and uses the proposed insurance, none of these differences affect the basic argument in favor of a new insurance product.

16. *See infra* Parts I, IV.

17. *See infra* text accompanying notes 129–32.

for tort law,[18] explains why survivors deserve access to the tort system regardless of the prospect of a substantial collectible judgment.[19]

This Article proposes a new insurance product as a solution. "Civil recourse insurance" would give survivors and other victims of intentional person torts[20] access to the tort system.[21] This proposal builds upon the work of scholars who have also proposed market-based insurance solutions to address survivors' needs,[22] but tries to avoid the pitfalls that have stymied prior proposals. Civil recourse insurance would be a form of legal expense insurance that, if purchased before the victimization, would allow a survivor to sue her perpetrator in tort with her insurance company paying for her lawyer. The lawyer would pursue her claim regardless of whether her judgment would be substantial or collectible, so long as the claim had merit. This insurance would be, in effect, a new type of prepaid legal plan (also known as a legal services plan), an already popular product in the United States.[23] It would improve upon existing prepaid legal plans because they hardly increase the amount of plaintiff-side representation for survivors. Consequently, this new product would be more like the legal expense insurance that exists abroad, such

---

18. *See generally* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTION TO U.S. LAW: TORTS 62–69 (2010) [hereinafter OXFORD]; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for Redress of Wrongs*, 115 YALE L.J. 524 (2005) [hereinafter Goldberg, *Redress of Wrongs*]; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 929 (2010); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1812 (2009); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) [hereinafter Zipursky, *Civil Recourse*]; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 70–93 (1998) [hereinafter Zipursky, *Rights, Wrongs*].

19. *See infra* Section II.B.

20. While the exact contours of the insurance coverage will need to be determined, I am not proposing that the insurance cover property torts (such as trespass or conversion), even though gender-based violence may give rise to these torts.

21. *See infra* Part IV.

22. *See, e.g.*, Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 249–52 (2014) (suggesting (1) a social compensation mechanism for victims of intentional crime that would be funded by a small levy on the sale of liability policies; (2) the development of "fortuity clause insurance" as an add-on to liability insurance that would allow compensation from one's own policy if the tortfeasor was protected by an exclusion in his own liability policy; (3) the passage of legislation that makes the liability insurer compensate the victim with the right of subrogation against the actual tortfeasor; and/or (4) outlawing exclusion clauses); Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism —and Crime*, 102 MICH. L. REV. 268, 319 (2003) (proposing an "ex ante crime-insurance subsidy" in "the form of a tax deduction or credit available" for loss insurance for properties "in high-crime areas" or in the form of "government-provided reinsurance for crime-related losses"); Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 759–60, 774 (2013) (discussing liability and first-party insurance); Wriggins, *Domestic Violence Torts*, *supra* note 12, at 152–61 (discussing liability insurance).

23. *See generally* Jeremy B. Tomes, *The Emergence of Group and Prepaid Legal Service: Embracing a New Reality*, 16 TRANSACTIONS: TENN. J. BUS. L. 25 (2014).

as in Germany and the United Kingdom.[24] In addition, to maximize the usefulness of the insurance benefit, this Article recommends that the insured be allowed to utilize her lawyer in the forum that best meets her needs for recourse, such as the civil legal system, a school disciplinary process, or even the criminal justice system.[25] Ideally, the coverage would allow representation in more than one forum. The insurance would also provide the insured with legal advice about these options.[26]

A preliminary analysis suggests that premiums could be in the range of approximately $100–$350/year, depending upon certain assumptions, and that insurers would make a profit.[27] Nonetheless, this Article recommends that the government take specific steps to ensure the success of the market and the affordability of the product for all.[28] Civil recourse theory itself provides a strong case for the desirability and appropriateness of governmental action.[29]

This Article unfolds in four parts. Drawing heavily on other scholars' work, Part I elaborates on the problem. Survivors are often unable to sue their perpetrators because attorneys, who work on a contingent-fee basis, will not take their cases. A substantial collectible judgment is typically foreclosed because of insurance exclusions, laws that protect tortfeasors' assets, and insufficient damages. Other potential methods for accessing the civil justice system, including representing oneself in small claims court, obtaining an attorney from a prepaid legal plan, taking out a lawsuit loan, relying on statutory attorneys' fees, or using Legal Aid, are either unrealistic, unavailable, or unwise. Part I also demonstrates that efforts by some plaintiffs' lawyers to find a deep pocket, through "underlitigation" of claims or filing suits against third-party defendants, are tactics that can be unavailing or unsatisfying.

Part II explores the reasons why the tort system is so important for survivors. Using anecdotes and empirical data, this Part demonstrates that survivors often want something other than compensation, a fact that puts them at odds with what lawyers want. In particular, survivors want accountability, revenge, empowerment, and deterrence. All of these goals could be furthered in the tort system regardless of a survivor's actual recovery. Part II also briefly addresses survivors' need for compensation. It recognizes the inadequacies of existing compensatory mechanisms but argues that solving that problem should not delay increasing access to the tort system for noncompensatory reasons. Part II then employs civil recourse theory to show that the tort system exists to meet a plaintiff's need for accountability, revenge, empowerment, and deterrence, regardless of financial compensation.

Part III lays out prior proposals to use third-party liability insurance and first-party loss insurance to meet survivors' needs. It identifies the particular

---

24. *See* discussion *infra* Section IV.B.1 and text accompanying notes 596, 689, 694.
25. *See infra* text accompanying note 618.
26. *See infra* text accompanying Section IV.A.
27. *See infra* text accompanying Section IV.B.2.a.
28. *See infra* text accompanying Section IV.C.4.
29. *See infra* Sections IV.C.1, 2.

obstacles that hampered the commercial success of those proposals and explains why those solutions were not optimal from the perspective of survivors. The discussion illuminates the merit of civil recourse insurance as a product.

Part IV then sets forth the details of the new insurance product and addresses issues of price, demand, and supply. Moral hazard and adverse selection are specifically analyzed. The German system of funding tort litigation is briefly described in order to make concrete the economic feasibility of legal expense insurance. Building upon the work of civil recourse theorists, Part IV also articulates the case for governmental involvement. It describes four governmental initiatives that would help develop and sustain a market for civil recourse insurance: insurance vouchers, reinsurance, governmental insurance, and mandatory coverage requirements.

Part IV concludes by examining the principal concern with the proposal: that insurance companies might exercise their power over their insureds in a way that would undermine survivors' wellbeing. Section IV.D acknowledges the merit of this concern and proposes some solutions to reduce its likelihood.

I. SURVIVORS LACK ACCESS TO THE CIVIL LEGAL SYSTEM

Most crime victims never utilize tort law to remedy their victimization. This fact has been known for over 50 years, ever since the Osgoode Hall study found that only 14.9% of crime victims considered suing, 5.4% consulted a lawyer, and a mere 1.8% recovered anything.[30] Often overlooked, however, is the study's finding that rape survivors, in particular, used the tort system less than other crime victims, even though a higher percentage of rape survivors suffered economic loss and faced a "compensation gap" than wounding or robbery victims.[31] In fact, no rape survivors consulted a lawyer or recovered tort damages.[32] While tort law has historically been irrelevant for most crime victims, it has been especially irrelevant for gender-based violence victims.

A. The Uncollectability of Substantial Judgments Deters Legal Counsel from Representing Survivors

A lot has changed since the Osgoode Hall study was published in 1968, but survivors of sexual assault and domestic violence continue to underutilize tort law.[33] While survivors may not sue for a variety of personal reasons,[34] including reasons

---

30. ALLEN M. LINDEN, THE REPORT OF THE OSGOODE HALL STUDY ON COMPENSATION FOR VICTIMS OF CRIME 21 tbl.II (1968).

31. *Id.* at 12 tbl.I, 33 tbl.VII.

32. *Id.* at 21 tbl.II. The authors attribute it to the fact that "these unfortunate women and girls were anxious to forget the unpleasantness of their experience." *Id.* at 22. It might also be due to the fact that the average out-of-pocket loss for rape survivors was only $77, far lower than the average for a wounding case ($264) or a robbery ($272). *Id.* at 36. In addition, one rape survivor said, "[W]hat I lost, cannot be replaced by money." *Id.* at 38.

33. *See supra* text accompanying notes 10–14.

34. *See* Lininger, *supra* note 10, at 1578–79, 1583–84 (mentioning privacy concerns, the inconvenience of lengthy civil proceedings, the potential relevance of comparative fault, and the potential impact on a criminal prosecution); *see also infra* note

that are specific to the survivor's race and class,[35] doctrinal barriers have largely disappeared,[36] and some social obstacles—like shame and guilt—appear to be abating.[37] Today the primary obstacle to suit is that lawyers will not take these

802; *cf.* ANDREW KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 39 (2009) (describing a study of five jurisdictions that showed the main reason domestic violence victims do not want to pursue a criminal action is fear of retaliation); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L & CRIMINOLOGY, 1194, 1221–23 (1997) (identifying inhibitions to rape reporting as embarrassment, retaliation, self-blaming, fear of the investigatory and adversarial processes, friends' and family members' attitudes, and a desire to preserve her relationship with the rapist); Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. COMM. PSYCHOL. 191, 191–92 (2010) (citing studies that identified shame and blame, concern they would not be believed because the rape was not stereotypical, fear of revenge, and fear of poor treatment by the police as inhibiting criminal justice participation).

35. *See generally* Sara S. Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1317 (2016) ("Negative experiences with, and perceptions of, criminal law, coupled with negative past experiences with public institutions, means that for many poor people, seeking formal legal help is off the table."); Elizabeth Kristen et al., *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 179–95 (2015) (identifying geographic, cultural, language, and immigration status barriers, among others, for low-income women who are abused at work); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 347 (2008), https://www.annualreviews.org/doi/pdf/10.1146/annurev.soc.34.040507.134534 (finding "a sense of entitlement or feelings of powerlessness, as well as differences in past experiences with civil justice problems, may play an important role in creating class-stratified patterns of action and inaction").

36. *See generally* Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 398 (2015) (discussing the demise of impediments to interspousal tort suits). Some hurdles remain. *See generally* 15 AM. JUR. PROOF OF FACTS 3D *Proof of Damages for Sexual Assault* 259 (Mar. 2019 update) [hereinafter *Damages for Sexual Assault*] (detailing challenges and suggesting ways around them).

37. *See, e.g.*, *Damages for Sexual Assault*, *supra* note 36, § 2 (noting that "[w]omen's inhibitions about public exposure [including 'shame and guilt' and 'adverse reactions of her family and friends'] are diminishing, due in part to changing societal attitudes toward rape and sexual assault"); Andrew Blankstein et al., *Harvey Weinstein Charged with Sex Crimes in Los Angeles*, NBC NEWS (Jan. 6, 2020), https://www.nbcnews.com/news/us-news/harvey-weinstein-accusers-rally-outside-courthouse-criminal-trial-begins-n1111246 ("Women are no longer willing to suffer in silence and are willing to testify under oath in a court of law." (quoting Gloria Allred)).

cases.[38] Plaintiffs' attorneys are typically hired on a contingent-fee basis.[39] Unless the case will bring a lawyer publicity and future clients,[40] a lawyer needs the prospect of a substantial collectible judgment to justify undertaking the representation.[41] Deborah Rhode observed: "Most complainants don't have the resources to pay for a lawyer, and most lawyers will only take cases if they generate substantial damages and are relatively easy to prove."[42] In addition, attorneys need

---

38. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 139 ("Getting a private attorney to take a case on a contingency basis where there are neither assets nor insurance is difficult, if not impossible."); *see also* Bublick, *supra* note 13, at 77 ("Perhaps the largest practical hurdle to direct litigation by the victim against the attacker is access to legal services."); *Time's Up Legal Defense Fund 2018 Annual Report*, NAT'L WOMEN'S LAW CTR. (2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/12/TIMES-UP-2018-Version-2.pdf (last visited May 8, 2019) ("Sexual harassment and assault is rampant. So many people need help fighting back – especially women working at low-wage jobs who can't afford attorneys to represent them.").

39. *See* Gross & Syverud, *supra* note 10, at 16 tbl.4 (noting individual plaintiffs had contingent-fee attorneys 96% of time); *Civil Justice for Victims of Crime*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/civil-justice-for-victims-of-crime (last visited June 8, 2019).

40. *See* HERBERT M. KRITZER, RISKS, REPUTATION, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE U.S. 46 (2004) (noting lawyers "capitalize on high-visibility cases . . . as a way of making themselves known to future potential clients").

41. Admittedly, attorneys may not take the case for other reasons. *See, e.g.*, Ellen Bublick & Jessica Mindlin, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 1, 5 (Sept. 2009) (mentioning private attorneys are interested in representing "sympathetic" plaintiffs, and not usually survivors who have "used drugs or alcohol," suffered "acquaintance" rape, or whose damages only materialize over time).

42. Elizabeth Blair, *Here's How the Time's Up Legal Defense Fund Actually Works*, NPR (Mar. 11, 2018), https://www.npr.org/2018/03/11/592307856/heres-how-the-time-s-up-legal-defense-fund-actually-works. Some gender-based violence claims can be difficult to prove as they occur in private. There may be no corroborating evidence, especially if the survivor did not call the police (she may have feared retaliation from the perpetrator or not wanted him arrested for other reasons). Even if she saw a medical provider for her injuries, she may not have told the provider the truth about what happened due to embarrassment or the presence of her perpetrator. In addition, victims of gender-based violence often face a credibility discount due to implicit gender bias and misconceptions about gender-based violence. *See generally* Merle H. Weiner, *You Can and You Should: How Judges Can Apply the Hague Convention to Protect Victims of Domestic Violence*, 28 UCLA WOMEN'S L.J. (forthcoming 2021).

assurance that the substantial judgment will be collectible;[43] otherwise, an easy case and substantial damages mean nothing.[44]

Three facts make the promise of a substantial collectible judgment unlikely in cases of gender-based violence and consequently hamper victims' ability to hire an attorney.[45] The barriers are liability insurance exclusions, uncollectable assets, and insufficient damages.

1. Liability Insurance Exclusions

Tort liability is overwhelmingly funded by liability insurance.[46] Yet perpetrators' liability insurance policies do not cover gender-based violence claims arising from intentional conduct.[47] Insurance scholar Tom Baker recognized the implications of this state of affairs: "Because the liability insurance component of homeowner's and renter's insurance does not provide coverage for assault claims, the victims of domestic violence, rape, and other crime-torts cannot, as a practical matter, bring tort actions to obtain civil redress for their injuries."[48]

Liability insurance policies exclude coverage for claims of sexual assault and domestic violence in several ways. If a perpetrator has insurance, it is typically a homeowners or renters policy, although it may be a commercial general liability

---

43. *See* Christine Rua, Note, *Lawyers for #UsToo: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault*, 51 COLUM. HUM. RTS. L. REV. 722, 752 (2020) ("Every attorney interviewed cited the challenges associated with collecting from assailants as a significant barrier in these suits."). Douglas Scherer once thought lawyers were not taking these cases because they misunderstood the "interspousal immunity doctrine" and the availability of tort suits outside of divorce proceedings. *See* Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 543 (1991). Many of the doctrinal obstacles have abated, see *supra* note 36, and do not explain the lack of representation today.

44. *Cf.* STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE 232 (2015) (noting the importance of a collectible judgment for plaintiffs' attorneys in Texas handling mostly medical malpractice claims).

45. While no statistics exist on lawyers' willingness to accept gender-based violence cases specifically, lawyers take employment discrimination cases at a much lower rate than other contingency-fee cases. *See* Kritzer, *supra* note 40, at 68, 71 (citing research that members of the National Employment Lawyers Association accepted only 21% of contingency-fee cases but tort lawyers accepted 49% of contingency-fee cases).

46. Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. SOC. SCI. 433, 436 (2010) ("Potential tort defendants without liability insurance rarely are sued, except if they have substantial assets."); Steven Shavell, *On the Social Function and the Regulation of Liability Insurance*, 25 GENEVA PAPERS ON RISK & INS. 166, 166 (2000) ("Liability coverage . . . accounts for over 90 per cent of tort-related payments in the United States.").

47. *See* Chamallas, *supra* note 8, at 536; Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 704–05 (2006); Wriggins, *Domestic Violence Torts*, *supra* note 12, at 124.

48. Baker, *supra* note 46, at 436; *see also* Merrimack Mut. Fire Ins. Co. v. Coppola, 690 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1997) (citing Brennan v. Orban, 678 A.2d 667 (N.J. 1996)) (acknowledging that "in cases where the abusive spouse does not have substantial assets, 'the lack of insurance coverage for intentional torts . . . may render the tort action an illusory remedy'").

("CGL") policy if the perpetrator runs a business,[49] or a professional liability policy if the perpetrator is a professional.[50] All of these policies usually say that an insured event must be an "occurrence," that is an accident, that results in "bodily injury."[51] Policies normally also specifically exclude coverage for intentionally caused injuries.[52] These provisions, as well as others,[53] make the perpetrator's insurance largely irrelevant when the plaintiff suffers sexual assault or domestic violence. Coverage questions are typically resolved on summary judgment,[54] with courts

---

49. 17 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119.6 (2d ed. 2011).

50. *See, e.g.*, Chicago Ins. Co. v. Manterola, 955 P.2d 982, 987 (Ariz. Ct. App. 1998) (holding a psychologist's professional liability policy barred claims arising from the psychologist's sexual relationship with a former patient because of the sexual-acts exclusion clause).

51. *See, e.g.*, RESTATEMENT OF LIABILITY INSURANCE § 34 cmt. a., illus. 1 (AM. L. INST. 2019) (including language from the 2004 ISO Commercial General Liability insurance policy).

52. 17 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119.6 (explaining that "standard CGL and homeowners policies have an intentional injury exclusion" for damage which is "expected or intended from the standpoint of the insured"); *see also* James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 105 (1990).

53. Some exclusions specifically call out sexual molestation, misconduct, or harassment. *See, e.g.*, Rudd v. Allstate Ins. Co., 54 Fed. App'x 634, 635 (9th Cir. 2002) (concluding no coverage existed for the insured when a housekeeper alleged her employer, *inter alia*, "'sexually attacked' her, 'repeatedly raped and sodomized' her, and 'physically assaulted her'"); Farm Family Cas. Ins. Co. v. Samperi, 242 F. Supp. 3d 83, 85–86 (D. Conn. 2017) (concluding no coverage existed for the insured when his step-daughter alleged he had "'physically, psychologically and emotionally abused' her for a period of around nine years"); NCMIC Ins. Co. v. Walcott, 46 F. Supp. 3d 584, 589 (E.D. Pa. 2014) (concluding no coverage existed for a chiropractor from a professional liability policy when a survivor accused him of sexual assault and battery). In addition, "family exclusions," which are "now standard in homeowners and automobile policies," preclude coverage for suits by one family member against another. *See* Jennifer Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 156 (2010). *See generally* Elizabeth F. Kuniholm & Kim Church, 4 LITIGATING TORT CASES § 54:19 (Dec. 2018) (noting liability policies purposefully exclude gender-based violence claims).

54. *See, e.g.*, West Am. Ins. Co. v. Vago, 553 N.E. 2d 1181, 1182, 1185 (Ill. App. Ct. 1990); Altena v. United Fire & Casualty Co., 422 N.W.2d 485, 488 (Iowa 1988); Spivey v. Safeco Ins. Co, 865 P.2d 182, 190 (Kan. 1993); Merrimack Mut. Fire Ins. Co. v. Coppola, 690 A.2d 1059, 1063–65 (N.J. Super. Ct. App. Div. 1997); W. Nat'l Assurance Co. v. Hecker, 719 P.2d 954, 960 (Wash. Ct. App. 1986).

denying coverage either because the act is not an "occurrence,"[55] because there is no "bodily injury,"[56] or because the policy excludes intentional injury.[57]

Parties can sometimes circumvent these provisions when a policy contains a "final adjudication clause." Such a clause allows the insurer to deny coverage only if there is a final adjudication of the conduct in a proceeding; consequently, coverage is typically permitted when the insured settles the claim without admitting liability.[58] However, final adjudication provisions are typically not found in homeowners and renters insurance policies.[59] Even when such a provision is available, such as when a survivor sues a third party on a negligence theory or when a perpetrator is covered by a director and officer liability policy,[60] the settlement is unlikely to acknowledge

---

55. *See, e.g.*, Shanahan v. State Farm Gen. Ins. Co., 193 Cal. App. 4th 780, 789 (2011) (holding, *inter alia*, that an employer's alleged "groping" of an employee's buttocks was intentional sexual misconduct, excluded by the definition of "occurrence" under the employer's renter's insurance policy); State Farm Fire & Casualty Co. v. Sipola, No. A18-0295, 2018 WL 4289014, at *2 (Minn. Ct. App. Sept. 10, 2018) (holding as a matter of law that sexual assault is an act done with the intent to cause bodily injury); Mfrs. & Merchs. Mut. Ins. Co. v. Harvey, 498 S.E.2d 222, 225 (S.C. Ct. App. 1998) (holding that alleged sexual assault is not an "occurrence"); Thompson v. West Am. Ins. Co., 839 S.W.2d 579, 581 (Ky. App. 1992) (same). *See generally* 17 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119.6, p. 2 (explaining the importance of the "occurrence" clause for denying claims relating to sexual misconduct).

56. STEVEN PLITT & JORDAN ROSS PLITT, 1 PRACTICAL TOOLS FOR HANDLING INSURANCE CASES § 5:8 (June 2018 Update) ("A majority of cases have held that sexual misconduct involving touching without penetration does not constitute 'bodily injury.'"); *see, e.g.*, Swan Consultants Inc. v. Travelers Prop. Cas. Co., 360 F. Supp. 2d 582, 289–90 (S.D.N.Y. 2005); Tackett v. Am. Motorists Ins. Co. 584 S.E.2d 158, 160, 166 (W. Va. 2003).

57. 17 APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 119.6 ("In almost all post-1986 cases, only the intentional injury exclusion is applicable."); *see also* Craig Brown & Melanie Randall, *Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State*, 30 QUEEN'S L.J. 311, 324 (2004) (calling the intentional-conduct exclusion in homeowners policies "the most significant obstacle" for survivors in the U.S.).

58. *See* RESTATEMENT OF LIABILITY INSURANCE § 45 cmt. h (AM. L. INST. 2019).

59. *See, e.g.*, ALLSTATE INS. CO., ALLSTATE INSURANCE COMPANY STANDARD HOMEOWNERS POLICY, http://docs.nv.gov/doi/documents/home_policies/AllStateForms/AP1.pdf (last visited Oct. 28, 2020).

60. Marie-France Gelot, *Sexual Harassment: Is Your Company Exposed?* LOCKTON 1 (Feb. 2018), https://www.lockton.com/whitepapers/Gelot_Sexual_Harassment_Jan_18_low_res.pdf?utm_source=White_Paper&utm_medium=Daily&utm_campaign=Sexual_Harrassment-Is_your_company_exposed%3F; *id.* at 4 (explaining employment-practice liability insurance ("EPLI") policies may have exclusions "for bodily injury . . . [or] . . . assault and battery," for "intentional or . . . criminal acts," but they typically exclude coverage only if there is a final judgment by a court that establishes the excluded conduct took place"). Director and Officer ("D&O") policies are often similar. Cameron Argetsinger, *Insurance Coverage for Sexual Misconduct Claims*, 65 RISK MGMT. 32, 35 (Feb. 2018). While general liability policies typically exclude coverage "for injuries that are 'expected or intended,'" the exclusion may not apply to negligent hiring or supervision claims. *Id.* These final-adjudication clauses are "now quite common" in commercial policies. Anthony P. Tatum, *Navigating the Changing Landscape of Commercial*

the perpetrator's wrongdoing for fear of voiding coverage.[61] Thus, a settlement that permits coverage may leave the survivor feeling that the perpetrator has avoided accountability, as discussed in Section I.B.2.[62]

2. Uncollectable Assets

The absence of insurance might seem unimportant if the perpetrator has assets to satisfy a judgment. Survivors sometimes sue perpetrators who have substantial assets. For instance, Steve Wynn, a developer of many luxury hotels, reportedly paid $7.5 million to a former employee who alleged he raped and impregnated her.[63] A second employee received almost $1 million because Wynn allegedly "pressured her to have sex from 2005 to 2006."[64] Other accusers have received smaller payouts.[65] Wynn does not appear to have used insurance to fund these payouts.[66]

But most perpetrators do not have vast wealth like Wynn.[67] In fact, some commentators assume perpetrators lack any assets.[68] While other commentators have questioned this assumption, noting that perpetrators exist in all economic classes,[69] the vast majority of Americans still have only modest assets.[70]

Insurance, 2014 WL 7666064, at *2 (commercial liability); *see also* Joseph J. Blyskal et al., *Ill-Gotten Gains: Policy Language and Public Policy Viewed Recently*, IN-HOUSE DEF. Q., Fall 2016, at 52 (professional liability); Todd D. Kremin, *Significant Legal and Policy Developments that May Impact Professional and Financial Lines Claims*, 2016 WL 1089830, at *7 (director and officer liability).

61. *See* William Jordan, *"Final Adjudication" of Liability Requirement in D&O Policy's Wrongful Misconduct Exclusion Is Not Satisfied While Insured Appeals Conviction*, 42 PROF. LIABILITY REP. 15 (July 2017) (explaining that it is an open question "whether an admission of fault in a settlement agreement is a sufficient final adjudication of liability," but noting cases in which courts found the final adjudication requirement was not satisfied by a settlement that did not admit wrongdoing).

62. *See infra* text accompanying notes 170–71.

63. Tiffany Hsu, *Wynn Resorts Fined $20 Million over Handling of Steve Wynn Misconduct Claims*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/business/wynn-vegas-nevada-gaming-commission.html.

64. *Id.*

65. Bruce Mohl, *How Steve Wynn Covered His Tracks*, COMMONWEALTH MAG. (Apr. 2, 2019), https://commonwealthmagazine.org/gambling/how-steve-wynn-covered-his-tracks//.

66. *See id.*; Alexandra Olson & Marley Jay, *Wynn Sex Misconduct Case Raises Question: When Do Investors Need to Know?*, CLAIMS J. (Feb. 8, 2019), https://www.claimsjournal.com/news/national/2018/02/09/283002.htm.

67. *See generally Forbes' Real Time Billionaires*, FORBES https://www.forbes.com/real-time-billionaires/#64f65de03d78 (last visited Sept. 11, 2020).

68. *See* Elizabeth Adjin-Tettey, *Sexual Wrongdoing: Do the Remedies Reflect the Wrong?*, *in* FEMINIST PERSPECTIVE ON TORT LAW 179, 192 (Janice Richardson & Erika Rackley eds., 2012) (stating "it is not uncommon" for perpetrators to "be impecunious, in prison or dead, with no assets to satisfy the plaintiff's losses").

69. *See, e.g.*, *Damages for Sexual Assault*, *supra* note 36, § 6.

70. *See* U.S. CENSUS BUREAU, TABLE 1. MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS:

Regardless, tortfeasors with assets are frequently judgment proof,[71] even assuming the perpetrator's resources are not exhausted by the tort litigation itself.[72] As Steven G. Gilles's article *The Judgment Proof Society* notes, Americans are "judgment-proof in law" even when they are not "judgment-proof in fact."[73] Although intentional tortfeasors cannot take advantage of bankruptcy protection,[74] they can invoke applicable exemptions including those that cover garnishment of wages, homesteads, retirement plans, and trusts.[75] As a consequence, even when "liability is clear, the damages are large enough to make litigation worthwhile, the tortfeasor possesses sufficient assets and income to satisfy the expected judgment (or a substantial fraction of it), . . . the legal barriers to tort judgment collection result in no (or a greatly diminished) recovery."[76]

To be clear, the law protects both the rich and poor alike when it comes to tort judgments. "Virtually all of the income received by persons below the poverty line is sheltered from tort claimants by legal rules."[77] Gilles continues: "As things stand, indigent tortfeasors have nothing to fear from tort law."[78]

3. Insufficient Damages

Finally, even when the judgment is collectable, damages are sometimes too small to warrant an attorney's time.[79] Robert W. Gordon summed up the state of affairs this way: "[T]he chief defect of the personal-injury contingent-fee system for handling tort claims is not that it encourages frivolous claims, but that it filters out too many meritorious claims because they do not promise to yield an adequate recovery."[80] The amount of potential damages affects whether a lawyer will take a

---

2011 (2011), https://www2.census.gov/programs-surveys/demo/tables/wealth/2011/wealth-asset-ownership/wealth-tables-2011.xlsx (reporting that the median American net worth is $68,828). Thirty percent of Americans have a net worth below $18,754. *See* PK, *United States Net Worth Brackets, Percentiles, and Top One Percent*, DON'T QUIT YOUR DAY JOB, https://dqydj.com/net-worth-brackets-wealth-brackets-one-percent/ (last visited Jan. 6, 2020) (first citing BOARD OF GOVERNORS OF THE FED. RES. SYS., SURVEY OF CONSUMER FINANCES (SCF) (2013) and then citing BOARD OF GOVERNORS OF THE FED. RES. SYS., SURVEY OF CONSUMER FINANCES (SCF) (2016)).

71. Gilles, *supra* note 47, at 606, 613. Individual defendants pay from their own pocket only "a trivial proportion of tort claim payments overall." Baker, *supra* note 46, at 436.

72. *See* Lininger, *supra* note 10, at 1578.

73. Gilles, *supra* note 47, at 613.

74. *Id.* at 650.

75. *Id.* at 617–18, 623–24 (calling these "the 'big four' categories of largely exempt assets").

76. *Id.* at 617.

77. *Id.* at 615.

78. *Id.* at 616.

79. *Id.* at 608 (suggesting that "a tort claim is not litigable" unless "the amount in controversy is at least three times the plaintiff's attorney's expected costs of litigation and collection," and that "claims below a threshold of $5000 are likely to fall into this 'unlitigable' category").

80. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DAEDALUS, Winter 2019, at 177, 182 (citing Richard L. Abel, *The Real Tort Crisis–Too Few Claims*, 48 OHIO ST. L.J. 443, 467 (1987)).

survivor's case,[81] although the law says that this fact is irrelevant to the merit of the survivor's intentional tort claim.[82]

The size of a potential damage award depends upon many facts, such as the perpetrator's act, the survivor's characteristics, the parties' relationship, and the jury's sympathies. The unwanted touch on the thigh has a lower value than a violent rape and is therefore less likely to be of interest to an attorney.[83] The survivor's characteristics can also affect the size of an award,[84] such as the survivor's race, gender, sexual orientation, class, etc.[85] The parties' relationship is also an important

---

81. *Cf.* Baker, *supra* note 46, at 436 (citing a Florida personal injury lawyer's attention to "liability, damages, collectability" in deciding whether to take a case).

82. Nominal damages are available for an intentional tort claim. *See* RESTATEMENT (SECOND) OF TORTS § 907 cmt. a, b (AM. L. INST. 1979).

83. *Compare* Wilson v. Taco Bell of Am., Inc., 917 So. 2d 1223, 1224, 1226 (La. Ct. App. 2005) (affirming an award of $500 for the battery of an employee by a manager when the manager touched the employee's thighs and made grabbing motions at her buttocks and breasts), *with* KLC v. City of Montgomery, 2020 WL 96586, at *4 (M.D. Ala. Jan. 8, 2020) (awarding a mentally disabled woman $500,000 in compensatory and $500,000 in punitive damages for rape by a police officer). As calculated here, a rough estimate suggests that rape and domestic violence cases with a female plaintiff should often have damages amounting to approximately $375,000 to $475,000, assuming the abolition of the collateral source rule. *See infra* note 93 (explaining collateral source rule). In 2017, researchers estimated that the per-victim lifetime economic burden of rape for women is $122,278, including medical costs (39% of the total), lost work productivity (52%), criminal justice activities (8%), and other costs including survivor property loss or damage (1%). Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREV. MED. 691, 693 tbl.1 (2017). Government sources pay an estimated 32% of the lifetime economic burden. *Id.* Similar numbers exist for the economic burden of domestic violence. In 2018, researchers estimated the per-victim lifetime cost of domestic violence. Using the researchers' data, the lifetime cost of domestic violence for female survivors is $103,767, comprised of medical costs (63%), lost work productivity (35%), criminal justice activities (1%), and other costs (1%). Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 AM. J. PREV. MED. 433, 435 tbl.1 (2018). It is estimated that governmental sources pay 39% of the lifetime economic burden. *Id.* The above numbers do not include pain and suffering. Using the "rule of thumb" that pain and suffering damages are typically three times the compensatory damages, one arrives at a lifetime cost to the female survivor (with government expenditures subtracted) of $472,183 for sexual assault and $374,599 for domestic violence, calculated as follows: (Lifetime economic burden + 3x lifetime economic burden) – (.32 or .39 x lifetime economic burden). Admittedly, some have questioned whether the "rule of thumb" for pain and suffering damages is accurate. *See* Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795, 817 (1998).

84. E.S. DeJonghe et al., *Women Survivors of Intimate Partner Violence and Post-Traumatic Stress Disorder: Prediction and Prevention*, 54 J. POSTGRADUATE MED. 294, 296 (2008) (citing studies that show "several personal characteristics, including control, commitment, goal-orientation, self-esteem, adaptability, social skills, and humor were associated with greater general levels of mental health, as well as lower PTSD severity," following intimate partner violence).

85. *See generally* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).

factor.[86] A relationship of trust can enhance the harm.[87] Yet even when facts exist that suggest a large damage award is possible, juries sometimes award much, much less.[88]

Apart from the case's facts, the jurisdiction in which the case is brought can also have a large impact on the size of the award and the willingness of an attorney to represent a survivor. Some states cap damages,[89] especially noneconomic and punitive damages,[90] and these can be the bulk of the plaintiff's damages.[91] Empirical work by Christine Rua indicated that "plaintiffs filed substantially more tort suits for sexual assault in states without punitive and noneconomic damage caps."[92] Other factors influence survivors' access to justice, such as whether the state has eliminated the collateral source rule for intentional torts[93] and whether the state's legal culture is unfriendly to plaintiffs who sue for gender-based violence or harassment.[94]

As suggested by the foregoing, whether a substantial collectible judgment is likely often turns on fortuity, i.e., facts that are simply beyond the survivor's

---

86. *See, e.g.*, *KLC*, 2020 WL 96586, at *4 (granting motion of default against a police officer for sexual assault and noting violation of trust in damage computation); Mitchell v. Bones, 385 F. Supp. 2d 62, 64 (D. Me. 2005) (same).

87. *See* Sharon Shin Tang & Jennifer J. Freyd, *Betrayal Trauma and Gender Differences in Posttraumatic Stress*, 4 PSYCHOL. TRAUMA 469, 474 (2012).

88. *Compare* Morton v. Johnson, 2015 WL 4470104, at *1, *10 (W.D. Va. July 21, 2015) (awarding $2,000 in compensatory damages and $5,000 in punitive damages against former prison guard in his individual capacity in civil rights suit for sexual assault of prisoner), *and* Morris v. Eversley, 343 F. Supp.2d 234, 237–38 (S.D.N.Y 2004) (noting "Judgment was entered in favor of Morris against Eversley for $1,000 in compensatory damages and $15,000 in punitive damages" for guard's sexual assault of prisoner), *and* Gay v. Gay, 302 S.E.2d 495, 496 (N.C. Ct. App. 1983) (upholding award of $13,169 in compensatory damages and $10,000 in punitive damages against husband who broke wife's leg, choked her, and threatened her life), *with* Rua, *supra* note 43, at 752 tbl.2 (showing average awards in sexual assault cases from 2008-18 in eight states with plaintiff verdicts, including six states with amounts over $1,000,000 and sometimes much over).

89. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUST. & DEMOCRACY (Aug. 22, 2020), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary.

90. Rua, *supra* note 43, at 743–44.

91. *Id.* at 752 tbl.2.

92. *Id.* at 749.

93. The collateral source rule disallows a reduction in the plaintiff's damages because the plaintiff received compensation from other sources, including from the plaintiff's insurer. Thirty-nine states have modified the rule and six states have done away with the collateral source rule altogether. Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 978–79 (2012). For a state that did away with the rule and does not distinguish between negligent and intentional tortfeasors, see, for example, IDAHO CODE § 6-1606 (2019).

94. Michael Corkery, *Low-Paid Women Get Hollywood Money to File Harassment Suits*, N.Y. TIMES, May 22, 2018 ("Still, harassment cases face an uphill battle in places like Mississippi, Mr. Watson said. 'It is such a conservative state,' he said. 'There are not many lawyers who want to take on these claims.'" (quoting Louis H. Watson Jr., a sexual harassment lawyer)).

control. Attorneys consider whether a third party with insurance can be blamed, the wealth of the perpetrator, and factors that affect the size of the award, including the law of the jurisdiction. The comments of an attorney whose practice is devoted to handling domestic violence and sexual assault tort cases revealed the problems potential plaintiffs face:

> We get calls every week with these types of cases. Recently a woman was raped by her uncle and they wanted to pursue a civil case, but he had no assets and there was no bystander who allowed it to happen . . . . In those situations I have to say I'm sorry, I know that there is clear liability but there is nothing worth going after.[95]

B. Survivors Lack Other Ways to Pursue a Tort Claim Against the Perpetrator

Survivors' difficulty securing legal counsel is a serious problem because there is no substitute for a competent attorney when suing a perpetrator for a tort. As this Section now discusses, a survivor can rarely obtain an attorney without a contingent-fee arrangement. Although a contingent-fee attorney might take the case if the attorney can devise a litigation strategy that does not depend upon suing the perpetrator for the intentional tort, these other strategies can have their own problems, as discussed below.

1. Alternatives to Contingent-Fee Arrangements

Tort claims are typically litigated in a court of general jurisdiction. While parties may be able to represent themselves, "effective access usually requires the services of a competent lawyer."[96] In fact, Charlotte Alexander's empirical study of Title VII sexual harassment claims in the Northern District of Georgia found that "[p]ro se plaintiffs were substantially less likely to survive dismissal and summary judgment than represented plaintiffs, and also less likely to receive a settlement."[97]

A survivor might be able to represent herself in small claims court, but that option is not realistic.[98] Some small claims courts disallow tort suits,[99] and others have very low limits for recovery.[100] Moreover, the unfamiliar process will deter plaintiffs from going to court without an attorney.[101] Yet the costs of hiring an

---

95. Kim Hayes, *Sexual Assault Victims Can Seek Monetary Justice*, ENJURIS, https://www.enjuris.com/blog/news/civil-suit-rape-cases/ (last visited Aug. 8, 2019) (citing Colleen M. Quinn, director of the Women's Injury Law Center at Locke & Quinn).

96. Gordon, *supra* note 80, at 178.

97. Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17, 50 (2019).

98. *See* David L. Ganz, *Small Claims Defense*, *in* 121 AM. JUR. TRIALS 189, § 24 (2020). *But see* NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 33 (2015) (finding 76% of plaintiffs in small claims court were represented by counsel).

99. *See, e.g.*, MICH. COMP. LAWS § 600.8424(1) (2019); Ganz, *supra* note 98, § 10 n.2 (discussing Montana).

100. Ganz, *supra* note 98, § 2 (noting a range of jurisdictional limits from $1,500 in Kentucky to $15,000 in Delaware, Georgia, and Tennessee).

101. Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 443 (1990) (noting that "[p]laintiffs, hesitant to

attorney for a suit in small claims court typically seems excessive in light of the low amounts that can be recovered,[102] and attorneys—who are generally unwilling to take contingent-fee cases with low value—are unlikely to take small claims cases on a contingent fee. If the survivor represents herself, she may find she is opposed by her perpetrator's attorney if the perpetrator has homeowners or renters insurance. The insurance company's duty to defend is often greater than its duty to indemnify.[103] If the survivor and her perpetrator are both unrepresented, the absence of an attorney as a buffer between her and the perpetrator may make the experience particularly unpleasant.

Statutory attorney-fee provisions for claims based on Title VII, Title IX, or § 1983[104] do not necessarily alleviate survivors' difficulty retaining counsel. Even assuming a civil rights statute addresses a survivor's claim, many civil rights attorneys have a contingency-fee arrangement with the client and prefer clients with the prospect of a substantial collectible judgment.[105] Lawyers know that most cases will settle,[106] and that settlement is commonly conditioned on a waiver of the statutory fees.[107] Attorneys' concerns about payment explain why low-income

---

pursue a small claim *pro se* because of complicated procedures and unfamiliarity with the law, may choose not to file").

102. *See id.* at 449.

103. *See generally* RESTATEMENT OF LIABILITY INSURANCE § 13 (AM. L. INST. 2019); *id.* § 45 cmt. b, c ("Courts . . . generally enforce liability insurance defense coverage for uninsurable civil actions."); ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS § 6:19 (6th ed. 2020) (noting that "even if it would be against public policy to afford coverage for the judgment sought against the insured, the insured should still be entitled to defense cost benefits"). *Compare* Aetna Life & Cas. Co. v. Barthelemy, 33 F.3d 189, 190, 193 (3d Cir. 1994) (holding duty to defend existed despite intentional injury exclusion in homeowner policy when insured alleged he acted with victim's consent, although both were intoxicated, and alleged victim said insured did not expect or intend to cause the specific injuries she suffered), *with* Terrio v. McDonough, 450 N.E.2d 190, 194 (Mass. App. Ct. 1983) (holding insurer had no duty to defend insured against allegations of rape and battery because of intentional injury exclusion).

104. *See generally* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2018); 42 U.S.C. § 1983 (2018); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018). The attorney-fee provisions are found at 42 U.S.C. § 2000e-5(k) (2018) and 42 U.S.C. § 1988(b) (2018).

105. Thanks to Liz Tippett, who was an employment law attorney before entering academia, for this insight. *See also* Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 24 (2018) ("[I]t is well settled that a public interest lawyer may require in a retainer agreement that the client will pay a contingency fee to the lawyer if the lawyer does not receive sufficient attorneys' fees after successful litigation. There is no reason lawyers cannot use a similar provision to cover settlements as well.").

106. Alexander, *supra* note 97, at 46 fig.5 (reporting results from a study of employment law cases filed and closed in the Northern District of Georgia and noting that most cases settle prior to discovery); Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since* Evans v. Jeff D., 102 HARV. L. REV. 1278, 1287 (1989).

107. *See* ALBA CONTE, 1 ATTORNEY FEE AWARDS § 3:13 (3d ed. 2020); *Fee as the Wind Blows*, *supra* note 106, at 1278–79. This reality makes attorneys cautious and likely to accept only clients who they believe will not accept a fee waiver as part of the settlement.

workers have trouble getting legal counsel despite Title VII's attorney-fee provision.[108] Also, lawyers know that they may not get statutory attorneys' fees even if they win at trial because "prevailing party" has a technical meaning.[109] A declaratory judgment that the plaintiff was sexually harassed may not trigger the provision unless significant damages are awarded.[110] In one case, for example, the court explained that the plaintiff was not entitled to recover attorneys' fees even though she settled her case for $2,500 against the alleged perpetrator of sexual harassment and obtained a jury verdict against the school for violation of Title IX.[111] Despite the violation, the jury had not awarded her compensatory or punitive damages.[112] The court was unmoved by the fact that the plaintiff claimed she "never really cared about the money, but . . . sought . . . simply 'the truth.'"[113]

Carle, *supra* note 105, at 23–24. Commentators debate whether representation agreements that foreclose the potential for fee waiver during settlement are ethical and enforceable. *Compare Fee as the Wind Blows*, *supra* note 106, at 1288 nn.77–78, *with* Carle *supra* note 105, at 24 (arguing such agreements respect clients' dignity and autonomy). Alternatively, the attorney may arrange for an hourly rate to come out of a settlement. Email from Kevin Mintzer, Attorney, to Merle H. Weiner (Dec. 20, 2019) (on file with author). This solution still encourages attorneys to represent only clients whose settlement is expected to be large enough to cover the attorney's fees.

108. *See* Kristen et al., *supra* note 35, at 183–84; *cf.* Evans v. Jeff D., 475 U.S. 717, 756 n.10 (1986) (Brennan, J., dissenting) ("[E]ven when a suit is for damages, many civil rights actions concern amounts that are too small to provide real compensation through a contingency fee arrangement.").

109. *See generally* SUSAN M. OMILIAN & JEAN P. KAMP, 1 SEX-BASED EMPLOYMENT DISCRIMINATION § 14:7 (June 2020) (noting "a court may deny an attorneys' fee to a plaintiff . . . where . . . little was accomplished beyond the moral satisfaction of knowing that the petitioners' legal rights had been violated in some unspecified way"); Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees To "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49, 52 (2009) ("[M]ost courts have determined that plaintiffs who receive only nominal damages are not entitled to attorney's fees.").

110. *See, e.g.*, Walker v. Anderson Elec. Connectors, 944 F.2d 841, 847 (11th Cir. 1991).

111. Mary M. v. N. Lawrence Cmty. Sch. Corp., 174 F.R.D. 419, 421, 424 (S.D. Ind. 1997).

112. *Id.* at 421.

113. *Id.* at 424. Attorney-fee provisions in Title VII and Title IX do not always allow plaintiffs to recoup fees associated with tort suits against the direct perpetrator that may be joined under supplemental jurisdiction. The plaintiff must prevail on the federal claim to obtain attorneys' fees. *See, e.g.*, McFadden v. Villa, 93 Cal. App. 4th 235, 237 (Cal. Ct. App. 2001). Title VII and Title IX have more rigorous requirements than tort law. *See, e.g.*, Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1019 (2018) (noting "even unwanted touchings have been deemed insufficiently severe or pervasive to warrant the law's intervention"). Title IX requires that an "appropriate official" acted with "deliberate indifference." *See, e.g.*, Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 635, 638–39 (E.D.N.Y. 2013) (granting summary judgment for school district on Title IX claim because school lacked actual knowledge that student would pull other students' hair "toward his genitals" while telling them to "suck his dick"). Attorneys' fees will also be denied even if the tort claim is meritorious and the federal claim fails for a reason

The #MeToo movement highlighted survivors' inability to secure legal representation and spawned the Time's Up Legal Defense Fund, another potential source of legal assistance for some survivors. Over 21,000 people have contributed more than $22 million to the fund,[114] and a nationwide posse of lawyers, part of the Legal Network for Gender Equity, are "willing to step up and undertake legal representation of individuals experiencing harassment or other forms of sex discrimination at school, at work, or in health insurance or health care settings."[115] As of September 2018, "[t]he fund . . . received more than 3,000 requests from women seeking help with harassment in their own workplaces."[116] Although the Fund is an important initiative, it now only addresses workplace issues, such as sexual harassment and related retaliation.[117] That leaves most victims of domestic violence and sexual assault that occur outside the workplace without representation. Philanthropy is insufficient to provide free representation to this broad category of victims.

Programs that provide free legal services for the poor are not really helpful either, assuming a survivor even qualifies. Federally funded programs provide indigent survivors with free legal counsel for obtaining restraining orders, but those attorneys cannot pursue a tort action because the government will not pay them for it.[118] Legal Aid attorneys can bring tort suits, but rarely do. Tort suits constituted less than 1% of the caseload of attorneys funded by the Legal Services Corporation in 2013.[119]

Another option, prepaid legal plans, also do not increase access to the tort system for survivors. Plans typically offer a fixed number of hours of consultation or legal document review for delineated items such as wills, home purchase

---

unrelated to its substantive merit. *See, e.g.*, Myers v. Cent. Fla. Inv., Inc., 592 F.3d 1201, 1226 (11th Cir. 2010) (federal claim was time barred); Bonner v. Guccione, 178 F.3d 581, 593–601 (2d Cir. 1999) (same).

114. *See Time's Up Legal Defense Fund Annual Report 1 (2018)*, NAT'L WOMEN'S L. CTR., https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/12/TIMES-UP-Legal-Defense-Fund-Annual-Report-2018.pdf.

115. *Legal Network for Gender Equity*, NAT'L WOMEN'S L. CTR., https://nwlc.org/join-the-legal-network/; *see also* Julia Carpenter, *Moonves' Negotiated Exit Shows the Power of #TimesUp*, CNN MONEY (Sept. 10, 2018), https://money.cnn.com/2018/09/10/pf/times-up-moonves/index.html ("[M]ore than 700 attorneys have worked with Time's Up to provide free initial consultations for victims. In some cases, Time's Up works with attorneys to fund these cases as they make their way to court.").

116. Carpenter, *supra* note 115.

117. *See Time's Up Legal Defense Fund*, NAT'L WOMEN'S L. CTR., https://nwlc.org/times-up-legal-defense-fund/ (last visited Oct. 4, 2020).

118. Federal grant programs sometimes prohibit awardees from using the funds to bring a tort suit. *See* Carey, *supra* note 8, at 732–33; *see, e.g.*, U.S. DEP'T OF JUSTICE, FISCAL YEAR 2017 LEGAL ASSISTANCE FOR VICTIMS GRANT PROGRAM SOLICITATION 3 (Jan. 5, 2017), https://www.justice.gov/ovw/page/file/922496/download.

119. *See 2013 LSC by the Numbers*, LEGAL SERVS. CORP., https://www.lsc.gov/media-center/publications/2013-lsc-numbers (758,689 cases closed in 2013, and only 2,513 were tort cases); *see also* Carey, *supra* note 8, at 732 ("Representation in these cases is nearly impossible to secure through a legal services or nonprofit law office.").

agreements, or tax matters.[120] Sometimes these plans address survivors' needs, such as by providing a survivor with help filing for a divorce or obtaining a restraining order.[121] A plan may address the need for tort representation, but typically these plans do not increase plaintiffs' accessibility to the legal system. U.S. Legal Services, for example, refers plaintiffs to network attorneys who will provide plaintiffs with a better contingency fee than the market rate.[122] The plan also protects the first $1,000 of recovery from any fee.[123] Yet if an attorney is unwilling to take a case on a contingency basis at the normal rate because the case does not offer the prospect of a substantial collectible judgment, the attorney would be *less* willing to take the case when the lawyer has to charge a lower contingency rate.

Presumably a survivor could hire a lawyer by the hour, but most people cannot afford such an arrangement.[124] A "lawsuit loan" is a relatively new source of funding for plaintiffs but is available only *after* a plaintiff finds a lawyer and files a lawsuit; moreover, these loans are usually a rip off, with an annual interest rate of

---

120. *See infra* note 477.

121. *See, e.g.*, BENEFITS GUIDE § 6:77 (2020) (discussing employer-provided group legal plans that cover family law); Jean Clauson, *Legal Service Plans Are a Win-Win for Attorneys and America's Middle Class*, GP SOLO, Jan.–Feb. 2019 (recommending ARAG legal service plan for domestic violence victims). The ARAG policy is available through employers and provides an attorney for purposes of obtaining a civil protection order. The policy allows the insured to pursue individuals in the same household and allows both the insured and the co-insured to pursue perpetrators outside the household. However, ARAG will not help the survivor of workplace gender-based violence sue her employer because the insurance is offered through the employer. Telephone Conversation with Ann Cosimano, General Counsel, ARAG (Aug. 29, 2019). Admittedly, some have found these prepaid legal plans insufficient to meet survivors' needs because they cover "a small number of people," may not cover "contested family matters," and may have "significant limits on the extent of legal services available." *See* Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 593 n.77 (2003). It would be advantageous to expand the availability and coverage of such plans, although such a recommendation is not the focus of this Article. However, it would be fruitful for insurers and policymakers to consider how civil recourse insurance might be combined with these prepaid plans, and whether legal expense insurance might provide representation for other legal issues intertwined with the intentional tort (such as a divorce).

122. Telephone Conversation with Debbie Corson, Client Service Director, U.S. Legal Services (Aug. 13, 2019). Other prepaid legal plans are similar. Telephone Conversation with Ann Cosimano, General Counsel, ARAG (Aug. 29, 2019) (discussing reduced contingency fees). ARAG provides four hours of general in-office legal representation, so long as that representation is not covered elsewhere nor excluded. That might allow a survivor some limited representation. In addition, ARAG offers a reduced hourly fee on certain matters, but it is generally not practical to fund litigation with an hourly fee. *Id.*

123. Telephone Conversation with Debbie Corson, *supra* note 122.

124. CIVIL JUSTICE COUNCIL, THE LAW AND PRACTICALITIES OF BEFORE-THE-EVENT (BTE) INSURANCE: AN INFORMATION STUDY 14 (2017); DANIELS & MARTIN, *supra* note 44, at 231; Bublick, *supra* note 13, at 77; Carey, supra note 8, at 733.

27%–60% and sometimes over 100%.[125] "Litigation financing,"[126] another option, has not yet become available to individuals for securing a plaintiffs' attorney.[127]

In sum, most survivors find themselves unable to sue their perpetrators because they need to hire an attorney, they cannot obtain one without the prospect of a substantial collectible judgment, and they lack other realistic payment methods. "Plaintiffs' lawyers function as the civil justice system's gatekeepers,"[128] and, unfortunately, the gate is closed for most survivors. Alternative methods for seeking legal redress or for securing a lawyer do not exist in practice. Instead, survivors of domestic and sexual violence fall within a justice gap. This is problematic because survivors have valid legal claims, and they do not seek access to the tort system primarily for compensation, as discussed in the next Part.

While the justice gap is a huge problem worthy of a solution, the process of attempting to secure a civil attorney may itself cause survivors harm. Attorneys end up telling survivors that their interests in holding their perpetrators accountable do not warrant an attorney's time and effort. This message is heard repeatedly by those survivors who talk to more than one lawyer.[129] Although no researcher has yet studied the effects of this rejection, the effects may approximate the well-documented harm that survivors experience in the criminal justice system when police or prosecutors fail to help.[130] As described by a researcher who studied

---

125. *See* Martin Merzer, *Cash-Now Promise of Lawsuit Loans Under Fire*, FOX BUS. (Apr. 19, 2013), https://www.foxbusiness.com/features/cash-now-promise-of-lawsuit-loans-under-fire; Carron Nicks, *Lawsuit Loans: How Do They Work?*, NOLO, https://www.nolo.com/legal-encyclopedia/lawsuit-loans.html (last visited Oct. 30, 2020).

126. *See generally* AM. BAR ASS'N COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE 5 (2013) (explaining that alternative litigation finance "refers to mechanisms that give a third party (other than the lawyer in the case) a financial stake in the outcome of the case in exchange for money paid to a party in the case" and the funds are used to fund either litigation or non-litigation expenses); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 863 (2015) (explaining that such financing usually is in exchange for "a percentage or fraction of the proceeds from the case or a multiple of the funds invested, if the plaintiff wins").

127. *See* AM. BAR ASS'N COMM'N ON ETHICS 20/20, *supra* note 126, at 6–9 (noting that such funding is typically for one of the following: nonlitigation purposes such as living expenses; large, complex, commercial litigation; or, to help lawyers secure lines of credit for litigation-related disbursements).

128. DANIELS & MARTIN, *supra* note 44, at 230.

129. *Cf.* KRITZER, *supra* note 40, at 73 (noting that people talk to multiple lawyers when lawyers reject them as clients); *id.* at 74 (noting that it is "fairly common for the lawyer to explain why he was not interested in taking the case, usually attributing it to dubious liability or a lack of damages").

130. Haley Clark, *What Is the Justice System Willing to Offer?*, 85 AUSTL. INST. FAM. STUD. 28, 34 (2010) (relaying statement from Penny, a survivor, who said, "You know, I'm a person being violated in, I would say, one of the worst ways a person could be violated, and I get this little letter to say, 'Sorry it's not really important'. For the criminal justice system to say, 'Well it's not worth our pursuing', that's the bit that's been the hardest. Apart from the abuse itself, that part has been really hard. It almost felt like being abused again.") (Penny was one of the 22 subjects who experienced sexual assault either in adulthood and/or during childhood and either by a family member or someone else)); *id.* (citing research by

survivors' interaction with actors in that system, "The prioritisation afforded to proceeding with certain cases over others seemed to denigrate the value of their experience, question their credibility as a person, and repeat the position of insignificance that the perpetrators put them in."[131] Survivors' treatment in the criminal justice system has been labeled the "second assault,"[132] and a survivor's rejection by plaintiffs' attorneys (or their administrative staff who screen cases), who otherwise mean well, may be the "third assault."

2. Alternatives to Intentional Tort Suits Against the Perpetrator

To the extent that survivors find lawyers, it is usually because the lawyers can structure the case to trigger insurance coverage by alleging something other than intentional misconduct. Tort lawyers appreciate the importance of insurance to the workings of the U.S. tort system. Consequently, they sometimes "underlitigate," e.g., claim that the plaintiff was injured by the perpetrator's negligence instead of intentional misconduct,[133] or they focus on the perpetrator's defamatory denials.[134] More commonly, they pursue a culpable third party who has liability insurance.[135] These third parties are often businesses that carry employment practices liability insurance, director and officer liability insurance, or general commercial liability insurance, all of which may afford coverage.[136] Suits against these "once-removed" defendants are rooted in theories like premise liability, respondeat superior, and negligent supervision.[137]

Yet intentional torts cannot always be successfully underlitigated against the perpetrator. The court may find the effort an attempt to circumvent the exclusions in the defendant's liability insurance or consider it offensive to some

---

Herman and Koss). Many contingent-fee lawyers are concerned about their reputations for purposes of attracting future clients, see KRITZER, *supra* note 40, at 81–82, and their self-interest may result in more sensitive interactions with potential clients than prosecutors offer victims. However, anecdotes in Kritzer's work give reason for concern. *See, e.g.*, *id.* at 79 (example of lawyer engaged in victim blaming, albeit in the context of a negligence claim not involving gender-based violence).

131. Clark, *supra* note 130, at 34.

132. Patricia Yancey Martin & R. Marlene Powell, *Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853, 856 (1994). Ironically, Madigan and Gamble, who recognized that the "second rape" could occur whenever there was "apathy" from those the survivor told, see LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM x (1989), saw hope for victims' empowerment in the civil justice system. *See id.*

133. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997); Swedloff, *supra* note 22 (citing Pryor, *supra*).

134. *See, e.g.*, Graham Bowley, *7 Women Suing Bill Cosby Reach Settlement in Defamation Case*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/arts/television/cosby-defamation-lawsuit-settlement.html.

135. *See* Baker, *supra* note 46, at 436–37; Bublick, *supra* note 13, at 61.

136. *See supra* note 60.

137. Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 443–44 (2013).

other policy.[138] For example, in *State Farm Fire and Cas. Co. v. Tippett*,[139] the plaintiff framed her claim as negligence, as well as sexual assault and battery, to trigger coverage.[140] The plaintiff accused the policyholders of using a date-rape drug to enable their attack.[141] Specifically, she alleged that while she was incapacitated, one of the insureds "dragged her to a vehicle in the parking lot of the club, where he intended to and did strike her and sexually assault her by touching her breasts, digitally penetrating her vagina, and/or engaging in vaginal sexual intercourse and/or oral sex."[142] She claimed that the perpetrators were negligent in failing to realize that she was incapacitated.[143] Calling her argument "unreasonable and illogical," and its implications a violation of public policy, the court held that the intentional injury exclusion of the insureds' homeowners policy barred the claim.[144] The defendants' insurance policy did not provide coverage for "negligent rape."[145]

Similarly, courts sometimes reject a plaintiff's effort to access liability insurance by suing a third party, such as a landlord, employer, school, or premises owner,[146] assuming there is even a third party who can be blamed for something.[147] If the third party is a coinsured, the intentional act exclusion may apply to the coinsured party and bar recovery.[148] Any exceptions to the intentional act exclusion (such as for vicarious liability or negligent supervision) may not apply if the insured

---

138. Sometimes courts see such efforts as attempts to circumvent a shorter statute of limitations. *See, e.g.*, Baska v. Scherzer, 156 P.3d 617, 622, 627 (Kan. 2007); Gouger v. Hardtke, 482 N.W.2d 84, 88 (Wis. 1992).

139. 864 So. 2d 31 (Fla. Dist. Ct. App. 2003).

140. *Id.* at 32.

141. *Id.* at 33.

142. *Id.*

143. *Id.* at 36.

144. *Id.*

145. *Id.*; *see also* Florek v. Vannet, No. A18-0997, 2019 WL 1320619, at *3 (Minn. Ct. App. Mar. 25, 2019) (allowing negligence per se claim for alleged sexual assault, but denying liability insurance); *cf.* Am. Nat'l Fire Ins. v. Schuss, 607 A.2d 418, 419 (Conn. 1992) (rejecting loss insurer's attempt to hold defendant, and presumably liability insurer, responsible for fire by arguing that it was an act of negligence instead of an intentional tort). *But see* Borrack v. Reed, 53 So. 3d 1253, 1259 (Fla. Dist. Ct. App. 2011) (May, J., concurring specially) (expressing disdain that court allowed plaintiff to characterize boyfriend's actions as negligent, and not intentional, when he tricked her into jumping off of a cliff and into water where she was injured upon landing).

146. *See, e.g.*, Doe v. Alsaud, 12 F. Supp. 3d 674, 677 (S.D.N.Y. 2014); W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B., 766 S.E.2d 751, 778 (W. Va. 2014). *See generally* Bublick, *supra* note 13, at 103 ("In contrast to the large number of cases affording coverage for third party-negligence claims, in a number of similar cases, allegations of third party negligence were not covered by other CGL or homeowners insurance policies.").

147. *See* Chamallas, *supra* note 13, at 49 (contrasting "the relatively high number of tort claims brought against third parties for rape and sexual assault" with the "very few such third-party claims . . . brought in the domestic violence context").

148. *See, e.g.*, Allstate Ins. Co. v. McCranie, 716 F. Supp. 1440, 1449 (S.D. Fla. 1989); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 821–22 (D. Alaska 1987). *But see also* Fischer, *supra* note 52, at 148–49 (explaining that intentional-act exclusions do not usually bar coverage when an innocent coinsured is sued on a theory of derivative liability unless the intentional tortfeasor controls the business).

was involved in the wrongdoing in some way.[149] Efforts to sue a third party can also be unsuccessful when the action would violate another policy, such as when the third party is the U.S. government. The Federal Torts Claim Act precludes a negligence claim if it "arises out of" an assault, and this would be the case, for example, if the government negligently hired a sexual predator who attacked the plaintiff.[150]

Moreover, underlitigating claims against the perpetrator or suing a third-party defendant can place a survivor in a worse doctrinal position than if she simply sued the perpetrator for the intentional tort. Damages are not presumed in a negligence action, as they are for intentional torts.[151] As a result, for example, the appellate court in *Fritz v. Baptist Memorial Health Care Corp.*[152] affirmed a judgment in favor of a nursing home despite the fact that the jury found the nursing home had breached a duty of care when its resident sexually assaulted another resident who had dementia.[153] The plaintiff could not prove damages because she had no physical injury, did not report pain, and said that she was "okay" afterwards.[154] In addition, survivors may experience a loss of privacy when proving damages as part of a negligence case; defendants may obtain access to their mental health records.[155] A negligence suit may also foreclose a punitive damage award,[156] thereby eliminating the prospect of punishing the perpetrator's behavior.[157] Finally, states typically allow a defendant accused of negligence, but not an intentional tort, to raise the plaintiff's fault as a defense.[158]

---

149. Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1281 (1994).

150. *See, e.g.*, Lambertson v. United States, 528 F.2d 441, 443 (2d Cir. 1976); Lilly v. United States, 141 F. Supp. 2d 626, 630 (S.D. W. Va. 2001); Turner v. United States, 595 F. Supp. 708, 709–10 (W.D. La. 1984); *cf.* Davis v. Fulton Cty., 90 F.3d 1346, 1352–54 (8th Cir. 1996) (dismissing a 42 U.S.C. § 1983 suit against prison and its employees for rape by an escaped convict because of official immunity doctrine and public duty doctrine).

151. Reynolds v. MacFarlane, 322 P.3d 755, 760 (Utah Ct. App. 2014).

152. Fritz v. Baptist Mem'l Health Care Corp., 211 S.W.3d 593, 594 (Ark. Ct. App. 2005).

153. *Id.*

154. *Id.*

155. *See, e.g.*, Evans v. Club Mediteranee, 184 A.D.2d 277, 277 (N.Y. App. Div. 1992) (denying a protective order for mental health records because a plaintiff who alleged sexual assault placed her mental health at issue).

156. *See* U.S. DEP'T OF JUSTICE, PUNITIVE DAMAGE AWARDS IN STATE COURTS 2005 1 tbl.5 (2011) (showing that plaintiffs who alleged intentional torts and went to trial won punitive damages in 30% of their cases, as compared to plaintiffs who alleged premises liability or medical malpractice and won punitive damages in less than 0.5% and 1% respectively); *see also* Rua, *supra* note 43, at 760.

157. *See, e.g.*, Schmidt v. Schmidt, 2000 WL 895264, at *1, *3 (Ohio Ct. App. June 30, 2000) (affirming punitive damages award of $61,759 for assault and battery, for throwing his wife's phone at the wall, ripping off her nightshirt, pushing her against the wall, and disabling her car, although compensatory damages were nominal, because "Appellant's behavior demonstrates an intolerable disregard for the rights and safety of his estranged wife").

158. *See* Ellen Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1415 (1999).

Even when available and successful, plaintiffs may find these workaround strategies largely unsatisfying.[159] When employed against the perpetrator, a negligence claim shifts the focus away from the moral reprehensibility of the perpetrator's conduct. Ellen Pryor called the underlitigation of gender-based violence claims "particularly ironic and unfortunate—given the lessons that feminist scholars have taught about the value of consciousness-raising and personal and shared narratives."[160] Also, this strategy, where successful, undermines the deterrent effect of tort law. The insurance company, not the perpetrator, incurs the cost of the perpetrator's behavior, but the insurance company never charged the perpetrator premiums for that coverage.[161]

Although third-party suits may usefully compensate victims and deter acts that enable gender-based violence,[162] this strategy can similarly shift the focus in a troubling way.[163] The shift occurs for a variety of reasons. Sometimes the perpetrator is not named in the suit.[164] Plaintiffs' attorneys may not want the perpetrator to be part of the case because the jury is likely to blame the judgment-proof perpetrator instead of the insured third party.[165] Sometimes the perpetrator settles quickly,[166] leaving the attorney focused on the third party and its liability. During this longer phase, the perpetrator's acts may receive little attention as the third-party defendant emphasizes its own lack of responsibility.[167] When the perpetrator or the third party settle, the agreement may not discuss the perpetrator's wrongdoing for fear that it

---

159. *See* Bublick & Mindlin, *supra* note 41, at 5; Swedloff, *supra* note 22, at 745.

160. *See* Pryor, *supra* note 133, at 1748, 1750.

161. *See* David A. Fischer & Robert H. Jerry, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 887–88 (2001) (citing Pryor, *supra* note 133).

162. *See* Swan, *supra* note 137, at 404–07; *see also* Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 588–89 (2005) (finding some survivors felt rage at the third party and wanted them held accountable too).

163. *See* Rua, *supra* note 43, at 767.

164. Sara L. Crewson, Note, *Women Made Whole: How Tort Law Can Change the Lives of Domestic Violence and Sexual Assault Victims* 16 (2015) (on file with author).

165. The presence of the perpetrator may undermine altogether the survivor's case against the third party in a state with either joint and several liability or several liability if the jury only pins responsibility on the perpetrator.

166. See Bublick & Mindlin, *supra* note 41, at 3 ("In a significant number of the 2000–2005 appellate court decisions in cases filed by sexual assault victims, the victim settled with the perpetrator before trial and proceeded with litigation only against the other party.").

167. *See* Chamallas, *supra* note 13, at 54 (discussing the "sex exception" to vicarious liability based on a belief that sexual abuse "is exceptional behavior motivated by lust, rather than by opportunity and abuse of power"); Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 14, 14, 17 (2018) (describing narrow interpretation of "scope of employment" for vicarious liability and narrow interpretation of "outside scope of employment" for negligence liability); *see, e.g.*, Jackson v. N.Y. Univ. Downtown Hosp., 893 N.Y.S.2d 235, 236–37 (N.Y. 2010) (affirming grant of summary judgment because there was no evidence hospital knew or should have known of the defendant's "propensity for the conduct which caused the injury").

will trigger an insurance exclusion.[168] Additionally, any third-party liability may have little effect on the perpetrator. Employers, for example, rarely pursue the perpetrator for indemnification,[169] although admittedly the perpetrator might lose his or her job. The unsatisfying nature of these suits was evident in the comments of some plaintiffs in response to the settlement of their suit against Harvey Weinstein and his film company. The settlement neither required Mr. Weinstein to admit wrongdoing nor required him to pay anything personally.[170] One of the plaintiffs said the settlement made her feel "defeated and hopeless."[171]

In short, these alternative strategies do not exist for all survivors, they come with doctrinal disadvantages, and they often shift attention away from the perpetrators' wrongdoing in a problematic way. In addition, the fact remains that many perpetrators are never made to account at all for their actions in the civil justice system.

Some commentators focus on survivors' need for compensation when they criticize the tort system and recommend alternatives to it.[172] Yet compensation is not the only, or even the best, justification for access to the tort system in this context. Admittedly victims need compensation and tort law fails to provide it. But that is a different problem with different potential solutions.[173] Regardless of whether or how survivors obtain compensation, they also deserve a formal, publicly sanctioned, survivor-controlled process to hold their perpetrators accountable.

II. SURVIVORS NEED ACCESS TO THE CIVIL LEGAL SYSTEM

As demonstrated, survivors often lack access to the civil legal system because gatekeeper attorneys require the prospect of a substantial collectible judgment to take a plaintiff's case. This Part will now establish that most survivors care little about compensation. Rather, they seek access to the civil legal system for

---

168. Knutsen, *supra* note 22, at 226. Knutsen discusses other "litigation distortions" from underpleading or focusing on a third party's liability, *id.* at 224, 251, including inefficiency in disputing the nature of the tortfeasor's conduct, "unnecessary delay, complication, and expense" from adding a third-party defendant, and pressure to settle claims, instead of litigate them, for fear of triggering an insurance exclusion. *Id.* at 224–26.

169. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1243 (1984) (stating that generally, "empirical evidence suggests that principals very rarely pursue their rights to indemnity against their agents"). It may be bad optics for an employer to go after a former employee.

170. Ray Sanchez & Sonia Moghe, *Judge Rejects Harvey Weinstein's $19 Million Settlement with Accusers*, CNN (July 14, 2020), https://www.cnn.com/2020/07/14/us/harvey-weinstein-settlement-rejected/index.html.

171. Megan Twohey & Jodi Kantor, *Weinstein and His Accusers Reach Tentative $25 Million Deal*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/us/harvey-weinstein-settlement.html.

172. *See, e.g.*, Rua, *supra* note 43, at 764 (proposing "the goals and benefits of . . . tort suits" be obtained instead through criminal restitution); Nora West, Note, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 U. TORONTO FAC. L. REV. 96, 115 (1992) ("[A] civil suit would not be advisable when the attacker is imprisoned or known to be poor, because a judgment for damages would likely be unsatisfied.").

173. *See infra* Section II.A.3.

accountability, revenge, empowerment, and deterrence. The mismatch between attorneys' needs and survivors' needs creates the access to justice problem.

A. It's Not About Compensation

Survivors of domestic and sexual violence often want access to the tort system for reasons other than collecting a substantial judgment, although most survivors undoubtedly welcome the money when it exists. Like other tort plaintiffs, compensation is often not survivors' most important motivation. Tamara Relis's empirical study of medical malpractice cases revealed that plaintiffs are often suing for "extra-legal aims of principle," including "desires for acknowledgments of harm, retribution for defendant conduct, admissions of fault, prevention of reoccurrences, answers and apologies . . . ."[174] In fact, Francis Shen interviewed plaintiffs' attorneys who represent victims of gender-based violence and found "a common theme: with the criminal system failing them, clients sought out justice through the civil system. Yes, there was money involved. But these survivors were after something far deeper."[175] For example, John Clune, a well-known plaintiffs' lawyer who represents many sexual assault survivors, told Shen, "Every single client that comes into my office says, 'This isn't about the money.'"[176] Other plaintiffs' lawyers confirm this fact.[177] When the famous women's rights attorney Gloria Allred was asked what her clients were seeking in their civil suit against Jeffrey Epstein's estate, she explained, "'[T]he truth,' as well as 'justice, which they were denied in the criminal justice system.' Lastly, she said, accountability."[178]

1. The Simpson/Goldman Example

The civil case against O.J. Simpson illustrates well the importance of the tort system's nonmonetary benefits for both victims of gender-based violence and their families. On June 12, 1994, Nicole Brown Simpson and Ron Goldman were murdered.[179] The families brought a wrongful death suit against O.J. Simpson and received a much better result than from the criminal proceedings, which ended in

---

174. Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 706–07, 721, 743 (2007) (noting that 65% of plaintiffs failed "to mention financial compensation as an objective at all . . . unless probed").

175. Shen, *supra* note 14, at 38–39.

176. *Id.* at 38.

177. *See, e.g.*, Maureen Balleza, *Many Rape Victims Finding Justice Through Civil Courts*, N.Y. TIMES (Sept. 20, 1991), https://www.nytimes.com/1991/09/20/health/many-rape-victims-finding-justice-through-civil-courts.html ("G. Robert Friedman, a Houston lawyer who has won several large judgments for rape victims, said the victims' pursuit of litigation is usually fueled more by a desire for justice than an interest in the money.").

178. Stephanie Pagones, *Epstein Victims, Attorneys File Civil Suits Against Estate*, FOX BUS. (Aug. 30, 2019), https://www.foxbusiness.com/business-leaders/epstein-victims-attorneys-file-civil-suits-against-estate. Allred then mentioned the estate should compensate the victims for their pecuniary losses. *Id.*

179. Emily Shapiro, *25 Years Ago, the OJ Simpson Murder Case Began: A Look Back at Key Moments in His Life*, ABC NEWS (June 11, 2019), https://abcnews.go.com/US/key-moments-oj-simpsons-life/story?id=48724637.

Simpson's acquittal.[180] Simpson was found liable for $33.5 million, including $25 million in punitive damages.[181]

As many predicted, recovering this award was near impossible. Simpson claimed during the trial that he was destitute.[182] The jury seemed to base the award on Simpson's future earnings,[183] although, as one plaintiffs' attorney noted, "Knowing the infamy that this man lives in now, . . . his chance of making money would be slim to none."[184] Twenty-five years after the murders, the attorney for Nicole Brown Simpson's estate reported that the victims' families have received "[n]ot much of anything."[185] Ron Goldman's sister revealed that they collected "less than 1%" of the amount awarded.[186]

Nonetheless, the verdict was extremely meaningful for the families. At the time of the verdict, Fred Goldman, the father of the decedent, said, "The jury decision of last Tuesday was the only decision important to us, to find the killer of my son and Nicole responsible . . . . The money is not an issue. It never has been. It's holding the man who killed my son and Nicole responsible."[187] John Kelly, the lawyer for Nicole Brown Simpson's family, said their objective was "never money."[188] Twenty-five years later, Kelly elaborated: "I think there is just some measure of justice, some measure of closure. Not everybody, but a lot of people were able to move on with their lives after that."[189]

The verdict had a social impact too. Its newsworthiness was reflected in the fact that television stations announced it during the President's State of the Union.[190] At the time, law professor Vivian Berger said, "This is as close as a civil jury can come to declaring him a murderer."[191] Daniel Petrocelli, the attorney for plaintiff Fred Goldman, described the verdict as the civil case's "legacy."[192]

---

180. *Id.*

181. B. Drummond Ayres Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), https://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html.

182. *Id.* (stating that he "pleaded in court that he was more than $850,000 in debt").

183. *Id.*

184. *Id.* (citing Browne Greene).

185. Charles Creitz, *Nicole Brown Simpson's Estate Lawyer: Lasting Memory of OJ Civil Case Was Getting 'the Right Result,'* FOX NEWS, (June 12, 2019), https://www.foxnews.com/us/oj-simpson-murders-25th-anniversary-civil-case-attorney-for-nicole-brown-family-my-lasting-memory-was-the-right-result-at-the-end (citing John Q. Kelly).

186. Richard Winton, *Kim Goldman's Crusade: Make O.J. Simpson Pay and Never Forget*, L.A. TIMES (June 12, 2019), https://www.latimes.com/local/lanow/la-me-oj-simpson-murders-kim-goldman-20190612-story.html.

187. Ayres, *supra* note 181.

188. *Id.*

189. Creitz, *supra* note 185.

190. Dominick Dunne, *Why the Civil Case Against O.J. Simpson Would Never Be Enough*, VANITY FAIR (Apr. 1997), https://www.vanityfair.com/magazine/1997/04/dunne199704.

191. Ayres, *supra* note 181.

192. Jeffrey Cole, *Daniel M. Petrocelli: Reflection on the O.J. Simpson Case*, 23 LITIG. 32, 38 (1997).

While the civil suit was important to establish "accountability" and "justice,"[193] some family members also used it to obtain revenge. At the time of the civil trial, Goldman's sister, Kim, said, "It doesn't have anything to do with money . . . . If we can make him feel a quarter of the pain we feel, it's worth it."[194] Many years later, she still harbored a desire for revenge: "I certainly wish that something bad would happen to him. I'd love to see all hell break loose over him. He killed my brother and mocked us for 20 years. I wish the worst for him."[195] She admitted that she "dreams of revenge."[196] She said, "I still experience intense, immeasurable angers. I also let myself daydream of killing the beast that destroyed my brother's future."[197]

At the time, some people winced at the thought that the families might have been seeking revenge through tort litigation. For example, Fred Goldman's rabbi said Goldman is "a 'moral force,' seeking justice, not revenge."[198] A friend emphasized the Goldman family's attempt to make the legal system more victim friendly: "If you can do something constructive, that's not vengeance."[199] A juror speaking about the punitive damages that were awarded emphasized, "This is not about revenge. This is about justice and there's a big difference. And I get real upset when people think this is about revenge, it is not. It's not a happy day, it's really not."[200] Some recognized that it is often impossible to know a plaintiff's true motive, although observers will ascribe one nonetheless. Lawyer Ronald Kuby remarked, "Unless I quite mistake the expression on Fred Goldman's face, it's not about money . . . . It's about justice or revenge, depending on your point of view."[201]

Like the Simpson and Goldman families, survivors of gender-based violence seek a range of outcomes from the civil legal system besides compensation. That fact is clear from the qualitative studies discussed next.

---

193. Stephanie Simon, *Civil Cases Offer Victims Another Chance to Prove a Point*, L.A. TIMES (Sept. 2, 1996), https://www.latimes.com/archives/la-xpm-1996-09-02-me-39938-story.html ("My client lost his son. This is his last chance to seek justice." (quoting the attorney for Fred Goldman)).

194. Vincent J. Schodolski, *Round 2: Simpson's Testimony Likely in Pending Civil Lawsuits*, CHI. TRIB. (Oct. 6, 1995), https://www.chicagotribune.com/news/ct-xpm-1995-10-06-9510060254-story.html.

195. Peter Sheridan, *I Can't Forgive OJ Simpson for What He Did, Says Ron Goldman's Sister*, EXPRESS (June 7, 2014), https://www.express.co.uk/life-style/life/480845/Kim-Goldman-I-can-t-forgive-OJ-Simpson-for-what-he-did-to-my-brother-Ron.

196. *Id.*

197. *Id.*

198. Phil McCombs, *The Goldmans' Trial of Tears*, WASH. POST (Oct. 31, 1995), https://www.washingtonpost.com/archive/lifestyle/1995/10/31/the-goldmans-trial-of-tears/c37f4f01-2713-4494-b22a-f3a609828e1a/.

199. *Id.* (citing Sherie Karp).

200. *USA: Reaction to OJ Simpson Civil Trial Verdict*, ASSOCIATED PRESS (Feb. 11, 1997), http://www.aparchive.com/metadata/youtube/80f9ea2bc86bc81bfabb6b4bbf3d792e.

201. Simon, *supra* note 193.

2. Empirical Research

Five empirical studies, conducted in Canada, the United States, the United Kingdom, and Australia, have explored what survivors of domestic and sexual violence seek by participating in a civil suit or the justice system generally. These studies confirm that survivors are not so interested in money, but are very interested in accountability, revenge, empowerment, and deterrence.

Feldthusen and colleagues interviewed 34 Canadian sexual violence survivors who pursued crime victim compensation or civil actions.[202] The authors found that money was not the survivors' motivation for bringing a civil lawsuit: "Overwhelmingly, money assumed a relatively minor role for . . . the civil litigants . . . . They said things like, 'Money was not important,' 'I didn't have expectations about money,' and 'I never hoped to get any money. It was more because it was something else I could do to him.'"[203] The authors continued, "With one exception, the women indicated that by launching a civil suit, they were seeking public affirmation of wrong, revenge, or retribution and justice."[204]

Feldthusen also examined case digests and newspaper reports of 33 litigated Canadian cases brought by sexual battery survivors from 1985 to 1992, 26 of whom were victimized as children, and identified a therapeutic rationale for their participation in the civil justice system.[205] He found the following:

> [D]amages do not always seem central to the action. Frequently, plaintiffs have litigated sexual battery actions knowing in advance that there would be virtually no prospect of collecting on the judgment. Instead of the prospect of financial gain, many sexual battery plaintiffs have reported therapeutic motivations for suing. By therapeutic, I mean only that some aspect of the litigation — the complaint, the process, or the outcome — is expected to, or does, assist the victim along the path to recovery. For some plaintiffs, the sexual battery litigation was perceived as part of the healing process. Others have indicated that they brought suit to punish their assailant. Still others claim they sought public vindication. At least one plaintiff specifically hoped her suit would encourage other victims. Taken together, these constitute an unusual modern manifestation of the original justifications for tort law: corrective justice, vindication, appeasement, and even retribution.[206]

These points were amplified in a small but important qualitative study by renowned psychiatrist Judith Herman. Herman sought to discover what justice looks

---

202. Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 433–51 (1998) (discussing Feldthusen's work). For a general description of crime victim compensation, see *infra* notes 249–58.

203. Des Rosiers et al., *supra* note 202, at 442.

204. *Id.*

205. Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 OTTAWA L. REV. 203, 206 n.5 (1993).

206. *Id.* at 210–11.

like from the perspective of survivors of sexual and domestic violence.[207] Five of the 22 people Herman interviewed had filed a complaint for civil damages in addition to their criminal complaints.[208] In four cases, the plaintiff obtained a judgment or settlement "even though the criminal charges had not resulted in a conviction."[209] The fifth case was still pending.[210]

Herman found that validation from the community—"an acknowledgement of the basic facts of the crime and an acknowledgement of harm"—was the survivor's "most important object."[211] After validation, survivors generally wanted "vindication," e.g., a clear expression that the offense was wrong.[212] This "affirmed the solidarity of the community with the victim and transferred the burden of disgrace from victim to offender."[213] Deterrence was also a motivation: "Besides exposure, the objective most frequently sought by this group of informants was safety for themselves and for other potential victims."[214]

Herman also found that some survivors sought vengeance: "5 of the 21 informants clearly stated a wish to make their perpetrators suffer."[215] A few wanted exposure to lead to "shunning and community ostracism,"[216] i.e., "a rebuke to the offenders' display of contempt for their rights and dignity," not physical pain.[217] Others acknowledged their vengeful feelings but refused to give in to them for fear of becoming morally indistinguishable from their abusers.[218] "Even those who felt the most vengeful thought that they could be mollified by a genuine apology."[219]

---

207. Herman, *supra* note 162, at 579.

208. *Id.* at 580.

209. *Id.*

210. *Id.*

211. *Id.* at 585. This was true "for those who sought criminal sanctions and by those who filed civil complaints." *Id.* at 594.

212. *Id.* at 585.

213. *Id.*

214. *Id.* at 594.

215. *Id.* at 590.

216. *Id.* at 594.

217. *Id.* at 597.

218. *Id.* at 591.

219. *Id.* at 586. ("[T]hey were roughly evenly divided on the question of apology. Some expressed a fervent wish for a sincere apology and believed that this would be the most meaningful restitution the offender could give."); *see* Jeffrey M. Osgood, *Is Revenge About Retributive Justice, Deterring Harm, or Both?*, 11 SOC. PERSONALITY PSYCHOL. COMPASS 1, 9–10 (2017) (citing studies that demonstrate forgiveness is more likely than revenge after the wrongdoer apologizes). A preference for forgiveness instead of revenge may reflect the closeness of the relationship. *See* Karina Schumann & Michael Ross, *The Benefits, Costs, and Paradox of Revenge*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 1193, 1199 (2010) ("If victims become convinced that the transgressions were unintentional, or that their transgressors truly respect and care for them, or that their transgressors are otherwise good people, their anger dissipates and they are less inclined to seek revenge. Researchers using recalled offences, as well as role-played and laboratory victimizations, report that victims are less likely to seek revenge and more likely to forgive when their transgressors apologize for the wrongdoing.") (citation omitted). It may also be a product of dependency. *Cf.* Sasha

Herman's subjects sometimes had multiple objectives, as was illustrated by the statement of Julie Cloutier, a woman who brought a civil action against her rapist after the criminal case was dropped.[220] She said,

> I wanted him to go to court. Money wasn't the issue. I wanted him embarrassed. He was going to have to get a lawyer and pay for a lawyer. He was going to have to tell his family. He wanted to sign a confidential agreement. I said no, of course I'm going to tell people about it.[221]

Clare McGlynn and Nicole Westmarland also conducted a small study, but in the United Kingdom, to explore survivors' perceptions of justice. They spoke with 20 survivors, some of whom had been involved with the criminal justice system, as a way to investigate sexual violence survivors' understandings of justice.[222] The authors found that survivors' views shifted over time; they called the shift "kaleidoscopic justice."[223] Evident in this "fluidity" was a strong emphasis on "consequences, recognition, dignity, [and] voice,"[224] and, importantly, "prevention and connectedness."[225]

A brief elaboration on these concepts demonstrates that they resonate with the other studies' findings. "Consequences" could "take a variety of forms, including and beyond the conventional criminal justice system."[226] In addition, "recognition" was key to "any sense of justice," and an "acknowledgement, conveying support" that they had in fact been "harmed and victimized."[227] Justice also encompassed participating in a process that treated the survivor with "dignity," i.e., "as a person with worth,"[228] something that many felt did not occur in the criminal justice system.[229] "Voice" embodied both the desire for power, i.e., "active participation in the decisions and direction of justice processes,"[230] and the desire to have an actual forum in which to voice one's harm.[231] They also wanted "a society that recognizes the harms of sexual violence and actively seeks to reduce its prevalence."[232] Finally,

---

Johnson-Freyd & Jennifer J. Freyd, *Revenge and Forgiveness or Betrayal Blindness?*, 36 BEHAVIORAL & BRAIN SCI. 23, 23 (2013) (noting unawareness may also be an adaptive response to interpersonal harms in highly dependent relationships).

220. Herman, *supra* note 162, at 594.

221. *Id.*

222. Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179 (2019).

223. *Id.* at 185–86 ("Kaleidoscopic justice is justice as a continually shifting pattern, constantly refracted through new circumstances and understandings.").

224. *Id.* at 180.

225. *Id.*

226. *Id.* at 186–87.

227. *Id.* at 188. "Recognition can come from the responses of perpetrators," but it also depends on the community recognizing the wrong. *Id.* at 188–89. It addresses "the issues of humiliation, lack of respect, moral injury." *Id.* at 189.

228. *Id.*

229. *Id.* at 189–90.

230. *Id.* at 191.

231. *Id.* at 192.

232. *Id.* at 193–94. Various mechanisms could facilitate recognition and prevention, including schools that educate to promote social change.

"connectedness" was defined by the authors "as being valued as a whole person in society, not just as a victim, survivor or piece of evidence."[233] Having access to the civil legal system was a component of the larger social support for the "victim-citizen."[234] Such access was thought to be "society's material expression of empathy, support and dignity, with the aim of enabling a victim-survivor to regain a sense of belonging and connection with society and feel a sense of justice."[235]

These same themes emerged in Haley Clark's interviews of 22 sexual assault survivors in Australia about what justice means in light of their experiences with the criminal justice system (although 8 interviewees had no such contact).[236] Clark also found survivors had a multitude of objectives, including retribution, deterrence (for oneself and for others), accountability (with consequences), official recognition of the harm, education of the community, support for survivors, and prevention.[237] Importantly, she too found many wanted "voice," something that was too often missing from their experiences with the criminal justice system.[238] Although they wanted "their 'day in court'" to share their experience, they found the criminal justice system's committal hearing and trial process "frustrating and traumatic" because "[i]t did not allow victim/survivors to tell their story as a whole or to explain what the assault meant to them."[239] They also wanted control, something the criminal justice system denied them.[240]

As this Section suggests, the empirical evidence confirms what John Clune said:[241] Most survivors are not motivated by money. Survivors want accountability, revenge, deterrence, empowerment, voice, healing, and respect. Yet they lack access to the civil legal system because their claims do not offer the possibility of a substantial collectible judgment. This reality is particularly unfortunate because, as Section II.B will soon describe, modern tort theory says the tort system can provide exactly what these survivors want.

3. But What About Compensation?

Before turning to a discussion of modern tort theory, it is important to recognize that survivors of gender-based violence deserve and frequently need compensation, even if that is not their primary motivation for suing their perpetrators. After all, survivors' out-of-pocket costs can be very large. A story in the *New York Times* revealed that one young woman's sexual assault on campus cost

---

233. *Id.* at 194. It included "being treated with dignity, [and] having a voice," but also "receiving societal support in the aftermath of trauma, including financial assistance . . . [to address] the harms and impacts of sexual violence." *Id.*

234. *Id.* at 195.

235. *Id.* at 194–96.

236. Clark, *supra* note 130, at 29. The majority of those interviewed experienced sexual assault in the family. *Id.*; *see also* Haley Clark, *A Fair Way to Go: Justice for Victim-Survivors of Sexual Violence*, *in* RAPE JUSTICE: BEYOND THE CRIMINAL LAW 18, 18 (Anastasia Powell et al. eds., 2015).

237. Clark, *supra* note 130, at 30–31.

238. *Id.* at 33–34.

239. *Id.*

240. *Id.* at 34.

241. *See supra* text accompanying note 176.

her family $245,573.[242] Survivors may have to incur these costs themselves, as millions of Americans lack insurance to cover medical costs[243] and lost income.[244] The vast majority of Social Security Disability Insurance claims are also denied.[245] Of course, these economic costs exclude pain and suffering, which also goes uncompensated.

Two compensatory mechanisms for crime victims exist apart from the tort system, i.e., restitution and crime victim compensation, but both options are problematic. Restitution is not always available,[246] it does not always cover

242. Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), https://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html. The mother noted, "We're fortunate to have top-tier health insurance, which helped defray many of the costs. But this is still an extraordinary amount of money, and I often wonder how survivors from less privileged backgrounds recover from these attacks." *Id.*

243. This is true even with the Affordable Care Act. Edward Berchick et al., *Health Insurance Coverage in the United States: 2017*, U.S. CENSUS BUREAU (Sept. 2018), https://www.census.gov/library/publications/2018/demo/p60-264.html. Military benefits might cover those who are abused while enlisted, but high evidentiary burdens exist to obtain some of those benefits. *See* Ben Kappelman, *When Rape Isn't Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault*, 44 SUFFOLK U. L. REV. 545, 546 (2011).

244. Fischer & Jerry, *supra* note 161, at 871 n.70 (saying that 55% of the workforce has short-term disability insurance and 22% has long-term disability insurance); *Chances of Disability*, COUNCIL FOR DISABILITY AWARENESS (Mar. 28, 2018), https://disabilitycanhappen.org/disability-statistic/ (claiming 51 million Americans lack disability insurance beyond social security).

245. *Chances of Disability*, *supra* note 244 ("From 2006 to 2015, only 34 percent of Social Security Disability Insurance (SSDI) claimants had their applications approved: 23% at the initial application stage and the remainder after a reconsideration or appeals process."). The lowest-income workers may be able to rely on government programs. Fischer & Jerry, *supra* note 161, at 871 n.70.

246. While "[e]very state currently allows for criminal restitution," Rua, *supra* note 43, at 770, "[i]n many states, the right to order restitution is still discretionary." Adam Ortlieb, Note, *Mandatory Victim Restitution Act: A Replacement for Victims' Intentional Tort Claims for Violent Crimes in New Jersey*, 69 RUTGERS U. L. REV. 385, 386 (2016). *See generally* Gilles *supra* note 47, at 689–90 (describing problems with relying on criminal restitution); Swedloff, *supra* note 22, at 750–53 (reporting that criminal restitution is often unavailable).

noneconomic loss,[247] and it is not always paid.[248] Crime victim compensation requires documentation of expenses,[249] typically excludes noneconomic losses,[250] and has caps, with the average set at $25,000.[251]

Most important, however, is the fact that both options are tied to the criminal justice system, thereby making them less than ideal from some survivors' perspective, even assuming the tort is also a crime. A prerequisite to restitution is the apprehension and successful prosecution of the perpetrator, not a small feat given the extensive case loss for cases involving gender-based violence.[252] In addition, a survivor must typically participate in the criminal prosecution to achieve a conviction.[253] Many survivors do not want to participate in the criminal process.

---

247. *See* Swedloff, *supra* note 22, at 754 (noting restitution in the state systems typically excludes pain and suffering). Federal restitution may be better for gender-based violence survivors than for other crime victims because it may include emotional damages. *See* 18 U.S.C. § 2248(b)(3)(F) (2018); 18 U.S.C. § 2264(b)(3)(G) (2018). *But see* United States v. Berk, 666 F. Supp. 2d 182, 192 n.9 (D. Me. 2009) (questioning whether pain and suffering damages are included in 18 U.S.C. § 2259, despite language that restitution should include "any other losses suffered by the victim as a proximate result of the offense"). If pain and suffering damages were available, this would differ from criminal restitution available under the Mandatory Victims Restitution Act. *See* 18 U.S.C. § 3663A(b)(2) (2018) (categories of mandatory restitution to victims of certain crimes); United States v. Serawop, 505 F.3d 1112, 1124 (10th Cir. 2007) ("MVRA does not provide incidential [sic], consequential, or pain and suffering awards.").

248. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2017 33 tbl.8C, 39 tbl.8E (2017), https://www.justice.gov/usao/page/file/1081801/download (noting courts ordered approximately $29 billion of restitution to victims of crime in fiscal year 2017 and only about $8 billion was collected).

249. *See* Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 106 (2015).

250. Swedloff, *supra* note 22, at 754.

251. *An Overview*, NAT'L ASS'N CRIME VICTIM COMP., http://www.nacvcb.org/index.asp?bid=14 (last visited May 11, 2019); *see also* Swedloff, *supra* note 22, at 755. The Victims of Crime Act of 1984 provides funds to state-level crime victim compensation programs. *See* 34 U.S.C. § 20102 (2018).

252. Sherry Hamby et al., *Intervention Following Family Violence: Best Practices and Helpseeking Obstacles in a Nationally Representative Sample of Families with Children*, 5 PSYCHOL. VIOLENCE 325, 330 (2014) (noting a lack of reports, arrests in only half of cases reported, attrition in charging, absence of convictions or pleas in half the cases where charges were filed, and lack of jail time as a disposition, and concluding, "Of the original 517 cases of family violence, only 10 perpetrators (less than 2%) served any jail time."); Herman, *supra* note 162, at 574 (calling gender-based violence "crimes of impunity," and noting less than 5% of rape cases result in a prison sentence); s*ee also* Michelle Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 910–12 (2001) (noting that "biased imperatives behind the historical requirements in rape law" lead police to "disproportionately 'unfound' rape complaints, place the complaints in non-criminal codes and discourage women from proceeding with their complaints," and cause prosecutors to "disproportionately dismiss rape cases").

253. *See* Gilles, *supra* note 47, at 689–90. This is the practical reality even for federal prosecutions although federal law says "[n]o victim shall be required to participate in any phase of a restitution order." 18 U.S.C. § 3664(g)(1) (2019).

Sometimes they fear the absence of control or poor treatment by authorities,[254] or sometimes they do not want the perpetrator punished[255] because, for example, they oppose mass incarceration.[256] Similarly, crime victim compensation programs are a corollary to the criminal justice process and typically require a victim to cooperate with the police and prosecution.[257] This requirement can create a huge barrier to the receipt of crime victim compensation.[258]

---

254. *See* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 316–19 (2020); Herman, *supra* note 207, at 573 (noting that many survivors never report to the police because they do not want to experience the "theater of shame" that often follows); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 147 (2012) (citing studies that reveal only 5%–20% of survivors report their assault to police, and that there is a high rate of attrition); Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. COMM. PSYCH. 191, 193 (2010) (noting that "survivors withdrawing their participation may not be surprising given that numerous studies have shown the CJ process can be challenging and sometimes adversarial for survivors," because, *inter alia*, "survivors often are treated by the police in ways that they experience as upsetting and victim blaming").

255. *See* ANDREW KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 39, 46 (June 2009) (reporting results of study where 45% of domestic violence survivors did not want their perpetrator prosecuted); West, *supra* note 172, at 113 (explaining how survivors do not always want to subject the perpetrator to the criminal justice system, especially if the perpetrator is an intimate partner or relative). *See generally* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 111–12 (1992) ("In many such cases of assault, when the victim knows the perpetrator, the victim's overriding priority is to assure her future safety and to obtain a remedy for damages already done. Although she may seek jail time for her attacker, she might prefer other alternatives, including a suspended sentence with counseling, agreement to a restraining order, and/or restitution for damages. Public prosecutors may or may not seek such dispositions; however, prosecutors are not trained to inquire into and seek to effectuate *victims'* interests in a prosecution. Such alternative resolutions do not fit the paradigm of criminal prosecution, and victims who seek them are sometimes said to be 'abusing the criminal process.' Moreover, even if some prosecutors' offices use alternatives to prosecution of domestic violence, such a blanket policy may be no more in a given victim's interests than a blind policy of aggressive prosecution. An attorney who represents the victim will, by definition, focus on the victim's needs, *whatever they may be*, rather than automatically following a blanket governmental policy.").

256. *See* Herman, *supra* note 162, at 596.

257. Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth - The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 239 (2011) ("Programs generally require that the victim: 1) report the crime promptly to law enforcement, 2) cooperate with police and prosecutors in the investigation and prosecution of the case, 3) submit a timely application to the compensation program, 4) have a loss not covered by insurance or some other collateral source, and 5) be innocent of criminal activity or significant misconduct that caused or contributed to the victim's injury or death.").

258. *See id.*; Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 76–77 (2015); Swedloff, *supra* note 22, at 756.

Other pockets of compensation may exist,[259] but the bottom line is that survivors' need for compensation is largely unsatisfied. A solution is warranted. Some scholars have concluded that the "only viable solution" is "a substantially enhanced public compensation scheme."[260] Whether that conclusion is right, or politically viable,[261] is beyond the scope of this Article. It is also beyond the scope of this Article to suggest legal reforms that would make more probable the collection of a tort judgment.[262]

Simply put, survivors' need for compensation is a separate issue from whether survivors deserve better access to the tort system for noncompensatory reasons. That is, even with the development of an excellent public compensation scheme, survivors would still have a need for the tort system because of their other needs.[263] Of course, until an adequate nontort compensatory system is crafted for crime victims, the tort regime also has the benefit of offering some survivors the prospect of some compensation.

B. The Tort System's Purpose Is to Provide Those Things Survivors Want and Need

Once one recognizes that survivors frequently want something from the tort system other than compensation, the question becomes whether that system is designed to address these other needs. At one time, the answer might have been no. After all, Dean Prosser said on page one of his famous treatise that the "function" of tort law is "the compensation of losses."[264] Subsequently, tort scholars have argued that the tort system's purpose is not solely, or even necessarily, to compensate. As

---

259. For example, compensation might be available in a divorce proceeding if the parties are married, the state recognizes the relevance of fault to property distribution, and the parties have sufficient assets to compensate the survivor. Similarly, a party may be covered by workers' compensation for an on-the-job injury if the injury arises out of and in the course of employment. Those requirements can be hard to establish. *See, e.g.*, Continental Ins. Co. v. McDaniel, 772 P.2d 6, 7 (Ariz. Ct. App. 1988) (mentioning trial court's holding that workers' compensation coverage did not exist for alleged on-the-job sex harassment and battery by employer against employee).

260. Brown & Randall, *supra* note 57, at 316. The Canadian crime victim compensation system covers pain and suffering. *Id.* at 330, 336.

261. *Id.* at 316 (acknowledging such a solution would encounter "political opposition" because of the funds required); Swedloff, *supra* note 22, at 771, 773–74.

262. *See generally* Gilles, *supra* note 47, at 705 (recommending the "eliminat[ion of] the barriers that enable intentional tortfeasors to keep their personal assets and incomes").

263. *See* Brown & Randall, *supra* note 57, at 339–40; *cf.* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 659 (1985) (proposing, as part of reform focused primarily on negligence claims, that compensation for intentional torts should be independent of the tort system but that the tort system should remain for purposes of deterrence). For example, a restitution order may insufficiently satisfy a survivor's desire for revenge because the defendant is already on trial, the defendant may already have an attorney paid for by the state, and the prospect of restitution may even reduce the judge's willingness to impose incarceration if the judge wants the perpetrator to work to fulfill his obligations under the restitution order. *See* Leroy L. Lamborn, *Propriety of Governmental Compensation of Victims of Crime*, 41 GEO. WASH. L. REV. 446, 451 (1973).

264. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, 1 (1941).

they describe it, the system's purpose dovetails precisely with survivors' own goals. This fact makes survivors' access to that system imperative.

1. Civil Recourse Theory

Over the last 25 years or so, scholars have been proposing and refining civil recourse theory as the conceptual basis for tort law. The theory's primary architects have been Benjamin Zipursky and John Goldberg.[265] Their voluminous body of scholarship argued that civil recourse theory best harmonizes disparate aspects of tort law.

Civil recourse theory posits that tort law is the government's way of acknowledging that private individuals are "entitled" to hold accountable other individuals who inflict a legal wrong on them.[266] The entitlement to civil recourse is grounded in "political and moral" concerns as much as instrumental reasons. Zipursky explained:

> Part of the state's treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them. Relatedly, a legal and political order that respects an individual's right not to be treated in a certain manner cannot permit persons to invade such rights with impunity; forbidding responsive aggression without providing any avenue of private redress is a way of permitting rights invasions with impunity. This is . . . even true of wrongs that are crimes or infractions, given that enforcement by the state of criminal and regulatory law is discretionary. Our system affords a victim a civil right to hold a wrongdoer answerable to her. A legal right of action in tort against the wrongdoer is that right.[267]

Zipursky described tort law as a "hybrid of public and private law," with the state "empowering" private parties to bring actions for violation of social norms.[268]

a. Accountability

Civil recourse theory differs in a number of ways from corrective justice, the traditional justification for tort law.[269] Corrective justice aims "to redress unjust gains and losses" caused by the person responsible for the plaintiff's injury "by means of a financial adjustment."[270] Louis Kaplow and Steven Shavell observed,

---

265. *See supra* note 18; *see, e.g.*, Zipursky, *Civil Recourse, supra* note 18, at 735 (calling civil recourse theory a conceptual device to "illuminate[] the structure of tort law").

266. Zipursky, *Civil Recourse*, *supra* note 18, at 735–36.

267. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 974.

268. Zipursky, *Civil Recourse, supra* note 18, at 755.

269. *See generally id.*; Solomon, *supra* note 18, at 1776.

270. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2354–55 (1990); *see also* Susan Randall, *Corrective Justice and the Torts Process*, 27 IND. L. REV. 1, 2 (1993) ("Although definitions vary, one may broadly characterize corrective justice as the correction of certain imbalances or losses created by individual action.").

"[M]ost corrective justice claims have the form: 'If A wrongfully injures B, A must pay B for the loss B suffers as a consequence of A's act.'"[271]

In contrast, civil recourse theory recognizes that compensatory damages are not the be-all and end-all of a tort suit.[272] In fact, "[I]t is the entitlement to the claim itself—the 'avenue of recourse'—that is the 'animating idea' behind tort law."[273] Its proponents persuasively argued that tort law isn't about "restoring normative equilibrium" through compensation,[274] but rather that "it is a system that permits those who have been wronged to have the state force certain remedies out of those who have wronged them."[275] Instead of centering compensation as the purpose of tort law, civil recourse theory makes accountability the heart of tort law.[276]

As a descriptive matter, I accept Zipursky and Goldberg's argument and assume that civil recourse theory provides a compelling, perhaps even the most compelling, basis for the existence and structure of tort law. This conclusion seems particularly appropriate in the context of intentional torts because insurance does not exist to provide compensation and promote deterrence.[277] In fact, the details of tort law make perfectly clear that compensation is not its sole purpose in the context of intentional torts. After all, financial loss is not "a condition of liability."[278] Leslie Bender explained why in her criticism of corrective justice: "Tort theories incorporating Aristotelian notions of corrective justice about wrongful gains and losses miss the place of dignity and social justice at the heart of tort law."[279] In addition, tort law provides noncompensatory remedies, including injunctions and

---

271. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1046 (2001).

272. *See* Goldberg, *supra* note 18, at 603; Solomon, *supra* note 18, at 1776.

273. Solomon, *supra* note 18, at 1777 (citing John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 403 (2005)).

274. Zipursky, *Civil Recourse*, *supra* note 18, at 750.

275. *Id.*

276. In that sense, the tort system is like the criminal system, although in the criminal system the state controls the action, the defendant experiences a different type of "stigma," and the "human consequences" for the wrongdoer are potentially more extreme. Goldberg & Zipursky, *supra* note 18, at 946–47.

277. Critics argue that "civil recourse theory" fails to capture the purpose of negligence suits, which is to create a "social insurance scheme" and not to afford a "vehicle for individual justice." Solomon, *supra* note 18, at 1817–18 (identifying criticism). *But see* Alexander Lemann, *Coercive Insurance and the Soul of Tort Law*, 105 GEO. L.J. 55 (2016) (arguing that technology has helped insurers monitor insureds' behavior, thereby allowing insurance premiums to better reflect and deter risk than the tort system, and enhancing other justifications for the tort system, such as civil recourse).

278. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 954 ("Trespass and nuisance, as well as battery and false imprisonment, do not set loss as a condition of liability.").

279. Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 258 (1998).

punitive damages.[280] These remedies are sometimes what survivors want most.[281] Moreover, if the defendant is indigent or judgment-proof, corrective justice may have little significance.[282] Civil recourse theory, however, explains why a plaintiff should still have access to a tort remedy.

Civil recourse theory has considerable appeal. Scott Hershovitz discussed the expressive value of tort law,[283] claiming that tort law's expressive function is so important that it may be tort law's primary function.[284] "Sometimes we need to say, clearly and loudly, this defendant wronged that plaintiff, and our saying so can be significant quite apart from any material consequences that follow."[285] Tort law "treats wrongs as wrongs,"[286] and in doing so, tort law readjusts the social standing of the plaintiff and the defendant.[287] He argued that when someone intentionally harms another, society ought to care if tort law provides a remedy because that remedy says that the defendant's acts were not acceptable.[288] The tort suit is important not because it condemns the defendant, but because it "vindicate[s] the social standing of the plaintiff."[289]

The empirical evidence makes clear that survivors of gender-based violence want civil recourse, i.e., they want the perpetrator to be held accountable through a legal process. A nominal damage award or an uncollectible damage award could achieve that result. A settlement in which the perpetrator acknowledged the wrongdoing could do so as well.

b. Revenge

Andrew Gold's article, *A Taxonomy of Civil Recourse*, recognized that civil recourse theory embodies "several distinct recourse norms,"[290] none of which are mutually exclusive.[291] Apart from accountability, civil recourse is also a "means for revenge."[292] Early proponents of civil recourse theory were in fact quite explicit that tort law can be a means for revenge, i.e., "to get even."[293] Zipursky wrote, "[W]here

---

280. Goldberg & Zipursky, *supra* note 18, at 960–61; *see also* Zipursky, *Civil Recourse*, *supra* note 18, at 748–49.

281. *See* Bublick, *supra* note 13, at 74 (mentioning that the desire for a specific nonmonetary remedy, such as "an apology or the assailant's transfer to a different university, apartment complex, or job," may be attainable through settlement).

282. Gilles, *supra* note 47, at 609 (noting that "the deterrence, corrective-justice, and loss-spreading functions of tort law are badly compromised by the omnipresence of judgment-proof tortfeasors").

283. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 16 n.34 (2017).

284. *Id.* at 5.

285. *Id.*

286. *Id.* at 63.

287. *Id.* at 12, 63.

288. *Id.*

289. *Id.* at 45.

290. Andrew S. Gold, *A Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65, 80 (2011).

291. *Id.*

292. *Id.* at 73.

293. Zipursky, *Civil Recourse*, *supra* note 18, at 737.

the state forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the state."[294] Zipursky did not suggest that people must be able to obtain revenge through the system, only that they do obtain revenge,[295] just as they also sometimes obtain corrective justice.[296] He did concede there are advantages to a process that lets people "get even" through civil recourse: "[T]he state renders this form of recourse nonviolent and civil."[297]

This particular benefit of civil recourse deserves attention because vengeance motivates some survivors of gender-based violence,[298] including 25% of Herman's subjects.[299] That some survivors want vengeance is not surprising. Psychologists have called revenge a "universal phenomenon,"[300] "automatic and immediate,"[301] something that "permeates human life,"[302] and has "deep roots in human nature."[303] Intentional torts are the most likely torts to trigger a desire for revenge,[304] although Haley Clark's research suggested that vengeful victims of sexual assault often seek only "fair" retribution, reflecting notions of "proportionality" and "just deserts."[305]

For survivors of gender-based violence who want revenge, a tort action can provide a "civil" outlet for their vengeance, as Zipursky acknowledges,[306] even when a collectible judgment is unlikely. A "civil" outlet for vengeance has high

---

294. Zipurksy, *Rights, Wrongs*, *supra* note 18, at 84.

295. Zipursky, *Civil Recourse*, *supra* note 18, at 737.

296. *Id.* at 754–55.

297. *Id.* at 746. Preventing people from taking justice into their own hands has been a classic justification for allowing a battery claim for an offensive touching that did not cause a physical injury. *See, e.g.*, Cohen v. Smith, 648 N.E.2d 329, 333 (Ill. App. Ct. 1995) (citing Respublica v. De Longchamps, 1 Dall. 111 (Pa. 1784)).

298. Des Rosiers et al., *supra* note 202, at 433–51; *see also* Carey, *supra* note 8, at 742 (noting that some victims' primary objective is "public humiliation of the perpetrator"); Swan, *supra* note 137, at 429 (noting that some plaintiffs "look at compensation as a form of 'blood money'").

299. Herman, *supra* note 162, at 590 (mentioning the "wish to make their perpetrators suffer").

300. Jon Elster, *Norms of Revenge*, 100 ETHICS 862, 862 (1990).

301. Rose McDermott et al., *'Blunt Not the Heart, Enrage It': The Psychology of Revenge and Deterrence*, 1 TEX. NAT'L SECURITY REV. 69, 69 (2017).

302. Amy L. Cota-McKinley et al., *Vengeance: Effects of Gender, Age and Religious Background*, 27 AGGRESSIVE BEHAV. 343, 348 (2001).

303. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1411 (2003).

304. *See* Neil Vidmar, *Retribution and Revenge*, *in* THE HANDBOOK OF JUSTICE RESEARCH IN LAW 31, 57 (Joseph Sanders & V. Lee Hamilton eds., 2001) (describing the psychological states in the arousal of retribution motives, including whether "the violator's act is perceived as intentional"); *see also* Gilles, *supra* note 47, at 668; Sherwin, *supra* note 303, at 1403; *cf.* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275, 298 (2001) (reporting finding from interviews with personal injury lawyers that "rape and other assaults that result in serious harm are the clearest cases that justify pursuing blood money," i.e., payment from the defendant's own resources instead of insurance).

305. *See* Clark, *A Fair Way to Go*, *supra* note 236, at 28–29.

306. *See* Goldberg & Zipursky, *supra* note 18, at 972–73.

social value: survivors avoid the harmful legal and social consequences of illegal vengeance,[307] and perpetrators are spared what they often perceive to be worse violence than what they inflicted on the victim.[308]

Indeed, survivors sometimes, although perhaps rarely, strike out at their attackers themselves. Consider, for example, Lorena Bobbitt, who is a survivor of domestic abuse.[309] Bobbitt notoriously "sought revenge by cutting off [her husband's] penis with a kitchen knife as he lay sleeping in their bed. She then left the house with the penis, got into her car, drove away, and threw it out the car window."[310] A psychology professor writing about revenge called Bobbitt's case "a powerful example" of "revenge . . . to even the score."[311] Or consider domestic abuse survivors who kill their batterers, sometimes for reasons of revenge.[312] Occasionally family, friends, and even "furious mobs" engage in vengeful acts against the perpetrator, as historians have documented.[313]

It is unclear exactly how tort law reduces vigilantism, but several possibilities exist. On the one hand, an avenue for civil recourse may quench the thirst for revenge by offering a forum for accountability. Research shows that the existence of a fair mechanism for resolving grievances in the workplace can decrease the chance that victims will pursue revenge themselves.[314] Similar results exist for children on the playground.[315] Likewise, Osgood found that "there is a strong relationship between public perceptions of procedural justice in the police and courts and levels of vigilantism."[316] Justice Stewart articulated this general idea in *Furman v. Georgia*, a death penalty case, when he asserted that unless people believe the government will "impose upon criminal offenders the punishment they 'deserve,'" there will be "sown the seed of anarchy—of self-help, vigilante justice

---

307. *See* Cota-McKinley et al., *supra* note 302, at 343 (noting that "[t]he person seeking vengeance will often compromise his or her own integrity, social standing, and personal safety for the sake of revenge").

308. Arlene M. Stillwell, Roy F. Baumeister & Regan E. Del Priore, *We're All Victims Here: Toward a Psychology of Revenge*, 30 BASIC & APPLIED SOC. PSYCHOL. 253, 260 (2008) (describing a "magnitude gap" whereby the avenger's and target's perspectives differ on the proportionality of the response).

309. *Id.* at 253.

310. *Id.*

311. *Id.*

312. *Cf.* Harvard Law Review Association, *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1574–76 (1993) ("[W]omen who kill their abusers are routinely convicted and sentenced to long prison terms" in part because "judges assume these women act in revenge or as vigilantes, rather than as reasonable people.").

313. *See* Katz, *supra* note 35, at 414–15.

314. *See* Schumann & Ross, *supra* note 219, at 1200; Daniel P. Skarlicki & Robert Folger, *Retaliation in the Workplace: The Role of Distributive, Procedural, and Interactional Justice*, 82 J. APPLIED PSYCHOL. 434, 438 (2006) (finding, *inter alia*, "reasonably fair procedures moderate an individual's retaliatory tendencies that would otherwise be maximized by the combination of having low levels of both distributive and interactional justice").

315. Osgood, *supra* note 219, at 9.

316. *Id.* (citing studies).

and lynch law."[317] Certainly some civil recourse proponents, such as Goldberg and Hershovitz, see the tort system as a substitute for personal vengeance.[318]

On the other hand, bringing a tort claim may itself satisfy a survivor's desire for revenge. That is, tort law does not simply quell the instinct for revenge, but tort law may satiate it. Psychologists have noted that the quest for revenge can be sated by acts short of physical violence,[319] as well as by "more restrained acts," i.e., a response that is not as bad or worse than the target's transgression.[320] Because revenge is not necessarily rational,[321] even a lawsuit with no prospect of recovery may scratch the itch.

My claim that tort law itself can be a source of vengeance goes beyond the claim of civil recourse theorists that a plaintiff might be satisfied by collecting punitive damages[322] or compensation for pain and suffering.[323] Rather, even absent the imposition of a damage award, some plaintiffs could be satisfied by a determination that the defendant wronged the plaintiff, knowing that the perpetrator wants no such determination.

In addition, the process of calling the defendant into court might itself satisfy the vengeful plaintiff. Survivors who act with vengeance have a range of goals, including to "teach a moral lesson, [or] to make a social statement ('I am strong')."[324] Jason Solomon suggested that even "superficially mundane service of process can be seen as vindicating second-person moral principles" because the perpetrator has to answer to the plaintiff.[325] In this way, a civil lawsuit can better satisfy the survivor's desire for revenge than participating in the criminal process: "[T]he offender is aware of why and who is administering the retaliatory punishment."[326] Moreover, the process of being sued can itself create a certain amount of inconvenience, cost, worry, and reputational loss for the defendant regardless of the end result. The costs include "lost time [and] invasion of privacy,"[327] not to mention a certain amount of "annoyance."[328] One senses these

---

317. Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

318. Goldberg, *supra* note 18, at 602; Hershovitz, *supra* note 283, at 10, 15–16, 22.

319. *See* Schumann & Ross, *supra* note 219, at 1201 (noting that a cost-benefit analysis can lead victims to select alternative acts to obtain justice, such as collective calls for reparations or legal action).

320. *Id.* at 1193.

321. Psychologists differ on whether revenge is irrational by definition, i.e., whether a victim must be willing to continue the vengeful behavior in contravention of a rational cost-benefit analysis. *Id.* at 1194.

322. Zipursky, *Civil Recourse*, *supra* note 18, at 749–50; *see also* Hershovitz, *supra* note 283, at 7 n.21 (citing Alcorn v. Mitchell, 63 Ill. 553, 554 (1872)); Sherwin, *supra* note 303, at 1402.

323. Sherwin, *supra* note 303, at 1397, 1401.

324. Osgood, *supra* note 219, at 5 (citing studies).

325. Solomon, *supra* note 18, at 1806.

326. Vidmar, *supra* note 304, at 41.

327. Gilles, *supra* note 47, at 661 n.260; *see also* Solomon, *supra* note 18, at 1813–15 (noting that the plaintiff impacts the defendant's "liberty" by "forcing the defendant to handle the lawsuit in some fashion").

328. Sherwin, *supra* note 303, at 1405.

threads in Julie Cloutner's statement, mentioned earlier,[329] when she said, "I wanted him to go to court . . . I wanted him embarrassed. He was going to have to get a lawyer and pay for a lawyer."[330]

A defendant's failure to participate in the litigation (perhaps because any judgment will be uncollectible) does not necessarily defeat the plaintiff's satisfaction.[331] A default judgment can still cause the defendant shame, and it will often be enforceable for a decade or so.[332] A plaintiff can feel justice has been served by knowing that the debt will hang over the defendant's head, possibly affecting the defendant's life choices or ability to enjoy the fruits of his labor.[333] Moreover, even an impecunious defendant may have some income or assets that a judgment will threaten, although not enough to attract a contingent-fee lawyer to the case.

Talk of "revenge" will undoubtedly make some people uneasy,[334] like was evident among those commenting on the O.J. Simpson civil verdict.[335] Some advocates of civil recourse theory distance themselves from the notion that civil recourse theory is a form of institutionalized revenge, primarily by rejecting the empirical claim that revenge motivates people to file suit.[336] Of course, the motives of those who do file suit because they may recover compensation tells us nothing about all those who do not file suit, including survivors without lawyers.

---

329. *See supra* text accompanying note 221.

330. Herman, *supra* note 162, at 594.

331. A small study in Canada found that defendants only defended in 13 of the 30 cases for which data was available. Feldthusen, *supra* note 205, at 206 n.5.

332. *See, e.g.*, GA. CODE. ANN. § 9-12-60(a)(1) (2019) (declaring that a judgment becomes dormant after seven years); TEX. CIV. PRAC. & REM. & CODE ANN. § 34.001(a) (2019) (declaring that a judgment becomes dormant after ten years).

333. *Cf.* RESTATEMENT OF LIABILITY INSURANCE § 27 cmt. d (AM. L. INST. 2019) (noting that the difference between the policy limit and the judgment against the insured is a good measure of damages for duty-to-settle cases when the insured is judgment-proof because "the excess trial judgment remains a debt owed by the insured" unless the insured declares bankruptcy or the tort plaintiff voluntarily waives that debt, because the insured's future assets can be used to pay it).

334. Cota-McKinley et al., *supra* note 302, at 344 (claiming vengeance "is publicly rejected by modern society"); David B. Hershenov, *Restitution and Revenge*, 96 J. PHIL. 79, 80 (1999) (noting that "justice and revenge are . . . antithetical" in the philosophical tradition); Dennis Klimchuk, *Retribution, Restitution and Revenge*, 20 L. & PHIL. 81, 81 (2001) (noting likely opposition to his argument that "punishment is the institutional expression of revenge (and as such justified)"); Solomon, *supra* note 18, at 1812 (noting that "[w]e generally think of revenge as something . . . which 'must be suppressed and overcome'").

335. *See supra* text accompanying notes 198–201.

336. *See* Gabriel Seltzer Mendlow, *Is Tort Law a Form of Institutionalized Revenge*, 39 FLA. ST. U. L. REV. 129, 133–34 (2011) (arguing that "it seems unlikely that what motivates tort plaintiffs is always or even usually a desire to inflict harm" because compensatory damages are meant to compensate the plaintiff, not to harm the defendant); *see also* Solomon, *supra* note 18, at 1813. Solomon does cite a study, however, that shows fewer than one in five medical malpractice litigants suing for perinatal injuries to infants seek revenge or deterrence. *Id.* at 1813 n.266.

Nonetheless, even if some survivors would be motivated by revenge, the law should not necessarily "accommodate those inclinations."[337] Dennis Klimchuk suggested that "if we permit vindictive feelings to be channeled through legal institutions . . . it is not because those feelings are natural or inevitable, but rather because they accord with an independent sense of justice."[338] In fact, if society increased access to civil courts for survivors of gender-based violence, including some with vengeful motives, society would simultaneously provide all survivors with more accountability, deterrence, and healing.[339] Since there is no empirical evidence that vengeance-motivated tort suits negatively affect people's attitudes toward our legal institutions[340] or toward survivors as a whole,[341] it seems wise to ignore survivors' motivations in crafting policy. After all, agnosticism is not the same as the state's endorsement of revenge. As Gabriel Seltzer Mendlow argued, "An institution's purpose does not depend on its participants' motivations."[342]

Finally, a different sort of critique is that survivors themselves might be harmed by pursuing a tort suit for reasons of vengeance. While it is commonly believed that acts of vengeance can have hedonistic benefits,[343] especially when the victim thinks the perpetrator "understood why they were being punished,"[344] the evidence is actually more mixed. For example, acts of revenge can also cause the actor "to continue to think about (rather than to forget)" the event, and this can be harmful.[345] Although acts of revenge can have both positive and negative consequences, i.e., the acts can be "bittersweet,"[346] society should not

---

337. Klimchuk, *supra* note 334, at 95.

338. *Id.* at 95–96 (arguing vengeance itself is not a good justification for the criminal law except to the extent it corresponds with moral justice). Questions about vengeance in the civil system may be less profound than in the criminal system, in part because incarceration is not a possibility and because the pursuit of vengeance is survivor driven.

339. *Cf.* Solomon, *supra* note 18, at 1814 ("Asking why the state should support the urge to retaliate, as Finnis does, might lead to quite a different answer than asking whether the state ought to support the instinct to hold another accountable.").

340. Vidmar, *supra* note 304, at 57.

341. Pop culture already has many tropes and stereotypes that characterize gender-based violence victims as vengeful. *See, e.g.*, Kristina Deffenbacher, *Rape Myths' Twilight and Women's Paranormal Revenge in Romantic and Urban Fantasy Fiction*, 47 J. POPULAR CULTURE 923 (2014).

342. Mendlow, *supra* note 336, at 134.

343. *See* Kevin M. Carlsmith et al., *The Paradoxical Consequences of Revenge*, 95 J. PERSONALITY & SOC. PSYCHOL., 1316, 1316–17 (2008) (noting that revenge "relieves the tension, and thus the anger"); Sherwin, *supra* note 303, at 1411 (noting that revenge "can give pleasure").

344. Osgood, *supra* note 219, at 10 (referring to the "messaging hypothesis"); Eric Jaffe, *The Complicated Psychology of Revenge*, OBSERVER (Oct. 4, 2011), https://www.psychologicalscience.org/observer/the-complicated-psychology-of-revenge (citing research by Mario Gollwitzer).

345. *See, e.g.*, Carlsmith et al., *supra* note 343, at 1324. *But see* Renate Ysseldyk et al., *Rumination: Bridging a Gap Between Forgivingness, Vengefulness, and Psychological Health*, 42 PERSONALITY & INDIVIDUAL DIFFERENCES 1573, 1581 (2007).

346. Fade R. Eadeh et al., *The Bittersweet Taste of Revenge: On the Negative and Positive Consequences of Retaliation*, 68 J. EXPERIMENTAL SOC. PSYCHOL. 27, 37 (2017).

paternalistically try to protect survivors from pursuing suits motivated by vengeance. Rather, consistent with civil recourse theory's purpose to empower plaintiffs, as described next, society should trust plaintiffs to make the best decisions for themselves. Society should, however, facilitate the plaintiff's engagement of a lawyer who could help her assess the pros and cons.

c. Empowerment

Civil recourse theorists describe tort law as empowering plaintiffs to hold accountable those who wronged them.[347] The government is obligated to empower victims and accomplishes this by providing a tort claim.[348] Importantly, victims become empowered as the state empowers them.[349] Because empowerment has therapeutic benefits for survivors of gender-based violence, civil recourse theory aligns the state's obligation with survivors' needs. This fact alone makes civil recourse theory particularly compelling and further justifies lawsuits against perpetrators, even absent the likelihood of an enforceable judgment.

Civil litigation can empower survivors and be therapeutic in many ways. Ronan Perry identified five, but the two most relevant here are the initiation of a legal action and the verdict.[350] The ability to file a lawsuit can "redefine [the victim's] sense of self as empowered" instead of "helpless."[351] Jason Solomon explained that suing a wrongdoer can be empowering because it affirms one's "moral worth, self-respect, and dignity."[352] The action will "restore [the victim] to the status of an equal."[353] The verdict—both its "public recognition of a traumatic event and its consequences" and the "public assignment of responsibility for the harm"—"exerts a powerful influence on the ultimate resolution of the trauma."[354]

---

347. *See* Goldberg & Zipursky, *supra* note 18, at 946–47 ("Tort law is . . . about empowering private parties to initiate proceedings designed to hold tortfeasors accountable." (emphasis omitted)); Goldberg, *supra* note 18, at 607 (claiming "[t]ort law involves a literal empowerment of victims—it confers on them standing to demand a response to their mistreatment" and "affirms their status as persons who are entitled not to be mistreated by others [and] . . . who [are] entitled to make demands on government"); Zipursky, *Civil Recourse*, *supra* note 18, at 699 (noting that the tort system "empower[s] plaintiffs").

348. Zipursky, *Civil Recourse*, *supra* note 18, at 737.

349. *But see* Chamallas, *supra* note 8, at 530–31 (noting a disconnect between the central image in civil recourse theory of a wronged tort victim who is empowered to seek justice and the fact that tort victims are typically portrayed as disempowered, and arguing that tort law has not empowered some victims, including survivors of gender-based violence, because of doctrinal and procedural obstacles). Zipursky's and Chamallas's claims are not inconsistent. Victimization can disempower, and the tort system can empower, although it may not always empower adequately.

350. *See* Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 966 (2009) ("[There are] five aspects of tort law and practice which may have an empowering effect, each at a different stage and in a different manner: the right of action, representation, the initiative, litigation, and the verdict." (emphasis omitted)).

351. *Id.* at 975.

352. Solomon, *supra* note 18, at 1785, 1794.

353. *See id.* at 1795.

354. Carey, *supra* note 8, at 743; Perry, *supra* note 350, at 987 (citing JUDITH L. HERMAN, TRAUMA AND RECOVERY 70 (1997)).

These benefits do not depend upon collecting large amounts of money. Positive consequences flow from the choice to sue (or not), participation in the process (having "voice"), and the legal system's treatment of the survivor as worthy.[355] Winning is not essential.[356]

It would be naïve to ignore the fact that survivors may encounter some of the same problems in the civil law system that they have experienced in the criminal justice system, and these problems may inhibit a survivor's healing. For example, because the assault often occurs in private, factual disputes turn on credibility.[357] Stereotypes and misconceptions can hamper a survivor's ability to achieve justice.[358] Nonetheless, the civil law process is generally believed to be more "survivor friendly" than the criminal justice process for a variety of reasons.[359] Most notably, the survivor has much more control, something recognized by Goldberg[360] and confirmed as important by Herman's interviewees.[361] In addition, the criminal system has considerable case loss, as well disappointing outcomes in many cases.[362] These results are less likely when the survivor is in control of the case and the burden of proof is a preponderance of the evidence. While some survivors may ultimately prefer other formal or informal channels for empowerment and accountability than the civil legal system, survivors should have a choice in light of each forum's

355. *See* Carey, *supra* note 8, at 741–45.

356. *See* Balleza, *supra* note 177 ("Seeking recourse in the civil system can be a part of the healing process, empowering the victim and giving her a measure of control over her life, say both rape victims and counselors. 'They can keep seeking a way to get some redress . . . . If they win, certainly. Even if they lose, they know they did everything they could.'" (quoting Cassandra Thomas, president of the National Coalition Against Sexual Assault and director of the rape crisis program at the Houston Area Women's Center)).

357. *See, e.g.*, State v. Long, 975 A.2d 660, 671–72 (Conn. 2009) (holding that a prosecutor's closing argument did not improperly vouch when questions about the victim-witness's credibility was based on facts in evidence).

358. *See* Clark, *supra* note 130, at 28; Gail Steketee & Anne H. Austin, *Rape Victims and the Justice System: Utilization and Impact*, 63 SOCIAL SERV. REV. 285, 299–300 (1989).

359. *See* Bublick, *supra* note 13, at 67–74 (detailing procedural, substantive, and practical advantages for survivors); Bublick & Mindlin, *supra* note 41, at 4–5; Perry, *supra* note 350, at 976–80; Solomon, *supra* note 18, at 1783, 1795; West, *supra* note 172, at 114.

360. *See* Goldberg, *supra* note 18, at 601–02.

361. Herman, *supra* note 162, at 582 ("Many informants experienced their marginal role in the justice system as a humiliation only too reminiscent of the original crime . . . . Informants who sought redress through a civil complaint had more control over the conduct of their legal cases."). In fact, Feldthusen's research suggests that dissatisfaction with the criminal process motivated survivors to pursue their civil actions. Des Rosiers et al., *supra* note 202, at 450.

362. *See* sources cited *supra* note 252.

potential advantages and disadvantages.[363] Choosing a course of action is itself empowering, especially when assisted by a client-centered lawyer.[364]

2. Deterrence

Another purpose of tort law besides enabling civil recourse, i.e., facilitating accountability, revenge, and empowerment, is deterring tortious behavior. Civil recourse adherents would not dispute this function but would contend that deterrence is not sufficient to explain the structure of tort law.[365] So be it, but deterrence often goes hand in hand with civil recourse theory because many plaintiffs, especially survivors of gender-based violence, seek accountability in order to further deterrence.

At first blush, one might assume that the survivor of gender-based violence seeks specific deterrence, i.e., she seeks to deter the particular person who has abused her from abusing her again. Specific deterrence is important for survivors of gender-based violence because perpetrators are likely to be repeat offenders.[366] For

---

363. Tuerkheimer, *supra* note 13, at 1151–67 (detailing problems with the criminal justice system, schools, and workplaces as avenues of accountability); *id.* at 1174–88 (identifying various benefits of addressing sexual misconduct through informal channels); *see* Herman, *supra* note 162, at 582 (noting survivors "also frequently complained of feeling powerless and marginalized in the face of the complex rules and procedures of the legal system, which they often perceived as a cynical game"). In the future, restorative justice options may reduce the importance of the tort system as an avenue for addressing survivors' needs. *Cf.* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 34, 40 (arguing that restorative justice can satisfy the needs of victims better than the criminal justice system although not necessarily with regard to material reparations). *See generally* Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 893 (2019) (noting "between 2010 and 2015, fifteen states enacted or updated restorative justice statutes"); Laurie S. Kohn, *#MeToo, Wrongs Against Women, and Restorative Justice*, 28 KANS. J.L. & PUB. POL'Y 561, 576–85 (2019) (advocating restorative justice for workplace sexual harassment and assault). Restorative justice seems distant at present because programs often exclude crimes of gender-based violence. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 276B § 3 (West 2019). Even where the restorative justice option exists, survivors need an attorney to advise them on the advantages and disadvantages of such a process and help them participate, if that is their choice. *See* Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM 123, 164 n.217 (2017).

364. Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 496–99 (2012) (using the Stages of Change Model from psychology to explain how lawyers can empower clients who experienced domestic violence).

365. *See* Zipursky, *Civil Recourse*, *supra* note 18, at 731.

366. *See* E. DRAKE ET AL., WASH. STATE INST. FOR PUB. POLICY, RECIDIVISM TRENDS OF DOMESTIC VIOLENCE OFFENDERS IN WASHINGTON STATE 5 (2013) (noting that "18% [of domestic violence offenders] were convicted for a new domestic violence felony or misdemeanor within 36-months compared to 4% of non-domestic violence offenders"); *see also* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) ("A majority of the undetected rapists in this sample were repeat offenders. . . . These repeat rapists each committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts."). *But see* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA

example, the National Violence Against Women Survey found almost two-thirds of the survivors of intimate partner violence said they experienced multiple assaults from the same partner, with an average of seven episodes.[367]

But general deterrence, i.e., deterring perpetrators in the public at large, is also a goal of many survivors who sue.[368] They believe that when survivors step up to hold their perpetrators accountable, fewer people will commit gender-based violence.[369] Whether the survivors recognize it or not, their suits become part of "social engineering," to quote William Prosser.[370] Their lawsuits can lead to legal advances for survivors. For example, the American Law Institute's *Restatement (Third) of Torts* is currently forging a new and important understanding of consent in the context of sexual assault.[371] Those efforts will only change behavior if courts apply the new doctrine,[372] and people believe the law might apply to them.[373] In that vein, plaintiffs who sue their perpetrators are themselves legal reformers. Professor Richard Abel aptly said, "To assert a legal claim is to perform a vital civic obligation."[374]

PEDIATRICS 1148, 1152 (2015) (questioning the number of repeat rapists on college campuses).

367. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 39 (2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf; *id.* ("Approximately half (51.2 percent) of the women raped by an intimate . . . said they were victimized multiple times by the same partner. . . . Overall, female rape victims averaged 4.5 rapes by the same partner.").

368. Balleza, *supra* note 177 ("A sense of duty is often a prime motive in filing these civil suits. 'I think women in these situations do feel a need to protect other women,' said Dr. Leslie Wolfe, executive director of the Center for Women Policy Studies in Washington.").

369. *See supra* text accompanying notes 214, 237.

370. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 3, at 15–18 (1941); *see also* Hershovitz, *supra* note 283, at 40 ("[T]he way that we respond to wrongdoing is partly constitutive of the basic structure of our social relations."); Perry, *supra* note 346, at 966 ("[T]ort liability . . . has an empowering effect on the societal level: it helps break unfair social structures, and reduces power imbalances that decrease individuals' opportunities to control their own lives.").

371. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSON § 18, cmt. f (AM. L. INST., Prelim. Draft No. 7, 2020) (on file with author) (declaring that "no means no" and such a communication "preludes a finding of actual consent, apparent consent, or presumed consent," unless it is "unclear whether the person is indeed sincerely communicating unwillingness").

372. *Cf.* ABILITY TO PAY, THE 22ND ANNUAL LIMAN CENTER COLLOQUIUM, Yale Law School, March 2019, at 142 ("Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants with lessened standards for negotiating civil transactions or conforming their conduct in a responsible manner.").

373. *See* LAWRENCE M. FRIEDMAN, IMPACT 120 (2016) ("[R]ealistically, what deters people . . . is perceived risks and benefits."); *id.* at 149 ("There are deterrence curves in civil law, as well.").

374. Abel, *supra* note 80, at 467.

Tort scholars who discuss deterrence often assume that tort law achieves deterrence by imposing the financial costs of the tort on the defendant, either directly or through increased insurance premiums.[375] Yet deterrence is possible even if the defendant is uninsured and judgment proof;[376] it results from shame, from the costs and inconvenience of defending a lawsuit, and from the possibility that the judgment will be enforced in the future. The Connecticut Supreme Court recognized this fact when it explained why damages were an element of a claim for negligence but not for battery: "Where the plaintiff's right has been intentionally invaded, its vindication in a court of law and the award of nominal and even exemplary damages serves the policy of deterrence in a real sense."[377]

The amount of deterrence that tort law affords in these instances, or in any instance involving an intentional tortfeasor, is unknown. After all, many intentional torts are also crimes. If a defendant is not deterred by the threat of punishment and criminal restitution, the defendant may not be deterred by a tort judgment either.[378] On the other hand, if there were a better chance of being held accountable in the civil system than the criminal system—with the lower burden of proof, the survivor's control of the suit, and the doctrinal treatment of consent[379]—then tort law may in fact deter better than the criminal law.[380] Certainly, anecdotal examples exist of batterers stopping their abusive behavior once a tort judgment was entered.[381]

In conclusion, both civil recourse theory and deterrence provide excellent justifications for tort claims by gender-based violence survivors, even if the plaintiffs are unlikely to obtain a large collectible judgment. Yet, as explained initially, these survivors are shut out of the tort system because they cannot find lawyers to represent them.

---

375. Gilles, *supra* note 47, at 673–74, 686; Wriggins, *Domestic Violence Torts*, *supra* note 12, at 145.

376. Lemann, *supra* note 277, at 77 (observing that "the mere threat of liability, with the attendant strain of being a defendant in a tort action, certainly has some deterrent effect regardless of how successful a plaintiff ultimately is in collecting a judgment" (discussing risky driving)).

377. Right v. Breen, 890 A.2d 1287, 1293 (Conn. 2006); *cf.* N. Bank v. Cincinnati Ins. Cos., 125 F.3d 983, 988 (6th Cir. 1997).

378. Gilles, *supra* note 47, at 674.

379. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSON § 18 cmt. f (AM. L. INST., Prelim. Draft No. 7, 2020) (on file with author) (discussing treatment of consent); Erin Murphy & Ken Simons, *Reasonably Speaking: Consent and Sexual Assault in Criminal v. Tort Law*, AM. LAW INST. (Mar. 26, 2019), https://www.ali.org/news/podcast/episode/consent--criminal-v-tort-law/ (last visited Nov. 25, 2019).

380. Gilles, *supra* note 47, at 674–75.

381. *See, e.g.*, Carey, *supra* note 8, at 753 (relaying facts of a particular case in which the author was involved).

III. EARLIER PROPOSALS TO ADDRESS SURVIVORS' NEEDS THROUGH INSURANCE

So far, this Article has argued that the tort system does not work for survivors because survivors cannot find lawyers who will help them access the system. Yet survivors want, need, and deserve those things that the tort system can offer: accountability, revenge, empowerment, deterrence, and yes, compensation if possible. The question is whether there is a way to make the system accessible to survivors.

This Part argues that insurance can solve the problem. Liability insurance already provides legal counsel to the perpetrators or third-party defendants in many instances. It is time to consider how insurance might provide legal counsel to survivors.

A number of scholars have explored how private insurance might benefit survivors, primarily as a way to get them compensation. Proposals have focused on both third-party (liability) and first-party (loss) insurance. Most notably, Jennifer Wriggins proposed that liability insurance should cover intentional torts, and Rick Swedloff proposed that loss insurance should compensate victims for their injuries, including pain and suffering.[382] These proposals, if feasible, could be part of a multifaceted approach to meeting survivors' needs through various insurance products, including the insurance product proposed in this Article. However, the liability- and loss-insurance products do not appear feasible, and both have some disadvantages from the perspective of survivors. Canvassing their limits demonstrates the promise of civil recourse insurance.

A. Liability Insurance

A "Domestic Violence Torts Insurance Plan," designed by Jennifer Wriggins, was the first liability-insurance proposal for gender-based violence torts.[383] It would make liability insurance available to "cover claims for domestic violence torts in order to increase deterrence and compensation and as a matter of fairness to domestic violence tort victims."[384] Specifically, Wriggins proposed that "mandatory automobile liability insurance would 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."[385] In addition, individuals' mandatory automobile insurance would have an "uninsured domestic violence tortfeasor" provision that would allow victims of domestic violence to make claims under their own policies if the defendants were

382. Swedloff described other proposals, including a liability-insurance proposal like Wriggins's, *see* Swedloff, *supra* note 22, at 759–61, but his loss-insurance proposal was the most novel.

383. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 152–61.

384. *Id.* at 152.

385. *Id.*

uninsured.[386] In either case, the insurance company would be able to seek reimbursement from the tortfeasor.[387]

This novel and well-intentioned proposal is, unfortunately, unrealistic. In commenting on mandatory liability insurance for intentional torts, Gilles concluded: "There are serious—probably insurmountable—problems with using a mandatory insurance strategy for intentional torts."[388] Swedloff also concluded, "[s]uch a product is likely to meet significant opposition."[389] In fact, 20 years have passed since Wriggins made her proposal and no states have required that mandatory automobile insurance include such coverage. Of equal importance, the insurance industry has not voluntarily modified automobile insurance in this way. Presumably, this type of added coverage is not sufficiently profitable.

1. Feasibility

To understand why Wriggins's proposal has not caught on, consider why the intentional tort exclusions in liability policies exist and persist. They emerged in the mid-1960s to 70s[390] and have remained a staple of insurance policies. Legislators could outlaw the problematic exclusions,[391] but none have.

They persist for several reasons. First, liability insurance rests upon the idea that events are unpredictable for the insured and predictable for the insurer.[392] Intentional torts flip that equation when the insured is the perpetrator.[393]

---

386. *Id.* at 153.

387. *Id.* at 152.

388. Gilles, *supra* note 47, at 704 (mentioning, *inter alia*, moral and public policy problems, the high cost of premiums, and the inefficiency compared to compensation through taxation).

389. Swedloff, *supra* note 22, at 768 (noting that people view compulsory insurance as "an inappropriate intrusion into private contract decisions").

390. Thomas D. Sawaya, *Use of Criminal Convictions in Subsequent Civil Proceedings: Statutory Collateral Estoppel Under Florida and Federal Law and the Intentional Act Exclusion Clause*, 40 U. FLA. L. REV. 479, 523–25 (1988). Even policies that tend to provide more liberal coverage for sexual harassment often exclude a lot of violence. *See* LOCKTON COMPANIES, SEXUAL HARASSMENT: IS YOUR COMPANY EXPOSED? 4–5 (2018), https://www.lockton.com/whitepapers/Gelot_Sexual_Harassment_Jan_18_low_res.pdf (noting that "some EPLI policies [exclude] . . . behavior that is so egregious that to insure it would be offensive to — if not outright against — public policy," including, *inter alia*, "sexual abuse or injury" and "sexual assault or molestation intended to lead to or culminating in any sexual act").

391. G. COUCH, COUCH ON INSURANCE §§ 101:11, 101:16 (3d ed. 2019) (mentioning that insurance contracts must be "consistent with public policy," otherwise they are "illegal and void," and that statutes are a source of public policy).

392. Bruce Chapman, *Allocating the Risk of Subjectivity: Intention, Consent, and Insurance*, 57 U. TORONTO L.J. 315, 315–16 (2007); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1024 (1989).

393. Others have noted, however, that sexual assault is unpredictable from the plaintiff's perspective. *See* Chapman, *supra* note 392, at 320.

Consequently, insurers rightly worry about moral hazard and adverse selection in the context of intentional torts.[394]

Second, because of the potential for moral hazard and adverse selection, it is often said that liability coverage for intentional torts violates public policy. Courts cite these particular concerns when interpreting ambiguous policies, thereby demonstrating the strength of these arguments despite some commentators' skepticism.[395] Simply, an entire body of caselaw exists in which courts have found that liability-insurance coverage for intentional torts violates public policy.[396] This sentiment makes it unlikely that Wriggins's proposal would ever be adopted. The insurance companies that make these arguments in court are also active in the legislative arena.[397] If reformers pushed legislators to think about outlawing exclusions (or mandating liability coverage), insurance companies might respond by encouraging legislators to adopt legislation like California's, which expressly says, "An insurer is not liable for a loss caused by the willful act of the insured."[398]

There are essentially three public policy arguments that have been persuasive. The first, articulated by George Priest, is that eliminating the exclusions is unfair to insureds who would never commit the excluded act—here gender-based violence—because they must bear the costs in their premiums.[399] This group of innocent policy holders is larger than the group of insured perpetrators who would benefit.[400] A Washington appellate court found this argument compelling, noting: "The average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with other homeowner's policyholders."[401]

---

394. Priest, *supra* note 392, at 1024; Christopher Parsons, *Moral Hazard in Liability Insurance*, 28 GENEVA PAPERS ON RISK & INS. 448, 448 (2003). Adverse selection occurs when people who are at high risk of making a claim purchase the insurance product in larger numbers than predicted, often undermining the product's profitability. Moral hazard occurs when the product causes people to engage in behavior that results in claims.

395. *See, e.g.*, Christopher French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 66 (2012) (calling it a "myth" that coverage for intentional torts would be against public policy).

396. *See, e.g.*, Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 490 (Iowa 1988); Regence Group v. TIG Specialty Ins. Co., 903 F. Supp. 2d 1152, 1161 (D. Or. 2012); Nat'l Fire Ins. Co. of Hartford v. Lewis, 898 F. Supp. 2d 1132, 1146 (D. Ariz. 2012); Chiquita Brands Int'l Inc. v. Nat'l Union Ins. Co., 988 N.E.2d 897, 900 (Ohio Ct. App. 2013); Pins v. State Farm Fire & Cas. Co., 476 F.3d 581, 584–85 (8th Cir. 2007); J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 992 N.E.2d 1076, 1081 (N.Y. 2013).

397. Swedloff, *supra* note 22, at 768.

398. CAL. INS. CODE § 533 (West 2019); *see also* MASS. GEN. LAWS ANN. ch. 175, § 47(6)(b) (West 2019) (stating "no company may insure any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing").

399. Priest, *supra* note 392, at 1026.

400. *Id.*

401. Rodriguez v. Williams, 713 P.2d 135, 137–38 (Wash. Ct. App. 1986); *see, e.g.*, Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 490 (Iowa 1988) ("[W]e think that

The second public policy argument is that the exclusion must exist to avoid a moral hazard effect; otherwise, there will be more victimization.[402] The deterrence rationale was evident in *Continental Insurance Co. v. McDaniel*.[403] There, the plaintiff alleged, among other things, that her employer exposed his penis, told her to "kiss [his] cock," pulled her head toward his penis, and "grabb[ed] and fondl[ed] her breasts, buttocks and pelvic area."[404] The court affirmed the denial of coverage as a matter of law saying, "[T]here is no coverage for an insured's intentional acts, wrongful under the law of torts, because contractual intent and public policy coincide to prevent an insured from acting wrongfully knowing his insurance company will pay the damages."[405]

The third public policy argument is that the exclusions are supported for reasons of retribution: perpetrators should not be able to buy insurance to relieve themselves of the cost of their transgressions. For example, the Oregon Supreme Court held that it would violate public policy to interpret an insurance contract to cover the insured's defense of his wife's assault-and-battery claim: "[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."[406]

These public policy concerns have been particularly salient in the context of personal injury torts, particularly sexual violence,[407] although the exact reason

---

neither [the insured], in purchasing his homeowner's policy, nor [the insurer], in issuing it, contemplated coverage against claims arising out of nonconsensual sex acts.").

402. *See, e.g.*, 2 INSURANCE CLAIMS AND DISPUTES § 6:19 (6th ed. 2019) ("There are cases from numerous states broadly stating that coverage for intentional wrongdoing is against public policy. An insured is not allowed to consciously control its risk of loss."); Tracy E. Silverman, Note, *Voluntary Intoxication: A Defense to Intentional Injury Exclusion Clauses in Homeowner's Policies?*, 90 MICH. L. REV. 2113, 2114 (1992) ("Allowing coverage for intentional acts not only frustrates insurance companies' efforts to calculate premiums accurately, but also contravenes the public policy goal of deterrence that underlies tort law.").

403. 772 P.2d 6, 9 (Ariz. Ct. App. 1988).

404. *Id.* at 7.

405. *Id.* at 9; *see also* W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985) (explaining that the exclusions "help control moral hazard" because "[o]nce a person has insurance, he will take more risks than before because he bears less of the cost of his conduct").

406. Isenhart v. General Cas. Co. of Am., 377 P.2d 26, 28 (Or. 1962); *see also, e.g.*, Thomas v. Benchmark Ins. Co., 179 P.3d 421, 425 (Kan. 2008) ("Kansas public policy prohibits insurance coverage for intentional acts: '[A]n individual should not be exempt from the financial consequences of his own intentional injury to another.'" (quoting Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374 (Kan. 1991)).

407. *See, e.g.*, Doe v. Shaffer, 738 N.E.2d 1243, 1247 (Ohio 2000) (noting different public policy implications when a negligent tortfeasor, as opposed to an intentional tortfeasor, seeks liability coverage, and holding that it did not violate public policy for insurer to indemnify and defend Dioscese and Bishop when suit was brought on behalf of a mentally disabled man who was sexually abused and contracted HIV while living in a care facility under the control of defendants, who did not commit the sexual assault).

why is unclear.[408] Courts seem to shrug off similar concerns in other areas where liability insurance exists for intentional wrongs, such as "defamation, disparagement, trademark infringement, unfair competition, false imprisonment, employment discrimination, wrongful termination, malicious prosecution, invasion of privacy, and certain statutory violations."[409] The Iowa Supreme Court made the distinction quite stark when it singled out insurance coverage for sexual assault as violating public policy: "Our holding here . . . should not be interpreted to mean that we condemn insurance coverage for all forms of intentional misconduct. For example, we have held that it is not against the public policy of this state to provide insurance coverage for punitive damages."[410]

Wriggins addressed these public policy concerns, as well as others, but her response to the moral hazard objection, in particular, was not entirely satisfying. Instead of denying that moral hazard would exist, she argued that her proposal would not increase moral hazard because perpetrators do not expect to incur liability anyway,[411] and her proposal would require reimbursement by the perpetrator.[412] While the status quo may have its own moral hazard problem when perpetrators know their victims cannot find lawyers to hold them accountable, it is uncomfortable

---

408. There are various potential explanations. On the one hand, sexual misconduct may be considered more odious than these other torts. In fact, rape is arguably much more serious than an ordinary battery, as it involves "great and different harm," is "inextricably intertwined with gender and patriarchy," and "creates an atmosphere of terror in the face of widespread sexual violence." Carey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 20, 25–27 (2015). Alternatively, it may reflect "old rape exceptionalism," i.e., the law or procedures are generally hostile to gender-based violence claims. *See, e.g.*, Michelle Anderson, *Campus Sexual Assault Adjudication, and Resistance to Reform*, 125 YALE L.J. 1940, 2000, 2005 (2016); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault*, 41 AKRON L. REV. 957, 960–61 (2008). After all, this interpretation of public policy helps keep these suits out of the courts, and some scholars have claimed that judges "seem to harbor some antipathy for rape lawsuits." Lininger, *supra* note 10, at 1585–88 (attributing the antipathy to the fact that judges "generally distrust complainants in rape cases," "feel greater empathy for the alleged rapists," buy into "popular misconception that complainants are vindictive, greedy, or mentally unstable," believe "rape allegations belong in criminal proceedings," feel "that the indignity and psychological harm that rape causes are not compensable in tort," or "resent rape suits as a nuisance that hinders the efficient management of judges' dockets"). Historians have claimed that judges' hostility to tort suits by domestic violence survivors, but not to criminal prosecutions of batterers or to relief in the divorce context, was because "tort placed married women in an aggressive legal posture and offered the possibility of an empowering remedy." Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379, 387–88 (2015).

409. RESTATEMENT OF LIABILITY INSURANCE § 45 cmt. h (AM. L. INST. 2019); *see also* French, *supra* note 395, at 67–69.

410. Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 491 (Iowa 1988) (citing Skyline Harvestore Sys. v. Centennial Ins. Co., 331 N.W.2d 106, 108–09 (Iowa 1983)).

411. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 163. This same response appears in Swedloff's article. Swedloff, *supra* note 22, at 763–64. Swedloff has other responses, including that the criminal law already provides a disincentive to committing the crime. *Id.* at 764; *see also* French, *supra* note 395, at 72 (mentioning the "many deterrents to bad behavior," including the criminal law).

412. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 161, 163, 165.

to promote a regime that continues the same level of moral hazard. A different solution (such as the one proposed in this Article) might reduce the moral hazard problem instead of merely leaving it unchanged. In addition, Wriggins's proposal risks increasing perpetrators' bad behavior if the liability insurance is not priced optimally.[413] While her proposal for reimbursement is theoretically a solution to the moral hazard problem, insurers might never pursue their insured for reimbursement, especially if the tortfeasor has few assets.[414] Similarly, while co-insurance or deductibles might minimize the problem,[415] they might not if the tortfeasor has no money or finds the deductible an insufficient deterrent.

Wriggins's more general response to the public policy concerns was to argue that the survivor's need for compensation is a strong public policy consideration too.[416] She is right, of course. Exclusions play out with a perverse irony. They bar compensation in those cases with the worst violence and, concomitantly, the most need for victim compensation. The Washington Court of Appeals explained this effect in a case in which it upheld the exclusion.[417] It first described the facts:

> [The insured] abducted the plaintiff at gunpoint and over the course of two days subjected her to an unremitting series of physical traumas, attacks, and unlawful restraints. These included repeating [sic] pointing and brandishing of a loaded pistol, threats of death and physical injury, sexual attacks, physical attacks and beatings, and other acts and attacks, all of which terrorized the plaintiff physically and mentally.[418]

The court then said, "We have no difficulty believing that [the plaintiff] was terrorized physically and mentally. Such a belief, however, only bolsters the conclusion that [the insured's] intent to act and intent to harm placed [the plaintiff's] personal injury claim outside the scope of [the insured's] homeowner's policy."[419]

---

413. HOWARD C. KUNREUTHER ET AL., INSURANCE & BEHAVIORAL ECONOMICS: IMPROVING DECISIONS IN THE MOST MISUNDERSTOOD INDUSTRY 194–95 (2013) (explaining that insurance has to be priced on the individual's likelihood of perpetrating, and the damage expected, to avoid moral hazard problems). *But see* Shavell, *supra* note 46, at 168, 176 n.27, 178 (2000) (explaining that deterrence is primarily achieved through pricing of premiums to reflect risk—which encourages insureds to take economically efficient safety precautions—but that benefit is unlikely when the insured is committing a crime).

414. Knutsen, *supra* note 22, at 251 (noting the unlikelihood that an insurer would subrogate against an insured who lacks assets because of "substantial collection costs" and a "sketchy" result).

415. *See* Wriggins, *Domestic Violence Torts*, *supra* note 12, at 164.

416. *Id.* at 165–67; *see also* French, *supra* note 395, at 100; Swedloff, *supra* note 22, at 766–67.

417. N.Y. Underwriters Ins. Co. v. Doty, 794 P.2d 521 (Wash. Ct. App. 1990).

418. *Id.* at 522–23.

419. *Id.* at 526.

Wriggins's advocacy for survivors' interests was successful. The *Restatement of Liability Insurance* now recognizes their interests.[420] However, while the *Restatement* tells courts that they need not interpret exclusion clauses broadly on public policy grounds because of the victim's interest in compensation, it does not tell them that they must prioritize victim compensation over the other public policy concerns.[421] Nor does it require legislatures to enact a mandatory insurance proposal like that proposed by Wriggins. In fact, the *Restatement* expressly says that "[a] term in an insurance policy excluding such coverage is enforceable."[422] Nor does it tell legislatures that compensation must be addressed through the perpetrator's liability insurance as opposed to some other mechanism. Wriggins's proposal is unlikely to be adopted because of the lingering public policy concerns about allowing a perpetrator to use his liability insurance to pay for the damage caused by his intentional torts.[423]

2. Is it Best for Survivors?

Apart from the economic and political feasibility problems associated with a liability-insurance proposal—including its likelihood to fall afoul of some people's views of good public policy, its potential to perpetuate and increase moral hazard, and its failure to gain insurance companies' interest—a liability-insurance proposal is not optimal from the survivor's perspective either. After all, liability insurance involves insurers in these cases but aligns them with the perpetrator. This creates an imbalance, both inside and outside the courtroom.

Liability insurance provides compensation to the survivor, but it also provides the insured with a lawyer to defend the liability claim.[424] The duty to defend is a corollary of the duty to indemnify.[425] A defense lawyer provided by the insurance company would probably be well-versed in how to defeat coverage. That attorney might attack the survivor's credibility or engage in behavior that could prove traumatic to the survivor, e.g., ask for the survivor's mental health records.[426]

---

420. RESTATEMENT OF LIABILITY INSURANCE § 45 (AM. L. INST. 2019) (permitting insurance coverage for civil liability arising out of criminal acts and expected or intentionally caused harm, "except as barred by legislation or judicially declared public policy"); *id.* § 45 cmt. g.

421. *Id.* § 45 cmt. f.

422. *Id.* § 45 cmt. a.

423. In stating that liability insurance should be available to pay the perpetrator's tort judgment, the *Restatement of Liability Insurance* suggests that the criminal law reduces any moral hazard concern. *See id.* § 45 cmt. d. That optimistic view assumes a more robust system for the prosecution of gender-based violence than currently exists. *See* sources cited *supra* notes 252, 254–55.

424. Gilles, *supra* note 47, at 664 (noting that "the duty to defend creates prepaid legal defense insurance for the insured").

425. *See* Baker, *supra* note 46, at 434; *see also* sources cited *supra* note 103. The perpetrator would not get an attorney, however, if the survivor claimed under her own uninsured motorist coverage.

426. *See generally* Weiner, *supra* note 363, at 171–72.

Because insurers would be worried about claimant moral hazard,[427] they might defend these claims with particular vigor. Claimant moral hazard is when a claimant targets someone with liability insurance because the insured has "deep pockets." The claimant predicts that the insurance company will settle instead of defend. The claimant may even be in collusion with the insured to defraud the insurer.[428] Fraud might be hard to detect because assaults typically occur in private. While sexual assault claims are infrequently false,[429] and domestic violence allegations are likely to be true,[430] insurers may fear that false allegations will increase once insurance is available.

Consequently, giving lawyers to perpetrators could be retraumatizing for survivors. A court in New Jersey implicitly recognized this downside to liability coverage when it denied insurance coverage in a case brought against the insured pursuant to special remedial legislation for domestic violence survivors that permitted compensatory and punitive damages: "We hold that the public policy of this State, to provide maximum protection to victims of domestic violence and to deter acts of domestic violence, precludes the availability of insurance coverage to provide a defense for such a claim or indemnification for such an award."[431]

In addition, providing more perpetrators with defense counsel could negatively impact the law, at least from the perspective of those concerned about survivors. Insurance lawyers might argue for interpretations of the law and new legal provisions that would benefit the insured. Instead of liability insurance achieving deterrence, compensation, and better norms,[432] liability insurance might cause norms to be shaped in the wrong direction.

Finally, even if liability insurance provided compensation to a survivor, the survivor might find the regime unsatisfying if she sought to use the legal system to achieve revenge. Although the survivor would have her day in court, there would be no "blood money,"[433] i.e., the insurance company would be paying any damages and even the cost of the perpetrator's defense.[434] The insurance company might never

---

427. Parsons, *supra* note 394, at 448, 453, 460–61.

428. *Id.*

429. Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 210 n.22 (2017) (citing research that indicates between two and eight percent of sexual assault allegations are false).

430. Peter G. Jaffe et al., *Custody Disputes Involving Allegations Of Domestic Violence: Toward A Differentiated Approach To Parenting Plans*, 46 FAM. CT. REV. 500, 508 (2008) (citing studies that show "the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators"). *But see* Yoav Mazeh & Martin Widrig, *The Rate of False Allegations of Partner Violence*, 31 J. FAM. VIOLENCE 1035, 1035 (2016) ("The rate of false [partner violence] complaints has been disputed for decades.").

431. Bittner v. Harleysville Ins. Co., 769 A.2d 1085, 1091 (N.J. Super. Ct. App. Div. 2001).

432. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 144–51.

433. *See* Baker, *supra* note 304, at 275.

434. It is typically not possible for the insurer to recoup the cost of the defense unless the insurance contract so states. RESTATEMENT OF LIABILITY INSURANCE § 21 cmt. a (AM. L. INST. 2019).

exercise its right of reimbursement, assuming reimbursement did not violate public policy.[435] Nor might the survivor ever know of the insurance company's efforts even if it did seek reimbursement. In addition, survivors might not receive the therapeutic benefit of tort litigation when the insurance company is, in effect, the other party. To make matters worse, there is some evidence that decision makers punish the perpetrator less severely in the criminal law system when the survivor receives insurance compensation.[436]

For those survivors who mainly want compensation, first-party loss insurance or a public compensation scheme seems like an easier and better process. Public compensation, in particular, would allow all survivors to receive compensation, not just those whose perpetrator purchases automobile insurance or who themselves purchase loss or "uninsured perpetrator" insurance. In fact, a liability-insurance proposal that is tied to car insurance might exclude the poor unless the government acted to make it available to those without cars and affordable for those with cars. Although automobile liability insurance is mandatory in all states,[437] one in eight drivers lack liability insurance despite the law's mandate.[438] Less than half the states require uninsured motorist coverage,[439] and people might not actually acquire uninsured motorist insurance even if it were also made mandatory.

The bottom line is that a liability-insurance solution seems unlikely to gain traction. Concerns about moral hazard and adverse selection will preclude insurers from offering this product on their own unless legislators mandate it for all drivers. That seems unlikely given the statements of courts and legislatures that "public policy" supports the existing exclusions. Even if insurers did offer it, Ellen Pryor predicts that the product would be priced so high that those who were most likely to need it would find it unaffordable.[440] Finally, even if such a proposal were feasible, it has disadvantages for survivors. Most notably, it weaponizes perpetrators by providing them with a lawyer.

B. Loss Insurance

Another insurance option for addressing the needs of survivors is first-party loss insurance. Loss insurance already exists to protect against the effects of third-

---

435. Swedloff, *supra* note 22, at 765 ("Typically an insurer may not assert subrogation rights against its own insured.").

436. Philippe P.F.M. van de Calseyde et al., *The Insured Victim Effect: When and Why Compensating Harm Decreases Punishment Recommendations*, 8 JUDGMENT & DECISION MAKING 161 (2013) (discussing property crimes).

437. 16 WILLISTON ON CONTRACTS § 49:33 (4th ed. 2019).

438. *Facts and Statistics: Uninsured Motorists*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists (last visited Oct. 1, 2019).

439. *Id.* (providing a table of "Automobile Financial Responsibility Limits by State" showing which states require uninsured motorist insurance); *see also* 16 WILLISTON ON CONTRACTS § 49:35 (4th ed. 2019).

440. *See* Pryor, *supra* note 133, at 1742 n.69. Wriggins addresses this problem by making the insurance mandatory. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 157–59.

party crime, although it tends to be available for businesses whose assets are damaged by criminal behavior.[441] First-party insurance also exists for individuals, but typically that product comes in the form of medical insurance and disability insurance. Neither of these are usually purchased with gender-based violence victimization in mind.

Loss insurance is a much more efficient way to compensate a victim than liability insurance. Neither is the survivor required to establish the perpetrator's legal responsibility, nor is the insurer obligated to defend the insured.[442] However, loss insurance does not cover pain and suffering, which can be a huge component of the damages survivors seek to recover when they do, in fact, bring a tort suit.[443]

Rick Swedloff analyzed several insurance products that might benefit survivors of gender-based violence, and his focus on loss insurance in particular advanced the conversation.[444] After explaining that most survivors of gender-based violence don't have sufficient first-party insurance[445] and that loss insurers do not cover pain and suffering,[446] Swedloff proposed the creation of a new first-party insurance product that would cover pain and suffering.[447] To address the moral hazard problem, i.e., that survivors might claim an unreasonable amount of pain-and-suffering damages,[448] he recommended that insurers use a scale that dictates payments for pain and suffering,[449] and that the insurer be treated as adverse to the insured in each case.[450] Swedloff predicted that "advantageous or propitious selection," instead of adverse selection, would be evident in sales of the product because those most likely to buy the insurance would be those most likely to avoid the risks of gender-based violence.[451] He recommended that the government subsidize the price of the product to assure demand, noting that people tend to minimize the risk of their own victimization and discount the ability of money to

---

441. GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 325 (4th ed. 1992) (explaining that the Insurance Services Office has crafted forms that are used for commercial crime policies); *see also* Michael Rossi, *New Stand-Alone E-Commerce Insurance Policies for First-Party Risks*, IRMI (Feb. 2001), https://www.irmi.com/articles/expert-commentary/new-stand-alone-e-commerce-insurance-for-first-party-risks#.XPgZcvp9tKY.email (explaining that such policies exist for businesses involved in e-commerce). These policies typically exclude criminal acts committed by the insured or the insured's partners.

442. Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 781 (1973).

443. 4 LITIGATING TORT CASES § 54:50 (2018) ("In most cases, this element [pain and suffering] is the most significant of the harms."); *see also* Swedloff, *supra* note 22, at 749.

444. *See generally* Swedloff, *supra* note 22.

445. *Id.* at 745.

446. *Id.* at 744–46.

447. *Id.* at 774–75.

448. *Id.* at 748–49 (explaining that "an insurance company has no real way of knowing whether the insured's claims to noneconomic damages are legitimate").

449. *Id.* at 775.

450. *Id.* The insurer would have subrogation rights and could pursue the tortfeasor.

451. *Id.* at 776.

address adequately the pain and suffering that might result.[452] Government subsidies could also help ensure that those who needed the insurance the most, i.e., those who are young and poor, could afford it.[453]

1. Feasibility

Swedloff and others have concluded that his proposal is not feasible.[454] He identifies potential demand problems: "People prefer not to think about negative events or ones that they fear."[455] Since this reason for inadequate demand is not related to price, he concluded that subsidization would not solve it.[456] Nor is it clear that copycat purchases would occur once some market penetration exists.[457]

Even if there were demand, supply problems would exist because insurers would still be concerned about adverse selection[458] and moral hazard.[459] In fact, Swedloff recognized, "[I]nsurers have shown little interest over the years in creating such a market."[460] In terms of moral hazard, insurers might worry that survivors would either fraudulently claim a sexual encounter was nonconsensual or search out victimization, not unlike the arsonist who burns down his house for the insurance

---

452. *Id.* at 786.

453. *Id.* at 783–85.

454. *Id.* at 787; *see also* Brown & Randall, *supra* note 57, at 335 (calling a first-party insurance solution "unworkable"). In denying its viability, Brown and Randall raise doubts about, among other things, demand, supply, and adverse selection. *Id.* at 328. They acknowledge that group insurance would be a way to expand the pool of insureds, but caution that such an approach would leave "too many gaps" in coverage among the population. *Id.* at 329.

455. Swedloff, *supra* note 22, at 780 (citing Howard Kunreuther & Mark Pauly, *Insurance Decision-Making and Market Behavior*, 1 FOUND. & TRENDS MICROECONOMICS 76, 92 (2005)); *see also* Brown & Randall, *supra* note 57, at 328. Swedloff cites some evidence that people would, in fact, purchase such insurance. Swedloff, *supra* note 22, at 778–79 (citing study by Ronen Avraham). However, he concludes that people may "underestimate the likelihood of injury and fail to price noneconomic injuries properly or otherwise consider the injuries incommensurable." *Id.* at 780. These impediments to demand for loss insurance may not impede demand for legal expense insurance. Swedloff assumes that people consider rape and domestic violence "low probability events" that then become "no probability events" in their physic, *id.* at 780–81, and they doubt that any amount of money could address their future injuries. *Id.* at 782. However, intentional torts more generally may be viewed as probable events and consumers may value accessing justice more than accessing compensation. In addition, evidence exists that "optimistic bias," which may cause someone to discount risk, does not necessarily apply to low-frequency devastating events, and an "availability heuristic" can cause people to overestimate their chances of an easy-to-recall occurrence. *See infra* text accompanying notes 642–43.

456. Swedloff, *supra* note 22, at 777.

457. *Id.*

458. *Id.* at 747 (noting that insurers "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").

459. Mark W. Dykes, *Occurrences, Accidents, and Expectations, A Primer of These (and Some Other) Insurance-Law Concepts*, 2003 UTAH L. REV. 831, 835 (2003) (describing moral hazard).

460. Swedloff, *supra* note 22, at 786.

money. Insurers would also worry about survivors who exaggerate pain and suffering, even within the scheduled amounts. Insurance companies currently "refuse to insure non-pecuniary losses" because of the difficulties of verifying loss.[461] Because concerns about moral hazard and adverse selection would find their way into the price of the insurance, some commentators predict that the price of loss insurance would be cost-prohibitive.[462] While Swedloff envisions that the government could help solve the demand problem,[463] he ultimately conceded that there are "significant barriers to this approach" because there is "no political lobby to create such a subsidy."[464]

2. Is it Best for Survivors?

Apart from concerns about the feasibility of a loss-insurance solution, a loss-insurance solution is not optimal from the perspective of survivors if survivors mostly want accountability, revenge, empowerment, and deterrence. Loss insurance is about compensation, but compensation is not survivors' primary concern.[465] While the loss insurer has a right of subrogation and may pursue the perpetrator, the loss insurer might never do so if the perpetrator is judgment-proof.[466] Moreover, in terms of the survivor's desire for accountability, revenge, and empowerment, the insurer's effort to collect might leave the survivor less satisfied than the survivor's own demands on the perpetrator. While the survivor could still sue the perpetrator, the survivor would continue to face barriers finding an attorney for the reasons that were discussed in Part I. In fact, compensation from loss insurance would probably further diminish her ability to find an attorney. In some states, legislatures have eliminated the collateral source rule for intentional torts,[467] and thereby have reduced the actual recovery from a tort action. In addition, notwithstanding a survivor's desire for justice, insurance money may mollify her own desire to pursue the

---

461. Ronen Avraham, *The Economics of Insurance Law-A Primer*, 19 CONN. INS. L.J. 29, 75 (2012). Saul Levmore and Kyle Logue suggested a creative way to address the moral hazard problem, but their solution is incompatible with loss insurance that would cover pain and suffering. *See* Levmore & Logue, *supra* note 22, at 319, 325–27 (recommending that uniform payouts go to a "Crime Fund," where the Fund's manager would be instructed to pay victims or their families only so much as necessary to replace provable lost earnings, to a cap, and that that surplus funds would be distributed to charities "who are in no position to increase crime rates").

462. Brown & Randall, *supra* note 57, at 346.

463. Swedloff, *supra* note 22, at 783–86 (noting that the poor and young are the most victimized but are also the least likely to be able to afford insurance so subsidization would and could help); *see also* Levmore & Logue, *supra* note 22, at 319 (proposing to make loss insurance more viable with an "ex ante crime-insurance subsidy" that "could take the form of a tax deduction or credit" either for purchasers or suppliers of insurance).

464. Swedloff, *supra* note 22, at 786.

465. *See supra* Section II.A.

466. 46A C.J.S. INSURANCE § 2029 (2019); Jef De Mot et al., *The Multiplication Effect of Legal Insurance*, 13 N.Y.U. J.L. & BUS. 1, 21 & n.63 (2016) (noting that the "common" right of subrogation, "arising either by contract or by public regulation," that allows the loss insurer to seek "reimbursement from the person or entity legally responsible" for the harm, rarely occurs and citing an insurance survey that found "a subrogation recovery ratio average (gross subrogation dollars recovered divided by paid losses) of merely 8.41%").

467. *See supra* note 93.

perpetrator,[468] especially if, as is likely, her loss insurer would have priority for any damages received from the tort action.[469]

Finally, a loss-insurance proposal may harm survivors because the insurer and the insured would be made adverse to address moral hazard. A survivor might experience institutional betrayal when her own insurer starts vigorously questioning her entitlement to compensation.[470] After all, the loss insurer and the survivor are supposed to be on the same team. The insurer would surely probe the extent of loss,[471] but might also probe issues that determine coverage, such as whether the insured consented to the battery. This scenario is made more likely by the large amount that would be at stake. While insurers who engaged in bad-faith conduct would be vulnerable to a tort claim for bad-faith denial of a claim,[472] that tort has hardly constrained problematic insurance practices.[473]

In conclusion, loss insurance might meet survivors' compensation needs, but it would not meet their other needs. It also could have some serious unintended consequences. Most important, such a product hasn't yet been offered, and it is doubtful whether it will ever be offered.

IV. CIVIL RECOURSE INSURANCE

The liability- and loss-insurance solutions fail to align the interests of the insurance industry, survivors, and the public in a way that makes these products commercially or politically viable. My proposal for "civil recourse insurance" does just that.

A. Described

Civil recourse insurance would provide the insured with a lawyer so that the insured could hold the perpetrator accountable in tort law (or, perhaps, in another legal forum of the survivor's choosing, such as a Title IX proceeding, the criminal law system, or potentially all of these). Any financial recovery would go to the

---

468. Fischer & Jerry, *supra* note 161, at 872 (noting an injured party with first-party insurance is less likely to sue).

469. This sort of arrangement is often reflected in the parties' agreement. *See, e.g.*, *Insured Can Agree to Reimburse Insurer Before Being "Made Whole,"* 26 No. 18 INS. LITIG. REP. 674, 674 (2004).

470. *See generally* Carly Parnitzke Smith & Jennifer Freyd, *Institutional Betrayal*, 69 AMER. PSYCHOLOGIST 575 (2014).

471. *See* Adjin-Tettey, *supra* note 68, at 189.

472. Ronald J. Clark, Dianne K. Dailey & Linda M. Bolduan, *First-Party Bad Faith as a Tort Action*, 3 L. & PRAC. INS. COVERAGE LITIG. § 28:17 ("Currently, at least twenty-nine states recognize a common law bad faith tort in the context of first-party insurance claims.").

473. *See id.* (citing cases); *see also* Avraham, *supra* note 461, at 87–88 (claiming that "barriers to litigation" and "insureds' lack of sophistication, knowledge, and resources" insulate insurers from bad-faith claims).

survivor, not to her lawyer[474] or the insurance company,[475] although the insurer could reclaim any award of attorneys' fees.

Civil recourse insurance would be a type of legal expense insurance. Legal expense insurance provides the policyholder with legal representation when a covered event happens.[476] It differs from the prepaid legal plans that are common in the United States.[477] Prepaid legal plans do not typically provide funding for a plaintiffs' lawyer in the way advocated for here.[478] In fact, while prepaid legal plans might offer a victim of gender-based violence an attorney to obtain a civil protection

---

474. If the attorney worked in excess of the insurance cap to achieve the client's objective, the attorney might get some of the recovery pursuant to a contingent-fee arrangement.

475. *See supra* text accompanying note 469.

476. The German system of legal expense insurance is described in detail *infra* Section IV.B.1.

477. RIAD, DETERMINING FACTORS FOR LEGAL PROTECTION INSURANCE 4 (2018), http://riad-online.eu/fileadmin/documents/homepage/Report-Summary_180102_final.pdf ("In the US legal protection exists as 'prepaid legal services' or 'legal plans' which are not necessarily set up as insurances. The main differences are that legal plans cover specific anticipated events, like drafting a will, while legal protection insurance covers unforeseen events (e.g. employment disputes or liability claims)."); Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience*, 30 J. L. & SOC'Y 31, 36–37 n.27 (2003) ("Legal service plans (LSP) . . . follow different principles to LEI [legal expense insurance]. First of all, they do not insure against a pecuniary loss as such, but merely allow a plan member to receive limited funding, defined by a certain number of lawyer's working hours. . . . Secondly, unlike LEI policies, LSP tend to focus on non-forensic legal expenses by funding a (very limited) amount of consultation time (between 1 and 2.5 hours). Litigation is usually funded for defendants only, with a cap at 50 hours under a popular LSP. Thirdly, unlike an insurance, LSPs do not require an external event, defined as the 'insured event', to invoke the policy. Finally, most LSPs are not open to the public, but set up as employee benefit trusts or as plans for trade union members.").

478. *See, e.g.*, *MetLife Legal Plans*, METLIFE, https://www.legalplans.com/civil-lawsuits/ (last visited Sept. 22, 2020) (providing legal counsel for specified reasons but not for plaintiff-side tort representation). This has been true of such plans from the beginning. *See* RICHARD F. KAHLE, JR., PREPAID LEGAL SERVICES AND HAWAII, REPORT NO. 4 (1975), https://lrb.hawaii.gov/wp-content/uploads/1975_PrepaidLegalServicesAndHawaii.pdf (noting that while most plans provide the insured a legal defense, "[m]ost plans do not provide for expensive court actions and many of them disallow suits or require a deductible in suits in which the member is the plaintiff"); *id.* at apps. C, F (citing policies that excluded contingent-fee cases); *see also* Samuel R. Gross, *We Could Pass a Law: What Might Happen if Contingent Legal Fees were Banned*, 47 DEPAUL L. REV. 321, 330 (1998). In contrast, the original legal expense insurance, apparently developed in 1885 for members of the Prévoyance Judiciaire society in France, allowed for plaintiff-side tort claims. *See* Vivien Prais, *Legal Expenses Insurance*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON "ACCESS TO JUSTICE" 431, 432 (A.A.S. Zuckerman & Ross Cranston eds., 1995). For a history of social clubs providing funding for litigation, such as in ancient Athens and Rome, see Michael K. Velchik & Jeffery Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J.L. BUS. & FIN. 1, 6–11 (2019).

order,[479] prepaid legal plans typically do not facilitate the survivor's retention of an attorney to hold the perpetrator accountable through the tort system. Rather, prepaid legal plans tend to offer members more favorable contingent-fee arrangements if members use the plan's network attorneys, but a member will only receive the lower rate if a network attorney agrees to take the case. If the attorney is not interested in the case at the attorney's regular contingent-fee rate or is only marginally interested, the attorney will be *less likely* to take the case with the lower pre-negotiated rate because the attorney's fees will be lower.[480]

In contrast, legal expense insurance makes access to justice *more likely*. Werner Pfennigstorf, a scholar who compared legal expense insurance to contingent fees, explained:

> As a means to guarantee injured persons access to the courts, legal protection insurance (European style) appears in several respects to be more effective than the American practice of contingent fees. Most importantly, access to the courts does not depend on whether the injured person's claim is large enough to attract the interest of a contingent fee lawyer, and in the event of success the amount awarded by the court to compensate the injured person for his loss is not reduced by the fees and expenses incurred.[481]

In fact, the Canadian Bar Association seeks to have "75 per cent of Canadians covered by legal expense insurance by 2030" as a way to increase access to justice.[482] Similarly, the Law Society in the United Kingdom recommended that "discussions should take place with the insurance industry on the feasibility of additional cover for areas [of legal expense insurance], particularly where there is no monetary compensation available and so a contingency arrangement is inappropriate."[483] In Germany, where such insurance is popular, "more than three-quarters of German lawyers shared the view that LEI stimulates litigation."[484]

From a survivor's perspective, there are real benefits to legal expense insurance apart from being able to access a lawyer to pursue a claim (whether for

---

479. *See supra* note 121. A civil protection order may not be available if there is not a threat of future violence, although a tort action would be available for past behavior even without a future threat.

480. *See supra* text accompanying notes 121–24.

481. Werner Pfennigstorf, *Liability Procedures and Alternatives in the Federal Republic of Germany*, 15 GENEVA PAPERS ON RISK & INS. 292, 304 (1990); *cf.* Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services Source*, 90 YALE L.J. 122, 143–45, 154 (1980) (finding that "[c]losed-panel prepaids are . . . most likely to fulfill the instrumental function of lawyer contact and thereby increase lawyer use").

482. *DAS Canada Sponsors Canadian Bar Association Access to Justice Initiative*, CAN. BAR ASS'N. (Sept. 3, 2013), https://www.cba.org/News-Media/Press-Releases/2013/DAS-Canada-sponsors-Canadian-Bar-Association-Acces.

483. CIVIL JUSTICE COUNCIL, *supra* note 124, at 7 (citing ACCESS TO JUSTICE REVIEW: FINAL REPORT 25–26 (2010)).

484. Kilian, *supra* note 477, at 45; *see also* BASIL MARKESINIS ET AL., COMPENSATION FOR PERSONAL INJURY IN ENGLISH, GERMAN AND ITALIAN LAW 31–32 (2005) (noting, without citation, "the availability of insurance has led to a substantial increase in court proceedings").

accountability, revenge, empowerment, deterrence, or some combination of these). First, legal expense insurance, unlike liability insurance, gives the survivor, and not the perpetrator, an attorney.

Second, legal expense insurance increases the odds that the survivor will get what she seeks from the action. Noncompensatory relief becomes more probable. A scholar of the American contingent-fee system found, "[W]hen the lawyer was to be paid out of the settlement (i.e., on a percentage of recovery basis), the focus of negotiation was almost exclusively on financial compensation, while lawyers paid on an hourly fee basis often introduced nonfinancial elements in settlement offers or demands."[485] In addition, legal expense insurance frees up the client to refuse inadequate settlement offers without the financial risks of going to trial.[486] Depending upon a plan's benefits, legal expense insurance might also allow a survivor to select an alternative pathway for accountability, such as restorative justice.[487]

Third, legal expense insurance will bolster deterrence, both specifically and generally.[488] The fact that a survivor can sue her perpetrator may deter further violence by that perpetrator,[489] assuming the perpetrator would be deterred by shame or the other consequences of litigation if he is judgment proof. The perpetrator may also find the empowered survivor a less attractive target.[490]

However, the biggest benefit, apart from being able to access a lawyer, should be general deterrence.[491] Research by Jef De Mot and colleagues suggests that legal expense insurance has a "multiplication effect": It greatly enhances "the overall deterrent effect of the tort system" because no tortfeasor knows if a particular survivor is insured.[492] The authors explain that deterrence is "significantly" enhanced.[493]

---

485. Herbert M. Kritzer, *Review: A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases*, 14 L. & SOC. INQUIRY 167, 177 (1989).

486. *Id.* at 180.

487. *See generally supra* note 363 and accompanying text (discussing restorative justice).

488. Werner Pfennigstorf & Spencer L. Kimball, *Legal Service Plans: A Typology*, 1 AM. B. FOUND. RES. J. 411, 427 (1976) (explaining deterrence has always been a goal of prepaid legal plans).

489. Carey, *supra* note 8, at 757.

490. *Cf.* Pfennigstorf & Kimball, *supra* note 488 (arguing that a prepaid legal plan is "likely to reduce the incidence of certain legal problems of the covered group" because "[w]hen they are no longer defenseless, they cease to be attractive as potential victims").

491. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 784 (8th ed. 2011) (arguing that "[t]he likelier a suit is to be brought . . . the greater is the deterrent effect . . . , and hence the less likely are potential defendants to engage in the forbidden conduct") (discussing contingent-fee arrangements).

492. De Mot et al., *supra* note 466, at 3, 5.

493. *Id.* at 5, 14. The authors do not say that market penetration must meet a particular threshold for this effect, but rather "every additional holder of legal expense insurance increases the probability that a negligent offender will be held accountable." *Id.* at 14.

The context for De Mot's analysis was negligence, but the deterrent effect of legal expense insurance should be even greater for intentional torts. Sexual violence perpetrators, for example, act deliberately and are likely to be deterred when the costs of their acts outweigh the benefits.[494] In addition, survivors of intentional torts are more likely to be motivated by revenge than victims of unintentional torts.[495] The prospect of being subject to a victim's physical revenge, and presumably legal revenge, is itself a deterrent.[496] In fact, "the simple *possibility* that another player could retaliate is usually enough to discourage harm."[497] The possibility of revenge becomes more credible when people decide, *ex ante*, to procure the means to do so.[498] Consequently, one would expect to see a reduction in the amount of victimization once legal expense insurance becomes available.[499] Scholars' observation about revenge outside the legal context applies within it too: "The potential for revenge is primarily beneficial . . . when it eliminates the need for actual revenge."[500]

Finally, enabling survivors to pursue their claims, aided by legal counsel, may develop the law in positive ways, thereby benefitting survivors generally. Two advocates for legal service plans made a similar point almost 40 years ago, noting, "[E]ach legal action supported by a legal service plan is a step in the process of shaping and developing the law, often for the benefit of the covered group, both by creating more favorable rules and by reducing the risk of future disputes. The benefits are not limited to covered group members but inure to all similarly situated persons."[501]

Legal expense insurance has received only limited attention in the United States,[502] but it deserves much more. Legal expense insurance offers a mechanism to align the survivor's needs (accountability, revenge, empowerment, and deterrence), the goals of the tort system (particularly civil recourse and deterrence), plaintiffs' lawyers' interests (payment for representation), and insurers' interests (profitability). As discussed below, the product should be attractive to insurers because legal expense insurance avoids the demand and supply problems (including moral hazard and adverse selection) that have doomed liability- and loss-insurance solutions. It should be attractive to politicians because it aligns the interests of

---

494. *See, e.g.*, Linda Coates & Allan Wade, *Telling It Like It Isn't: Obscuring Perpetrator Responsibility for Violent Crime*, 15 DISCOURSE & SOC. 499, 502 (2004).

495. *See supra* text accompanying note 304.

496. McDermott et al., *supra* note 301, at 71.

497. Osgood, *supra* note 219, at 8 (citing studies).

498. *Cf.* McDermott et al., *supra* note 301, at 82 (noting "[t]hreats of retaliation can be made more credible by pre-delegation to commanders in the field").

499. Carey, *supra* note 8, at 752, 757.

500. Schumann & Ross, *supra* note 219, at 1201; *see also* Jaffe, *supra* note 344.

501. Pfennigstorf & Kimball, *supra* note 488, at 428 ("When a legal service plan helps one subscriber to litigate an individual dispute, the decision may change the law favorably to the group.").

502. *See, e.g.*, MARIE GRYPHON, MANHATTAN INST. FOR POL'Y RES., GREATER JUSTICE, LOWER COST: HOW A "LOSER PAYS" RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM 16–18 (2008), https://www.manhattan-institute.org/html/greater-justice-lower-cost-how-loser-pays-rule-would-improve-american-legal-system-5891.html (discussing legal expense insurance in connection with the adoption of a loser-pays rule).

powerful groups: the insurance industry, plaintiffs' lawyers, and supporters of the #MeToo movement. Most importantly, it should be attractive to consumers, i.e., people who might become victims of intentional torts such as gender-based violence, because it provides them with the ability to seek justice, revenge, deterrence, and empowerment. These reasons to purchase insurance are at least as compelling as a financial motive, as described below.

B. Viability of Proposal

This Section now addresses the viability of this proposal. It focuses on the economic viability because the legal viability seems unproblematic. After all, legal expense insurance can be conceived of as a type of prepaid legal plan, and prepaid legal plans have been around in this country now for almost 50 years.[503] As law professor Judith Maute stated, "What was once scorned in horror has now become commonplace."[504] These plans operate in all 50 states, have millions of members, and employ thousands of attorneys.[505] State laws and regulations already govern these plans.[506] Pricing is determined by actuaries who attest to state and federal agencies that the premiums are adequate to sustain the plans.[507] ERISA covers these plans in the employment context.[508] Lawyers' ethics committees have also addressed various issues raised by prepaid legal plans.[509]

The product appears economically viable. This conclusion is based on the robust market in Germany for legal expense insurance, some preliminary calculations, conversations with an insurance actuary and an economist about the proposal, observations of the Time's Up movement, and the fact that "insurance is a diverse industry with multiple capacities."[510]

---

503. Alec M. Schwartz, *A Lawyer's Guide to Prepaid Legal Services*, 15 LEGAL ECON. 43, 43 (1989).

504. Judith Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915, 933 (2001).

505. Mary Juetten, *State of the Group Legal Services Industry: Things to Know*, ATTORNEY AT WORK (Aug. 3, 2017), https://www.attorneyatwork.com/can-legal-insurance-bridge-the-access-to-justice-gap/.

506. *See, e.g.*, OR. REV. STAT. §§ 750.505–.715 (2019) (Oregon Legal Expense Organizations Act); Tomes, *supra* note 23, at 58–60.

507. E-mail from Kenneth Bischel to Merle H. Weiner (Sept. 14, 2019) (on file with author).

508. *See* Michael B. Snyder, 4 COMPENSATION & BENEFITS § 47:235 (July 2019 Update); Tomes, *supra* note 23, at 55–58.

509. *See, e.g.*, ABA Comm. on Ethics & Prof'l Resp., Formal Op. 87-355 (1987); Colo. Bar Ass'n Ethics Comm., Formal Op. 81 (1989), https://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_81_2011.pdf; D.C. Legal Ethics Comm., Op. 225 (1992), https://www.dcbar.org/getmedia/45cbd83d-d721-4e12-8227-c0f555d599ff/DC-Legal-Ethics-Opinions_0620. The Supreme Court has even held that union members have a First Amendment right to facilitate the tort actions of members through collective action like prepaid legal plans. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 224–25 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 5–6 (1964); NAACP v. Button, 371 U.S. 415, 428–29 (1963).

510. RICHARD V. ERICSON & AARON DOYLE, UNCERTAIN BUSINESS: RISK, INSURANCE AND THE LIMITS OF KNOWLEDGE 286 (2004).

This Section begins by briefly describing the German experience. I then share my calculations, making explicit some of my assumptions.

1. The German Example

While legal expense insurance exists in various countries,[511] it has achieved its greatest success in Germany.[512] Germany has the biggest market in the world for legal expense insurance.[513] A high percentage of German households—40%—carry it.[514]

Legal expense insurance is important for German plaintiffs because otherwise they would have difficulty accessing legal counsel, albeit for reasons that differ from plaintiffs in the United States. Germany generally prohibits contingent-fee arrangements ("Erfolgshonorar").[515] Pro bono representation is quite rare.[516] In addition, "Legal aid, granted only subject to a stringent means test, is only for a small portion of the German population."[517] Litigation finance is available, but only

511. *See generally* RIAD, *supra* note 477.

512. *See* T. Raiser, *Legal Insurance*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8638, 8638 (2001).

513. *See* RIAD, *supra* note 477, at 4 (noting that Germany's market is almost four times bigger than the U.S. market). *See generally* Kilian, *supra* note 477 (describing reasons for the success of that market in Germany).

514. *See* RIAD, *supra* note 477, at 3.

515. Bernhard Schmeilzl, *No Win No Fee Agreements are Void in Germany*, CROSS CHANNEL LAWYERS (July 26, 2016), https://www.crosschannellawyers.co.uk/no-win-no-fee-agreements-are-void-in-germany/; Bernhard Schmeilzl, *How Expensive is a German Lawsuit?*, CROSS CHANNEL LAWYERS (Nov. 11, 2013), https://www.crosschannellawyers.co.uk/how-expensive-is-a-lawsuit-in-germany/ [hereinafter *How Expensive is a German Lawsuit?*]; *see also* Bundesrechtsanwaltsordnung [BRAO] [The Federal Lawyers' Act], Jan. 8, 1959, *Bundesgesetzblatt* [BGBL], as amended by Gesetz [G], June 12, 2011, BGBL I at 2515, art. 8, § 49b(2). However, there are exceptions, including for the indigent. *See Rechtsanwaltsvergütungsgesetz* [RVG] [Act on the Remuneration of Lawyers], May 5, 2004, BGBL, as amended by Gesetz [G], June 19, 2019, BGBL I at 840, art. 6, § 4(a), https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html.

516. *See* Kilian, *supra* note 477, at 43–44 (noting that the Bundesrechtsanwaltsordnung (BRAO) requires lawyers to charge according to the scale of fees and this "makes pro bono work more or less impossible in practice"). However, a lawyer does have the discretion to waive fees for a poor client after bringing the case to a conclusion. *See* BRAO § 49b(1). Also, for out-of-court matters, a lawyer can waive remuneration if "the prerequisites for the approval of advisory assistance (*Beratungshilfe*) have been fulfilled." *See* RVG § 4(1). Nonetheless, the rules are interpreted narrowly and thereby restrict pro bono representation. Michael Cheroutes, *Freeing Europe's Social Conscience*, 77 EUR. LAW. 54, 54 (2008).

517. Kilian, *supra* note 477, at 43; *see also* Act on Beratungshilfegesetz [BerHG] [Advisory Assistance Act], June 18, 1980, BGBL, as amended Gesetz [G], Aug. 31, 2015, BGBL 1474, art. 140, § 1, http://www.gesetze-im-internet.de/englisch_berathig/englisch_berathig.html#p0013 (describing a petition for "advisory assistance").

for cases of very high value.[518] While nonlawyers can offer legal services outside of court, lawyers must represent individuals in court.[519]

The German government[520] and the European Union[521] regulate legal expense insurance extensively. The law requires that the insured receive his or her choice of a lawyer.[522] Moreover, if the insurer refuses to provide coverage because the insured's legal claim lacks "sufficient prospects of success or is wanton," the insured is entitled to an impartial lawyer to confirm that assessment.[523] These legal requirements, and much more, are reflected in the German *Allgemeine Rechtsschutzbedingungen* ("ARB"), the template of general terms and conditions for legal expense insurance.[524]

German coverage for intentional tort suits is decidedly pro-plaintiff. The basic policy covers personal-injury work for plaintiffs[525] and excludes tort work for defendants.[526] Moreover, while the insurance provides an attorney for some criminal defense, the coverage does not extend to those accused of intentional criminal

---

518. Litigation finance provides legal expense coverage upfront in exchange for a share of the recovery if the client prevails. *See Litigation Funding*, FORIS, https://www.foris.com/en/litigation-funding.html (last visited Sept. 6, 2019); *see also id.* (noting that funding is typically available for cases where "the amount in dispute is above €100,000 and will not exceed €150 million," there is "a better then [sic] 50:50 chance of winning," and "the adverse party has a solid credit rating"). Plaintiffs tend to be corporations, not individuals. *See* E-mail from Volker Knoop, CEO, Foris AG, to Merle Weiner (Sept. 19, 2019) (on file with author) (noting that "rape cases will typically not pass a certain economic threshold to make litigation funding attractive").

519. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] as amended by Gesetz [G], Oct. 10, 2013, BGBL I 3786, art. 1, §§ 78–79, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. *See generally* Rechtsdienstleistungsgesetz [RDG] [Act on Out-of-Court Legal Services], Dec. 12, 2007, BGBL, as amended by Gesetz [G], May 12, 2017, BGBL I 1121, art. 6, http://www.gesetze-im-internet.de/englisch_rdg/index.html.

520. *See* Versicherungsvertragsgesetz [VVG] [Insurance Contract Act], 23 Nov. 23, 2007, BGBL I 2631, as amended by Gesetz [G], Aug. 17, 2017, BGBL I 3214, art. 15, http://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html#p0372.

521. *See* Directive 2009/138 of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the Business of Insurance and Reinsurance (Solvency II), 2009 O.J. (L 335) 77–79.

522. *Id.* § 201; VVG § 127; Der Gesamtverband der Deutschen Versicherungswirtschaft (GDV) [German Insurance Association], Allgemeine Bedingungen für die Rechtsschutzversicherung [General Conditions for Legal Expense Insurance] ("ARB 2012") § 4.1.3 (April 2018 version) (on file with author).

523. VVG § 128; ARB, *supra* note 522, §§ 3.4–3.4.2; *see also* Hans Möller, *Basic Concepts of International Legal Protection Insurance*, 12 FORUM (AM. B. ASS'N. SEC. INS., NEGL. & COMPENSATION L.) 951, 954 (1977) (noting that the policyholder "may ask his attorney to prepare an opinion on whether and why action [on] behalf of the policyholder's legal interests is necessary . . . [and that] then binds both parties (section 17 paragraph 2 sentence 2 of the ARB)").

524. ARB, *supra* note 522.

525. *Id.* § 2.2.1. Legal expense insurance tends to be a standalone policy in Germany, unlike in England, where BTE insurance is commonly added on to household contents, motorist's, and travel insurance. *See* CIVIL JUSTICE COUNCIL, *supra* note 124, at xi.

526. ARB, *supra* note 522, § 3.2.

misconduct unless the accused is acquitted, in which case the insurer reimburses the defendant.[527] It is possible to purchase a policy with broader defense coverage, but such coverage still requires that the action not result in a conviction for a premediated crime.[528]

Victims, in addition to receiving a tort lawyer, also receive legal assistance to help them assert their rights in criminal proceedings,[529] although the policy may provide a lawyer for only one of these purposes.[530] The attorney typically assists the survivor in obtaining compensation during the criminal proceedings[531] and will further assist with claims under the social code and victim compensation schemes when the survivor is also entitled to those.[532] The attorney can also help the survivor obtain injunctive relief.[533]

Moral hazard is addressed through provisions in the insurance contract. For example, the insurance company can cancel the insurance if two insurance claims are filed within a 12-month period,[534] although this right is rarely enforced.[535] In addition, the insured has the obligation to keep the costs of the legal proceedings as low as possible.[536] There are also exclusions that affect suits between household members.[537]

Legal expense insurance in Germany is a huge success today,[538] but this industry was not instantly profitable. In fact, its development was accompanied by financial hiccups, including underwriting losses that exceeded premiums in five out of eight years from 1975 to 1982.[539] In addition, while some thought this insurance

---

527. *Id.* § 2.2.9.

528. E-mail from Norbert Rollinger to Merle H. Weiner (Dec. 6, 2019) (on file with author).

529. ARB, *supra* note 522, § 2.2.12.

530. E-mail from Volker Knoop to Merle H. Weiner (Sept. 25, 2019) (on file with author).

531. *See* Strafgesetzbuch [StGB] [Penal Code], § 46a, https://www.gesetze-im-internet.de/englisch_stgb/print_englisch_stgb.html (Ger.) (noting the defendant may receive credit during sentencing for restitution).

532. ARB, *supra* note 522, § 2.2.12 (when the insured experiences permanent physical damage from the violent crime).

533. E-mail from Norbert Rollinger, *supra* note 528.

534. ARB, *supra* note 522, § 6.2.5.1.

535. Kilian, *supra* note 477, at 38.

536. ARB, *supra* note 522, § 4.1.1.4.

537. Most policies exclude coverage for disputes arising from family law, although they cover some limited advice. *Id.* §§ 2.2.11, 3.2.10; *see also* Matz-Townsend Finanzplanung, *Insurance in Germany*, HOWTOGERMANY, https://www.howtogermany.com/pages/insurance.html (last visited Sept. 23, 2019). In addition, exclusions exist for disputes between: (1) multiple policyholders on the same contract; (2) policyholders and co-insureds; and (3) nonmarital and unregistered partners when their disputes are related to their partnership. ARB, *supra* note 522, § 3.2.17. Co-insured parties include spouses, registered partners, named life partners, minor children, and unmarried children up to age 25. *Id.* § 2.1.2.

538. *See* Robert Schwebler, *Market Development and Market Structure of Legal Expenses Insurance in Germany*, 10 GENEVA PAPERS ON RISK & INS. 120, 129 (1985) (describing a robust, profitable, and competitive market, with many providers).

539. *Id.* at 126.

would increase the litigiousness of the German people, empirical evidence suggests that the insurance has caused only a "mild increase" in the filing of lawsuits.[540] In fact, attorneys continue to screen claims adequately.[541] Overall, Germany provides excellent evidence that legal expense insurance can be a viable product.

While the German and American legal systems differ in some ways, those differences should not matter to the economic viability of the product in the United States. First, Germany has a statutory table for lawyers' fees that governs how much lawyers can charge (Rechtsanwaltsvergütungsgesetz (the Federal Act on Lawyer Remuneration)),[542] unless the parties reach a different agreement.[543] For in-court representation, the amount is a floor: attorneys must charge this amount so as not to undercut each other and potentially provide subpar representation.[544] The statutory fee differs depending upon the size of the plaintiff's claim and the legal work involved, e.g., drafting paper, trial, or something in between.[545] German insurers believe that fee regulation is important to the success of legal expense insurance.[546]

The absence of such a legislatively imposed scale in the United States means that insurers themselves would need to create a scale and compensate attorneys according to it. Such a tool would be essential to keep costs manageable, especially because "costs of legal proceedings are much higher in the US than in EU countries."[547] This topic deserves attention at the front end so as not to impede the product's development.[548]

Second, in Germany, the loser bears the winner's attorney's fees if the case goes to trial (Unterliegenshaftung).[549] At first glance, that rule might appear to reduce an insurance company's exposure because the insured must reimburse the

---

540. Gross, *supra* note 478, at 331–32; Prais, *supra* note 478, at 439 (citing study by Jogodzinski, Raiser, and Riehl and noting those going to judgment only increased 5–8%); Raiser, *supra* note 512, at 8640 (noting that "[i]nsured plaintiffs litigate only 5-10% more often and more persistently than uninsured plaintiffs"); *see also* Kilian, *supra* note 477, at 46 (noting that most of the increase was for parking offenses with small fines). *But see supra* note 484 and accompanying text.

541. Raiser, *supra* note 512, at 8640 (mentioning research showing lawyers adequately screen out unfounded claims).

542. Rechtsanwaltsvergütungsgesetz [RVG] [Act on the Remuneration of Lawyers], May 5, 2004, BGBL, as amended by Gesetz [G], June 19, 2019, BGBL I at 840, art. 6, § 2, annex 1, https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html.

543. Schmeilzl, *How Expensive is a German Lawsuit?*, *supra* note 515; *see also* RVG § 3a(1).

544. *See* RVG § 4(1); Schmeilzl, *How Expensive is a German Lawsuit?*, *supra* note 515.

545. *See id.* § 2 & annex pt. 3 div. 1.

546. *See* Kilian, *supra* note 477, at 42.

547. RIAD, *supra* note 477, at 3. On a per capita basis, the revenue from the legal service market in 2016 for the United States was $893 compared to $308 in Europe. *Id.* at 10. This reflects both the expense of legal services and their increased use. *Id.*

548. CIVIL JUSTICE COUNCIL, *supra* note 124, at 3 (citing R. Lewis, *Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?*, 74 MOD. L. REV. 272, 278 (2011) (noting legal expense insurance developed later in England than other European countries because of complications in pricing legal services).

549. RIAD, *supra* note 477, at 14.

insurer if the loser pays the insured's fees.[550] Yet upon closer examination, the loser-pays rule may not be that significant to the profitability of legal expense insurance in Germany. German insurance companies cover the legal expenses of the other side when their insured loses.[551] So while an insurance company may recoup some of its expenses when their insured prevails, this recoupment is offset by the need to pay the other side's legal expenses when their insured loses.[552] If the insured wins and the defendant is uninsured, a successful recoupment will require that the defendant have sufficient resources to pay. Therefore, this difference between the United States and Germany may not affect the economic viability of legal expense insurance in the United States.

Third, the breadth of legal expense insurance coverage among the German population eliminates adverse selection problems that might otherwise exist.[553] Adverse selection is discussed in greater detail below,[554] but a balanced risk pool can be created in the United States by having the product address all intentional torts to the person, not just gender-based violence. The fact that legal expense insurance is successfully marketed in countries with much less market penetration than Germany suggests that the product can be viable with fewer insureds if it is accurately priced.[555] A number of other differences exist between Germany and the United States, but none appear likely to affect the economic viability of legal expense insurance in the United States.[556]

There is one important caveat, however, before leaving the German example. While Germany demonstrates the economic viability of legal expense

---

550. ARB, *supra* note 522, § 4.1.8.

551. *Id.* §§ 2.3.3.3–.4.

552. Admittedly, this conclusion assumes the plaintiff's chance of prevailing is approximately 50%, but it may be greater since a prerequisite of coverage is that the claim has sufficient prospects of success. *See* text accompanying notes 523, 688.

553. *See* Kilian, *supra* note 477, at 39–40 ("[M]arket penetration guarantees a very well balanced risk pool where the problem of risk-adverse selection has long been overcome.").

554. *See* discussion *infra* Section IV.B.2.c.ii.

555. *See, e.g.*, FINMARK TRUST, LEGAL EXPENSES INSURANCE 7 (Feb. 2014), http://www.finmark.org.za/wp-content/uploads/2016/01/Rep_legalExinsurance_2014-1.pdf (indicating that there are 1.5 million policy holders of legal expense insurance in South Africa).

556. For example, Germany does not have juries, and "[t]he general level of awards is modest by American standards." *See* Pfennigstorf, *supra* note 481, at 320. Punitive damages are not available, *id.*, although pain-and-suffering computations are influenced by "equitable considerations" and therefore have a small punitive element. *See* Werner Pfennigstorf, *Personal Injury Compensation: A Summary of the Geneva Association's Comparative Study*, 17 GENEVA PAPERS ON RISK & INS. 530, 540–41 (1992). Other differences include "the less pronounced adversarial nature of proceedings, . . . [and] generally a common disposition both among claimants and among insurers to negotiate rather than litigate." Werner Pfennigstorf, *Tort Liability and Alternative Approaches to Compensation: Summary of a Comparative Survey of Foreign Systems at Work*, 15 GENEVA PAPERS ON RISK & INS. 344, 351 (1990); *see* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 148 tbl.3 (2010) (showing a per capita civil litigation rate of 1.3% for Germany and 8% for the U.S.).

insurance, Germany does not provide evidence that this insurance would lead to more lawsuits by survivors of gender-based violence in the United States. Simply, it is impossible to say that the insurance even affects the number of civil suits by German survivors. In fact, some anecdotal evidence suggests that tort suits are few because perpetrators have no money,[557] and the amount awarded is low.[558] Like in the United States, German liability insurance typically excludes coverage for intentionally caused harm.[559] Assuming that these anecdotal accounts are accurate, a fair question is why more German survivors do not seek civil recourse for reasons of accountability, revenge, empowerment, and deterrence?

The answer may rest, at least in part, on a few factors that do not, and would not, exist in the United States with my proposal. First, German legal expense insurance excludes coverage for many domestic violence torts.[560] Consequently, a large number of gender-based violence survivors may simply be unable to bring a lawsuit.

Second, survivors' ability to obtain compensation from, and participate in, the German criminal system may be sufficient to satisfy their desire for accountability, revenge, empowerment, and deterrence. German survivors of gender-based violence "regularly file for compensation in the context of criminal proceedings."[561] In fact, Germany provides a free lawyer of one's choice to victims of serious crime for that purpose.[562] The victim can receive compensation for a wide range of harm, including psychological harm, and damages are payable regardless of support from other social systems.[563] Perhaps of more importance, survivors can also become a joint plaintiff in the criminal action, and their private attorney can work alongside the prosecutor to hold the perpetrator accountable.[564] It is estimated that about half of the sexual assault survivors have attorneys in criminal proceedings.[565]

---

557. THE DUBLIN RAPE CRISIS CTR. & TRINITY COLL. DUBLIN, THE LEGAL PROCESS AND VICTIMS OF RAPE 240 (1998), https://www.drcc.ie/assets/files/pdf/drcc_1998_analysis_legal_process_for_rape_vicims_1998.pdf. [hereinafter DUBLIN RAPE CRISIS CTR. ET AL.].

558. *See* MARKESINIS ET AL., *supra* note 484, at 18 (noting the "substantial gap between the level of awards for physical injuries, and compensation for infringement of personal rights," and citing an award of only €2600 for rape); *id.* at 79–80 (noting that tortfeasor's economic situation and the parties' relationship can influence the damage award).

559. Pfennigstorf, *supra* note 481, at 321–22. However, German liability insurance does not have the family exclusion. *Id.*

560. *See* Matz-Townsend Finanzplanug, *supra* note 537.

561. OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY 34 (2019). *See generally* Strafprozeßordnung [StPO] [Code of Criminal Procedure] § 403, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2382.

562. DUBLIN RAPE CRISIS CTR. ET AL., *supra* note 557, at 237.

563. *Germany—My Rights During the Trial*, EUROPEAN E-JUSTICE PORTAL (Apr. 13, 2018), https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-DE-maximizeMS-en.do?clang=en&idSubpage=2&member=1#n04.

564. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 561, at 22–25; *see* StPO §§ 397a, 406h.

565. DUBLIN RAPE CRISIS CTR. ET AL., *supra* note 557, at 238.

While the survivor's ability to participate in the criminal proceedings may be part of the answer, it cannot be the entire answer. After all, most gender-based violence in Germany is not resolved in the criminal law system. Only about 8% of the sexual violence crimes are reported to the police in Germany,[566] and only 10% of those perpetrators are convicted.[567]

Third, the answer may lie in the availability of compensation outside of the criminal justice system. Such compensation may eliminate survivors' ability to sue or reduce their interest in suing. Survivors who do not participate or seek compensation during criminal proceedings are still entitled to compensation directly from the State.[568] The survivors, however, have to transfer their claims against their perpetrators to the government so that the government can sue the perpetrators for recourse.[569] Similarly, if an insurance company compensates the survivor (such as for medical care and loss of earnings), the survivor's claim against her perpetrator is transferred by statute to the insurance company, although the survivor retains her claim for pain-and-suffering damages.[570]

Fourth, the answer may simply be cultural. Americans are simply more litigious than Germans.[571] Americans, much more than Germans, have historically seen the courts as vehicles to address social inequality, including between men and women.[572]

---

566. European Women's Lobby, *Germany*, *in* EWL BAROMETER ON RAPE IN THE EU 2013 (2013), https://www.womenlobby.org/IMG/pdf/2714_germany_lr.pdf.

567. Viviane Stroede, *Does Germany Have A Rape Problem?*, EXBERLINER (May 2, 2016), https://www.exberliner.com/features/zeitgeist/does-germany-have-a-rape-problem/ (detailing problems with Germany's rape law).

568. *See* Opferentschädigungsgesetz [OEG] [Crime Victims Compensation Act], Jan. 7, 1985, FEDERAL LAW GAZETTE [BGBL] at I 1580, as amended by Article 1 of the Act of 25 June 2009 (Ger.); *see also* DUBLIN RAPE CRISIS CTR. ET AL., *supra* note 557, at 239–40 (explaining that compensation is available even if the perpetrator of the crime is unknown, so long as the survivor can convince the State Compensation Board that the crime occurred, and that the award is not capped but general pain and suffering damages are not available). Germany has the collateral source rule, at least with respect to payments from employers, insurers, family, and friends. MARKESINIS ET AL., *supra* note 484, at 188 (discussing Vorteilsausgleichung).

569. OEG § 5; VINSON & ELKINS, COMPENSATION FOR THE MENTAL SUFFERING OF RAPE VICTIMS AND RAPE AND PROSTITUTION LAWS RELATING TO MINORS: A COMPARATIVE STUDY 31 (2013), https://www.trust.org/contentAsset/raw-data/1f16a695-7353-42a5-ac18-5fb1524a2f3c/file (noting "[s]uch state responsibility is seen as a consequence of the incapability of the State to protect its citizens from a violent assault and the manifestation of the welfare state principle according to Articles 20 and 28 of the German constitution (Basic Law, Grundgesetz, "GG")"). The victim retains a residual tort claim. E-mail from Volker Knoop, *supra* note 530.

570. MARKESINIS ET AL., *supra* note 484, at 181–84.

571. *See* sources cited *supra* note 556.

572. Willibald Steinmetz, *Introduction: Towards a Comparative History of Legal Cultures, 1750-1950*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY AND THE UNITED STATES 1, 40 (Willibald Steinmetz ed., 2000).

Despite the difficulty of documenting the effect German legal expense insurance has on the number of civil claims against perpetrators, there is no doubt that German survivors benefit from the availability of attorneys. Attorneys who represent survivors in criminal proceedings argue that "their presence at trial alone has a positive influence on the conduct of the trial," especially because the attorney helps assure that the court understands the rape's impact on the survivor.[573] Anecdotal evidence also suggests survivors find attorneys useful. For example, Helena, a German domestic violence survivor, was victimized by her controlling partner, who, among other things, thought of her "as his slave," and threatened serious harm to her son.[574] The police were initially helpful, providing her with an injunction, but were unresponsive when he violated the injunction by threatening her and tampering with her car.[575] At that point, Helena sought legal counsel.[576] As she wrote,

> I found a lawyer in the phone book who was really great, I really struck it lucky with him, he represented me really well and gave me good advice. The judge was also on my side and put pressure on him to speak the truth and admit to what he had done – the proceedings lasted over five hours. He got a suspended sentence under condition of community service, and he had to pay me compensation, but the compensation did not nearly cover the value of all the things he had kept or damaged.[577]

Finally, lawyers provide a real advantage to plaintiffs pursuing a civil action in District Court (the equivalent of small claims court). Plaintiffs who are represented likely recover more money,[578] as well as achieve more accountability, revenge, empowerment, and deterrence.

2. Modeling Viability

Would legal expense insurance for intentional torts to the person be an economically viable product in the United States, assuming, at this point, that consumers seek to maximize utility and insurers seek to maximize profit? The answer to that question appears to be yes.

---

573. DUBLIN RAPE CRISIS CTR. ET AL, *supra* note 557, at 238.

574. *Germany*, *in* EXPERIENCES OF INTERVENTION AGAINST VIOLENCE: AN ANTHOLOGY OF STORIES. STORIES IN FOUR LANGUAGES FROM ENGLAND & WALES, GERMANY, PORTUGAL AND SLOVENIA 45 (Carol Hagemann-White & Bianca Grafe eds., 2016).

575. *Id.*

576. *Id.* at 47.

577. *Id.*

578. *See* Magdalena Flatscher-Thöni et al., *Are Pain and Suffering Awards (Un-) Predictable? Evidence from Germany* 12–13 (Univ. of Salzburg, Working Paper No. 2015-02), https://www.uni-salzburg.at/fileadmin/multimedia/SOWI/documents/working_papers/wp2015_no02.pdf.

a. Price

An insurance premium is normally calculated by combining an actuarially fair premium and the insurer's business costs (administrative costs[579] and the cost of capital for reserves) and profit.[580] The actuarially fair premium represents the likelihood of the loss times the magnitude of the loss.[581] By way of example, if 10% of the insureds would file a claim in a particular year, and the average claim was for $10,000 in legal fees, then the actuarily fair premium is $1,000 plus the insurer's business costs and profit. This formula allows one to estimate the price of civil recourse insurance, although all the variables are admittedly speculative.

Perhaps the most difficult variable to determine is the insurer's likelihood of loss, as that depends upon the prevalence of the insured event. The insured event would be defined as when the insured, who is 18 years or older, becomes the victim of an intentional tort to the person. No data exists on the prevalence of intentional torts to the person, and so proxies must be used. Data exists on the prevalence of violent crime, but this figure may underestimate claims because intentional torts cover more than violent crime, such as offensive batteries that do not cause physical harm. Data exists on the prevalence of domestic violence and sexual violence independently, and can be broken down by gender, but this data may overestimate prevalence for all intentional torts. To address these issues, I provide a high prevalence rate (the likelihood that a woman will be the victim of domestic or sexual violence) and a low prevalence rate (the likelihood that anyone will be the victim of violent crime). Admittedly, my methodology is imperfect, but arguably is sufficient for purposes of a preliminary calculation.

The high prevalence rate is 4.5%. That represents the risk in any one year that a woman age 18 or older will be the victim of sexual or physical assault.[582] The 4.5% prevalence rate is likely an overestimate because it counts women twice if they

---

579. Business costs include sorting costs—i.e., determining if the insured experienced a triggering event. *See* Levmore & Logue, *supra* note 22, at 322 (calling sorting costs "huge").

580. Actuaries sometimes call the premium the "technical price" or the "cost of risk transfer." It excludes price adjustments that may take place to maximize profit given supply and demand.

581. KUNREUTHER ET AL., *supra* note 413, at 30–31.

582. *See* Kathryn E. Moracco et al., *Women's Experiences with Violence: A National Study*, 17 WOMEN'S HEALTH ISSUES 3, 7 tbl.2 (2007). This study is based on a national sample of 1,800 women between August and December 1997. This percentage reflects the midpoint of the confidence integral in a population-based national sample of noninstitutionalized women. The number is lower than findings from the National Intimate Partner and Sexual Violence Survey ("NISVS"), although it is impossible to know how much lower because the published prevalence rates for various categories reported in the NISVS overlap. *See, e.g.*, SHARON G. SMITH ET AL., CTR. FOR DISEASE CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF–UPDATED RELEASE 2, 8 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf (finding 4.7% of women experienced some form of "contact sexual violence" in the preceding 12 months and 5.5% experienced contact sexual violence, physical violence and/or stalking by an intimate partner during the preceding 12 months).

were a victim of both sexual and physical assault, even if by the same perpetrator.[583] On the other hand, this number may also underestimate potential claims because it does not count a survivor more than once if she experienced victimization by different people.[584]

The lower prevalence estimate is 1.18%. That reflects the number of violent crime victims, age 12 and older, in 2018.[585] Violent crime is defined as including "rape or sexual assault, robbery, aggravated assault, and simple assault," and the prevalence rate includes threatened, attempted, and completed occurrences of those crimes.[586] On the one hand, the statistic may underestimate claims because some victims may be victimized more than once,[587] although the claiming rate should be no more than 2% even assuming victimization by different perpetrators. On the other hand, the 1.18% figure arguably overestimates prevalence for adults, as it includes children who are more likely than adults to be victimized.[588] The 1.18% prevalence

---

583. TJADEN & THOENNES, *supra* note 367, at 17 (reporting that "41.4 percent of women . . . who were raped since age 18 were physically assaulted during their most recent rape").

584. This number also does not capture stalking. I excluded it because the authors' definition of stalking could involve activity that does not qualify as an intentional tort. *See* Moracco et al., *supra* note 582, at 5, 7 tbl.2 (defining stalking to include "being followed by a man in a way that frightened them; repeatedly contacted by someone after telling them to stop"). I also excluded it because many people are stalked by a physically abusive intimate partner who is already captured in the 4.5% prevalence figure. *See* Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, 51 J. FORENSIC SCI. 147, 150–51, 153 (2006). The NISVS found the 12-month prevalence rate for stalking was 3.7% for women. SMITH ET AL., *supra* note 582, at 18 tbl.5.

585. RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2018, 16 tbl.17 (2019) (approximately 3,254,250 victims). There were 275,325,390 people in this age range. *Id.* at 12 tbl.12.

586. *Id.* at 3. This prevalence statistic is based on the National Crime Victim Survey ("NCVS"), a self-report survey of violent-crime categories. *Id.* at 2. Homicide is not included, *id.* at 4 tbl.1, but that number is negligible. In 2017, there were approximately 17,000 homicides, or less than .007%. *See* U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2017, 2 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/murder.pdf.

587. The absolute number of victimization incidents (5,954,090) is higher than the number of persons experiencing victimization (3,254,250). *See* MORGAN & OUDEKERK, *supra* note 585, at 12 tbl.12, 16 tbl.17.

588. SMITH ET AL., *supra* note 582, at 4 (noting that 43.2% of females reporting attempted or completed rape "reported that it first occurred prior to age 18"); *id.* at 10 (noting 25.8% of females reporting intimate partner violence first experienced it prior to age 18). For a robust argument that children should be included in this proposal, see, for example, Charisa Smith, *#WhoAmI: Harm and Remedy for Youth of the #MeToo Era*, 23 U. PA. J.L. & SOC. CHANGE (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3459267. The recommended insurance product might be expanded to include victimized children, although the modeling here assumes coverage for adults.

rate is likely lower than the 4.5% prevalence rate for gender-based violence against women because of differences in the studies' methodologies.[589]

What would be the average loss? This number, too, represents an educated guess. Part of the difficulty of evaluating the average loss is that the amount may be affected by the insurance product's particulars, and many details are yet undetermined. These unknown details include the following: the level of coverage; the number of services covered, e.g., representation in one or multiple proceedings; the type of proceedings for which the insured could use the lawyer, e.g., Title IX proceedings, employment processes, criminal proceedings to assert victims' rights, small claims court, restorative justice processes, appeals;[590] limits on the choice of an attorney (without restriction or from a "closed-panel"[591]); conditions of coverage

589. Some caution is appropriate because the NCVS recorded lower rates of gender-based violence than other instruments. For example, the NCVS identified 204,000 victims of rape or sexual assault for 2015, see MORGAN & OUDEKERK, *supra* note 585, at 15 tbl.16, whereas Moracco captured almost 30 times that number in 2007 for women alone (assuming a female adult population of 140,000,000). *See* Moracco et al., *supra* note 582, at 5, 7 tbl.2 (assuming a 4.5% prevalence rate for physical and sexual assault by intimate partner or stranger). Various scholars have critiqued the NCVS for undercounting crime. *E.g.*, NAT'L RES. COUNCIL OF THE NAT'L ACADEMIES, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 1 (Candace Kruttschnitt et al. eds., 2014). Moracco herself explains why her data may differ from the NVCS data. *See* Moracco et al., *supra* note 582, at 7 (suggesting women may not think of their experiences as "crime" and methodological strategies may affect women's disclosures). In addition, the NCVS data used for this Article is much more current and crime rates have declined over the last 30 years. *See* MORGAN & OUDEKERK, *supra* note 585, at 1 fig.1 (reporting that the violent crime fell from approximately 3.0% in 1993 to 1.0% in 2018). The population has also aged during this time. U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2010, 5–6 (2014); U.S. CENSUS BUREAU, 65 AND OLDER POPULATION GROWS RAPIDLY AS BABY BOOMERS AGE 1 (2020). Of course, there may also be methodological problems in some of the survey instruments that find higher rates for gender-based violence. *See, e.g.*, NAT'L RES. COUNCIL OF THE NAT'L ACADEMIES, *supra*, at 110, 115 n.1 (calling for a "rigorous error evaluation" of the NISVS survey to try to get at the true numbers).

590. Some of these processes, which at times may be alternatives to the tort system for purposes of providing accountability and voice, may also be the most satisfying when the survivor has an attorney. *See, e.g.*, Weiner, *supra* note 363 (discussing the importance of attorneys for survivors in university proceedings offered pursuant to Title IX). In addition, an attorney could usefully help a survivor select the best option, or combination of options, in light of the advantages and disadvantages of each. *See* Tuerkheimer, *supra* note 13, at 1154–59, 1162, 1166–67 (discussing problems of school and employment processes and the criminal law).

591. Tomes, *supra* note 23, at 38–40; *see* Neil Rickman & Alastair Gray, *The Role of Legal Expenses Insurance in Securing Access to the Market for Legal Services*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON "ACCESS TO JUSTICE" 305, 311 (A.A.S. Zuckerman & Ross Cranston eds., 1995) (noting that companies in England "reserved the right to reject" an insured's choice and often "nominate solicitors themselves who the client can reject"); *see also Legal Expenses Insurance*, FIN. OMBUDSMAN SERV, https://www.financial-ombudsman.org.uk/businesses/complaints-deal/insurance/legal-expenses-insurance (last visited Mar. 6, 2019) (explaining that the insurer asks the lawyer chosen by the policyholder to agree to the firm's "standard terms of appointment").

(such as whether the claim must have "reasonable prospects of success"[592] or whether the claim must be asserted within a certain period of time after the triggering event[593]); and the deductible (if any).[594] These details should vary if insurance companies compete to sell the product.[595]

I assume for purposes of this analysis that the policy would cover $50,000 of legal expenses. To calculate the high-end of potential pricing, I initially assume that all claimants would seek the full amount of the coverage. I chose $50,000 because the standard amount of coverage in the United Kingdom, which has a developing legal expense insurance market, is £50,000.[596] Although £50,000 converts to approximately $65,000, $50,000 represents 200 hours of attorney time at $250/hour,[597] and seems far in excess of what would probably be needed in most cases. While the average amount of time tort lawyers spend on intentional tort suits for gender-based violence is unknown, Herbert Kritzer, using data from the Civil Litigation Research Project commissioned by the U.S. Department of Justice, found "[t]he typical state tort case takes only 20 hours of lawyer time on each side of the case."[598] The median number of hours goes up slightly, to 30 hours, if federal cases are included.[599] Moreover, data from England indicates that claims under legal

---

592. *See* Rickman & Gray, *supra* note 591, at 312 (describing requirements in England).

593. *See id.* (describing the six-month requirement in England).

594. In Germany, most legal expense insurance policies have a deductible. Michael Faure & Jef De Mot, *Comparing Third-Party Financing of Litigation and Legal Expenses Insurance*, 8 J.L. ECON. & POL'Y 743, 773 (2012).

595. *See Facts and Statistics: Industry Overview*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-industry-overview (last visited Aug. 25, 2019) (noting there are almost 6,000 insurance companies in the U.S.). One would hope that some insurers would include representation for a civil protection order proceeding or a related divorce proceeding in addition to representation for the tort remedy. Having an attorney can make an important difference to the survivor's success in these other types of proceedings. *See* Weiner, *supra* note 363, at 140 n.86, 150 n.131 (discussing civil protection order proceedings); Alesha Durfee, *Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders*, 4 FEMINIST CRIMINOLOGY 7 (2009). In a minority of states, the tort claim must be brought within the context of the divorce proceeding if the parties are divorcing, see Richardson v. Richardson, 906 N.W.2d 369, 380 n.10 (S.D. 2017), which suggests that the attorney should be able to handle the entire matter. The economic viability of combining aspects of a prepaid legal plan with this type of legal expense insurance is beyond the scope of this Article, but an insurance product that provided legal representation for multiple legal needs related to the victimization would be the most valuable for survivors. *See supra* note 121.

596. CIVIL JUSTICE COUNCIL, *supra* note 124, at xiii, 26, 49.

597. A 2017 survey of attorneys in Oregon found that the mean hourly billing rate for private practice was $286 and the median was $260. *See* OREGON STATE BAR 2017 ECONOMIC SURVEY: REPORT OF FINDINGS 12 (2017).

598. HERBERT M. KRITZER, THE JUSTICE BROKER 105 (1990). For state tort cases, the breakdown is as follows: 21% of cases take 0–8 hours, 33% of cases take 9–20 hours, 24% of cases take 21–40 hours, 13% of cases take 41–80 hours, and 8% of cases take over 81 hours. *Id.* at 86 tbl.7-4.

599. The breakdown is as follows: 15% of cases take 0–8 hours, 26% of cases take 9–20 hours, 22% of cases take 21–40 hours, 17% of cases take 41–80 hours, and 20% of cases take over 81 hours. *Id.*

expense insurance policies rarely exceed £25,000, although many insurers offer much higher levels of coverage as a way to attract business.[600] While the Time's Up fund pays lawyers up to $100,000 to go to trial,[601] many cases are funded with far less money.[602] Moreover, $50,000 seems adequate because the lawyer and client can always structure the representation so that it continues after coverage is exhausted.[603]

With these assumptions, potential premiums become calculable. As Table 1 indicates, the premium at the high end would be approximately $3,149 and at the low end approximately $826. Those numbers reflect the sum of the following: (the likelihood of victimization × loss) + (premium loading factor) + (profit). A premium loading factor reflects costs, including administrative and sales costs as well as the cost of capital reserves.[604] I assume the premium loading factor would be 33%, which is common.[605] I also assume that profit would be 5.2%, which was the average realized profit for the industry with property and casualty lines from 2008–2017, according to the National Association of Insurance Commissioners.[606]

The premium can quickly fall to a more affordable price of $356/year,[607] and even as low as $94/year,[608] by adjusting some of the assumptions to be more realistic. Of course, the absence of historical data invites the potential mispricing of

---

600. MINISTRY OF JUSTICE, THE MARKET FOR 'BTE' LEGAL EXPENSES INSURANCE 19 (2007) ("Claims under this type of insurance are rarely more than £25,000 even though the cover offered amounts to £50,000; £75,000 or £100,000 in a move which is designed to make the product more attractive."). It is "quite unusual for BTE Insureds to need to exceed the limits of indemnity," and it rarely happens. CIVIL JUSTICE COUNCIL, *supra* note 124, at 23. Most legal expense insurers in developed European markets, such as Germany, have ceilings above €30,000. RIAD, *supra* note 477, at 13.

601. Corkery, *supra* note 94 ("The assistance from Time's Up is relatively modest — about $3,000 to help pay the initial lawyer fees. If the case goes to trial, the fund will provide up to $100,000 for fees.").

602. *See id.* It is unclear whether $100,000 is needed because more than 200 hours of attorney time is necessary or because the fund pays more than $250/hour.

603. *See* CIVIL JUSTICE COUNCIL, *supra* note 124, at 23, 33 (explaining that in the United Kingdom, once a cap is met, the lawyer might continue the case on a contingent-fee basis, or "more rarely, self-funding the balance under a traditional retainer," and that a lawyer funded by insurance must advise the client "what will occur where the limits of indemnity are exhausted").

604. *See* KUNREUTHER, PAULY & MCMORROW, *supra* note 413, at 47.

605. *See id.* at 46–47; *cf.* Preble Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417, 466 (1968) (using a 20% loading figure). This percentage is applied to the total benefits paid out. A premium loading factor between 30%–40% of the premium is "consistent with the benchmark model of supply." KUNREUTHER ET AL., *supra* note 413, at 52. The calculation for the premium loading factor is (1 – loss ratio). *Id.* at 53. "The *loss ratio* is calculated by adding the incurred losses and loss adjustment expenses and calculating the ratio of that sum to premiums earned. . . . In other words, the lower the loss ratio, the higher the premium loading factor." *Id.*

606. *See* NAT'L ASS'N OF INS. COMM'RS, REPORT ON PROFITABILITY BY LINE BY STATE IN 2017, 36 (2018), https://www.naic.org/prod_serv/PBL-PB-18.pdf (based on rates of return on net worth). This estimate may be low. *See* FINMARK TRUST, *supra* note 555, at 37 chart 7 (showing profit margin of 14%–15% for legal expense insurers in South Africa).

607. *See infra* Table 1.

608. *Id.*

the product, but my analysis so far has assumed that every insured person who experiences an intentional tort to the person would file a claim and every person would need the maximum insurance benefit.[609] Both of these assumptions are highly suspect and lead to an inflated premium.

First, all those insured who suffer victimization would not file a claim. Take, for instance, survivors of domestic and sexual violence. Between 80% to 85% of survivors never report the incident to an authority.[610] While this proposal seeks to increase reporting (at least though a civil lawsuit), and while the *ex-ante* purchase of legal expense insurance should reduce the psychological and financial barriers to litigating gender-based violence torts,[611] it is nonetheless too optimistic to assume 100% claiming. Other barriers would still exist, including some that also hamper criminal reporting[612] and some that uniquely inhibit civil suits.[613] In addition, insureds generally underclaim because they fear increases in insurance rates.[614] While it is impossible to know the amount of claiming without historical data, it seems safe to assume that the claiming rate would be closer to 50% and perhaps, optimistically, 75%.[615]

Second, it is unlikely that each claim would require $50,000. The size of the claim will depend upon the number of hours an attorney works and the hourly fee the attorney charges. As mentioned, an attorney spends an average of 30 hours on a tort case.[616] The law of large numbers suggests "the average loss is virtually

---

609. As suggested, when actuaries price the product, they will consider the expected claims, administrative costs, and risk margins. Thanks to Kenneth Bischel, an actuary, who walked me through some of the analysis. E-mail from Kenneth Bischel to Merle H. Weiner (Sept. 14, 2019) (on file with author).

610. *See, e.g.*, Andrew Keshner, *Why Workplace Sexual-Harassment Complaints Keep Climbing*, MARKETWATCH (Apr. 29, 2019), https://www.marketwatch.com/story/why-workplace-sexual-harassment-complaints-keep-climbing-2019-04-25 (quoting Victoria Lipnic, the EEOC's acting chairwoman, that only about 15% to 20% of workers who experience sexual harassment report it). *See generally* Tuerkheimer, *supra* note 13, at 1152–67 (discussing the lack of reporting in the criminal justice, workplace, and school settings); sources cited *supra* note 254.

611. *See* Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577, 578–79, 581 (1981) (reviewing research on what motivates behavior after an initial decision, including, *inter alia*, self-justification).

612. *See supra* notes 34–35, 254–55.

613. *See, e.g.*, Bublick, *supra* note 13, at 81 (discussing doctrinal hurdles involving consent or intent); Wriggins, *Domestic Violence Torts*, *supra* note 12, at 139–41 (discussing procedural concerns, including statutes of limitations and a simultaneous divorce action). *See generally* Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019) (discussing employer-driven mandatory arbitration clauses).

614. KUNREUTHER ET AL., *supra* note 413, at 122 (mentioning the situation when an insured's loss is slightly above the deductible).

615. My estimates are very conservative. In South Africa, only "between 0.9% and 2% over the period 2010 to 2012" used the litigation benefit in their legal expense insurance. FINMARK TRUST, *supra* note 555, at 38. "Of those who claimed the average claim per policyholder ranges between 1.2 and 1.3 claims per year." *Id.*

616. *See supra* text accompanying note 599.

certain to be close to the expected loss."[617] At $250/hour, that means the average claim would be $7,500.

The overall amount claimed would increase if the insurance permitted representation in multiple forums. Consequently, for purposes of analysis, I assume that the insurance would not allow this, but would require the insured to select the forum in which she would receive representation after consulting with a lawyer who could help her make the choice.[618] While a more comprehensive product would be beneficial for survivors and might be commercially viable, this preliminary analysis assumes a more limited policy for simplicity's sake. Of course, the insured could hire the attorney on the side for the other actions, and some economies of scale would be expected.

In addition, the size of the average claim might be expected to increase if the parties were less likely to reach a settlement than in other tort actions. Estimates vary, but somewhere between 60%–95% of civil cases settle.[619] Several factors suggest the settlement rate would be at least as high, if not higher, in these gender-based violence cases. For one, the defendant would receive clear signals that the insured's claim has merit: the plaintiff would be represented, and the attorney would be funded by insurance. Moreover, the defendant's settlement offer should be more generous because of the plaintiff's ability to go to trial, and this, in turn, should positively affect the plaintiff's willingness to settle.[620] In addition, the plaintiff would need to settle if she seeks any nonmonetary relief, such as an apology or counseling for the perpetrator. Finally, the attorney's recommendation may be unconsciously influenced by the insurer's interest in settlement.[621] Research in the Netherlands indicates that legal expense insurance causes only a slight uptick in cases that proceed to trial.[622] Admittedly, the settlement rate might be lower if the insured is more likely to be motivated by revenge than other litigants and wants the proceedings to drag on. This concern is considered below, in the discussion of moral hazard, and found to be without much merit.[623]

---

617. KUNREUTHER ET AL., *supra* note 413, at 20.

618. A lawyer can be very helpful to the survivor if there is a criminal prosecution. The lawyer can help the survivor assert her crime-victim rights. *See generally* Crime Victims' Right Act, 18 U.S.C. § 3771(a) (2018). The lawyer can also help the survivor partake in a restorative justice process if that were an option and desired by all the parties. *See generally supra* note 363. A lawyer is also very helpful for civil protection order proceedings, divorce proceedings, and Title IX proceedings. *See supra* notes 121, 590, 595 (discussing advantages to insured of representation in other and related proceedings).

619. Fischer & Jerry, *supra* note 161, at 875 & n.89; *cf.* Faure & De Mot, *supra* note 594, at 771 (citing settlement rate of 80% in Belgium for cases covered by legal expense insurance).

620. De Mot et al., *supra* note 466, at 9.

621. Faure & De Mot, *supra* note 594, at 775 (citing research in England and Wales "that claims funded by LEI . . . settle faster than claims funded by other means" and suggesting that "[t]he lawyer monitored by an insurer will shirk less and will settle a case sooner on average").

622. *Id.* at 771 (noting that 6.5% of cases proceed to trial for those with legal expense insurance and 4% proceed to trial for those without it).

623. *See infra* text accompanying notes 705–08.

Third, the premium loading factor may, in fact, be lower than 33%. My estimate is hampered again by the lack of historical data (historical demand, in particular). Administrative costs reflect economies of scale, as they are generally spread across a large group of individuals.[624] If demand were sufficiently high, this number could come down. Moreover, if companies that already sell prepaid legal plans or traditional insurance also decide to sell legal expense insurance, the new product might benefit from preexisting economies of scale. Similarly, while high demand can lower risk margins, so can having a large insurer offer the product; it may already have sufficient risk-based capital to satisfy regulators.[625]

Finally, the pricing assumes no deductible. A deductible would make the insurance cheaper and might be desired by the consumer.

Plugging these variables into the formula produces a range of potential premiums, as indicated by Table 1. For example, even assuming a high prevalence rate (4.5%), the premium would only be $356 if one assumes 75% of eligible insureds would file a claim, and claimants would seek an average of $7,500 for legal fees (30 hours x $250). If the product is marketed to all victims of intentional torts (with a prevalence rate closer to 1.18%), then the premium can be reduced to $94, assuming an average claim of $7,500 and a 75% claiming rate.

---

624. The expected administrative costs will include personnel (such as actuaries, accountants, lawyers, claims processors, customer service reps, salespeople, cost control staff, service contracting staff, database administrators, analytics professionals, data entry workers, etc.), office costs (real estate, office supplies, electricity, etc.), and taxes and fees (imposed by government and charged by agents as commissions).

625. A large insurance company would already have substantial amounts of capital that could be "aggressively spent down in the early years of the program to 'buy' membership." The goal would be to get sustainable pricing and premiums before the reserves drop down to the minimum required capital. Thanks to Kenneth Bischel for this point.

Table 1: Potential Premiums for Civil Recourse Insurance

Victimization Rate	Percentage Who File a Claim	Percentage of Coverage ($50,000) Claimed	Actuarily Fair Premium	Premium Loading Factor (33%)	Profit (5.2%)	Premium
4.5%	100%	100% ($50,000)	$2,250	$743	$156	$3,149
4.5%	100%	15% ($7,500)	$338	$112	$18	$468
4.5%	75%	15% ($7,500)	$254	$84	$18	$356
4.5%	50%	50% ($25,000)	$563	$186	$39	$788
1.18%	100%	100% ($50,000)	$590	$195	$41	$826
1.18%	100%	15% ($7,500)	$89	$29	$6	$124
1.18%	75%	15% ($7,500)	$67	$22	$5	$94
1.18%	50%	50% ($25,000)	$148	$49	$10	$207

b. Demand

The market for this product is potentially large. No inference about demand should be drawn from the current unavailability of such insurance.[626] The lack of expressed demand may be attributable to incomplete information and misconceptions about the accessibility of legal redress when needed. Consumer education would be an important part of the marketing for the new product. There is a lot of advertising in countries where legal expense insurance is popular.[627]

Most people are risk averse, and they seek insurance to help minimize the feeling of risk.[628] In fact, a risk-averse person will pay premiums that cumulatively exceed the economic value of the loss because the certain smaller premiums are preferable to a larger uncertain loss.[629] For example, a person may be willing to pay $15/year to avoid a one-in-ten chance of losing $100. Insurers can shift risks from

626. Wriggins, *Domestic Violence Torts*, *supra* note 12, at 159 (addressing the lack of expressed demand in the context of her proposal).

627. *See, e.g.*, CIVIL JUSTICE COUNCIL, *supra* note 124, at 106 (discussing the United Kingdom).

628. Avraham, *supra* note 461, at 37.

629. KUNREUTHER ET AL., *supra* note 413, at 19, 27.

any one individual to the pool of insureds by relying on the law of large numbers, thereby calculating probable losses and charging actuarially fair premiums.[630] The consumer's decision to purchase the insurance will often be determined by "the premium rate . . . , wealth . . . , the size and probability of the loss . . . , and the degree of risk aversion."[631]

Taking these factors in turn illustrates why predicting demand is difficult. Starting with the premium, the discussion of price indicated that the premium could range from $94/year to almost $3,149/year. If the government subsidized the purchases,[632] the actual cost to the consumer could be lower than even the lowest estimated premium.

Second, wealth affects demand. Typically, there is an inverse relationship between wealth and risk aversion for relatively small losses. Someone who only earns $20,000 will find the loss of $10,000 much more frightening than someone who earns $400,000.[633] Yet someone with less income will be more sensitive to price and may be priced out of the legal expense insurance market altogether.

Third, the size and probability of loss affects the demand. Consider first the size of the loss. Will the purchaser calculate her potential uninsured loss as $50,000, i.e., the full insurance coverage? After all, most victims will not pay out-of-pocket legal fees after their victimization. Either they will not hire an attorney because they do not have the funds to pay an attorney on an hourly basis,[634] or they will hire an attorney on a contingent-fee basis and the payment won't feel like a loss because the payment only comes out of the recovery and not their pocket. Technically, of course, a contingent-fee payment is a loss, and it can be very high.[635] In addition, a victim who cannot hire an attorney foregoes potential economic recovery, the satisfaction of holding the perpetrator accountable, and the ability to channel her revenge. How will the consumer value these losses? If the purchaser doesn't think she will ever be victimized or assumes an attorney will take her case if she is, she may believe that the probability of loss is zero. The notion of loss becomes even more complicated when one considers that some third parties would purchase this insurance for others, such as parents who would purchase the policy for children who attend college. How will they measure loss or its probability?

Fourth, the level of risk aversion will vary. Certainly, not all consumers will see their risk as 4.5% or even 1.18%. Risk aversion can be affected by

---

630. Avraham, *supra* note 461, at 37–38.

631. RAY REES & ACHIM WAMBACH, THE MICROECONOMICS OF INSURANCE 2 (2008). Other models exist, see KUNREUTHER ET AL., *supra* note 413, at 96 (discussing "prospect theory"), but this Article's analysis focuses on the expected utility model.

632. *See* discussion *infra* Sections IV.C.4.a–b.

633. KUNREUTHER ET AL., *supra* note 413, at 98.

634. *See supra* text accompanying note 124.

635. *Compare* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees,* 81 WASH. U. L. Q. 653, 660 (2003) (discussing contingent-fee lawyers' "inordinately high rates of return, not infrequently amounting to thousands and even tens of thousands of dollars an hour") *with* Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. L. Q. 477, 482–83 (2004) (finding contingent fees are not that different from the hourly rates of lawyers in other areas).

demographic variables, such as wealth,[636] but also by gender and age as it affects the likelihood of victimization.[637] Some consumers, such as middle-age men, may calculate their risk as much lower and therefore be less concerned about it. Even those at higher risk, such as college age women or residents of low-income neighborhoods,[638] may think their actual risk is low.[639] Some people may assume that they can avoid victimization,[640] especially if they have an "optimistic bias" towards relative risk,[641] although optimistic bias is less likely to exist with low-frequency devastating events.[642] On the other hand, some people may overestimate their risk because of the "availability heuristic."[643] With all of the media attention on #MeToo, the availability bias may be quite robust for women. There are other factors that are influential too. For example, culture can affect a person's prediction of risk.[644] It is even possible that the availability of this insurance will itself decrease the perception of risk because people will believe it deters the bad behavior.[645]

The above analysis is complicated even further by the fact that not all consumers' decisions maximize utility, but rather are influenced by their "feelings, emotions, fuzzy thinking, limited information processing abilities, and imperfect

---

636. *See supra* text accompanying note 633.

637. *See, e.g.*, *Violence Against Women in the United States: Statistics*, NAT'L ORG. FOR WOMEN, https://now.org/resource/violence-against-women-in-the-united-states-statistic/ (last visited Aug. 31, 2019) ("Young women, low-income women and some minorities are disproportionately victims of domestic violence and rape. Women ages 20–24 are at greatest risk of nonfatal domestic violence, and women age 24 and under suffer from the highest rates of rape.") (citing government statistics).

638. *Id.*

639. *See* Paul Slovic, B. Fischhoff & Sarah Lichtenstein, *Perceived Risk: Psychological Factors and Social Implications*, 376 PROC. ROYAL SOC'Y LONDON A. 17, 18 (1981) (discussing that presentation format is important to the perception of risk); KUNREUTHER ET AL., *supra* note 413, at 211–12 ("[M]ost people feel small numbers can be easily dismissed, while larger numbers get their attention.").

640. KUNREUTHER ET AL., *supra* note 413, at 194; *cf.* Pryor, *supra* note 133, at 1741–42 (suggesting that consumers believe they do not need liability coverage for intentional torts because they can avoid committing an intentional tort and erroneous liability for intentional torts is rare).

641. *See* Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, *in* HEURISTICS & BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 313 (Thomas Gilovich et al. eds., 2002).

642. *See* David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, *in* HEURISTICS & BIASES, *supra* note 641, at 334, 335 (noting people tend to "overestimate" their likelihood of "low-frequency events (including extremely negative life-threatening events such as AIDS) and to underestimate high-frequency events").

643. Slovic et al., *supra* note 639, at 17, 18 ("People using this heuristic judge an event as likely or frequent if instances of it are easy to imagine or recall"); *see also* Avraham, *supra* note 461, at 107–08.

644. *Cf.* Aaron Wildavsky & Karl Dake, *Theories of Risk Perception: Who Fears What and Why?*, 119 DAEDALUS 41, 51–52 (1990) (noting "variegated pattern of risk perception" and finding that "cultural theory" provides the "best predictions" of risk perception when considering "knowledge, personality, political orientation, or demographic variables").

645. De Mot et al., *supra* note 466, at 5–6 (describing a free-rider problem).

foresight,"[646] as well as marketing techniques.[647] David Krantz and Howard Kunreuther's "goal-based model of choice" suggests that a "preset goal," instead of utility maximization, can motivate behavior.[648] Kunreuther, in a work with authors Pauly and McMorrow, identified four "main goal categories that may influence insurance purchase."[649] They are "investment goals, satisfying legal or other official requirements, worry or regret, and satisfying social and/or cognitive norms."[650]

The second of Kunreuther, Pauly, and McMorrow's factors—the existence of legal or other official requirements—is not a relevant factor now for assessing potential demand, but it could be. For example, colleges could require students to have legal expense insurance for intentional tort victimization, just like they often require health insurance. After all, students who are complainants in a student disciplinary process really benefit from legal representation.[651]

The third factor—worry or regret—might be a huge determinant of demand. Research shows that people purchase legal expense insurance in England and South Africa for peace of mind.[652] In Germany, a large percentage of people purchase the insurance because they are scared they will otherwise be deprived of their rights.[653] Advertising on the Insurance Information Institute's website suggests that peace of mind might particularly motivate college students' parents,[654] who are on average wealthier than the general population,[655] to purchase civil recourse

---

646. KUNREUTHER ET AL., *supra* note 413, at 9; *see also id.* at 143 (discussing the "overpurchase" of rental car insurance, warranties on consumer products, and low deductibles for property loss); Baker, *supra* note 46, at 438 (discussing the overpurchase of insurance for pain and suffering in the context of uninsured motorist insurance).

647. Demand can vary substantially depending upon whether consumers "opt in" or "opt out" of coverage. *See, e.g.*, CIVIL JUSTICE COUNCIL, *supra* note 124, at 91–92, 96 (discussing demand before and after the "opt-out" option was banned in England in 2016); Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 46–48, 50 (1993) (comparing New Jersey and Pennsylvania regimes).

648. KUNREUTHER ET AL., *supra* note 413, at 101–02 (citing David Krantz & Howard Kunreuther, *Goals and Plans in Decision Making*, *in* JUDGMENT & DECISION MAKING 137 (2007)). As they explain, "[P]eople often construct or select insurance plans designed to achieve multiple goals, not all of which are purely financial." *Id.* at 102.

649. *Id.* at 104.

650. *Id.*

651. *See generally* Weiner, *supra* note 363.

652. MINISTRY OF JUSTICE, *supra* note 600, at 24 (noting people in the United Kingdom purchased it because "they were afraid not to"); FINMARK TRUST, *supra* note 555, at 41 (noting people in South Africa purchased it for peace of mind, safety, and empowerment); *cf.* KUNREUTHER ET AL., *supra* note 413, at 105 (explaining that long-term care insurance is often purchased for this reason even if not a financially sensible decision).

653. RIAD, 2018 IPSOS-RIAD SURVEY ON LEGAL DISPUTES AND RISK AWARENESS OF EUROPEANS, http://riad-online.eu/key-issues/consumer-survey/#c5662 (27% of respondents to survey so indicated).

654. *See Protecting Your College Student from On-Campus Losses*, INS. INFO. INST., https://www.iii.org/article/do-i-need-insurance-child-going-away-college (last visited Aug. 25, 2019).

655. *See generally Percentage of Recent High School Completers Enrolled in College, By Income Level: 1975 through 2016*, DIGEST OF EDUC. STATISTICS, tbl.302.30,

insurance for their children. A headline on its website reads, "Protecting your college student from on-campus losses. Preventative measures, safety precautions—and the right insurance—can bring peace of mind."[656] The poor, of course, also value peace of mind and access to justice,[657] although their demand for this product will likely depend upon governmental price subsidies (as recommended below)[658] as well as effective marketing that addresses their distrust of the legal system.[659] Other emotions can also motivate purchasing decisions, including whether someone has experienced an uninsured loss.[660] Low-income individuals are more likely than others to have experienced the unavailability of civil recourse for gender-based violence.[661] People might also be motivated to purchase legal expense insurance by the potential need for future legal revenge, although no data exists to confirm or dispel this possibility.

The fourth factor—satisfying social or cognitive norms—might be an excellent motivator. Purchase of legal expense insurance might be equated with being a responsible feminist, or more broadly, a responsible citizen. In terms of the former, purchasing insurance would be an act that furthers feminist objectives ("women's empowerment against their attackers" through "collective resistance"[662] and deterrence of gender-based violence). Becoming a policyholder might become a mark of honor among those who are feminist-minded, just as it was a sign of social capital to belong to private prosecution associations prior to the development of a public criminal justice system.[663] There might be insurance contagion among

---

https://nces.ed.gov/programs/digest/d17/tables/dt17_302.30.asp (showing higher percentages of enrollment with higher family income).

656. INS. INFO. INST., *supra* note 654.

657. *Cf.* DEEPA NARAYAN ET AL., VOICES OF THE POOR: CRYING OUT FOR CHANGE 27–28 (2000) (noting that poor people surveyed from around the world identified physical security and access to justice as components of the good life).

658. *See infra* Sections IV.C.4.a–b.

659. Admittedly, government subsidies may not help certain populations to the extent that they distrust the legal system altogether and would not look to it to advance their interests. *See generally supra* note 35 (citing sources discussing distrust and reasons for distrust). Yet it is premature to draw conclusions about demand without data about how lower-income people would receive this particular product, especially after advertising campaigns and subsidies. *Cf.* Sandefur, *supra* note 35, at 349 ("We know little about the relative importance of different causes of diversion and discouragement or, for that matter, accessibility and empowerment.").

660. *See* Howard Kunreuther & Mark Pauly, *Insurance Decision-Making for Rare Events: The Role of Emotions* 16 (Nat'l Bureau of Econ. Research, Working Paper No. 20886, 2015), https://www.nber.org/papers/w20886.pdf (discussing low-probability, high-consequence events); KUNREUTHER ET AL., *supra* note 413, at 106–07 (citing research).

661. Low-income individuals are more likely to experience gender-based violence, see *infra* note 722, and less likely to have damages that would attract a contingent-fee attorney. *See supra* note 108.

662. West, *supra* note 172, at 97–98, 109.

663. Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers or Public Goods?*, 41 J. LEGAL STUD. 95, 114–15 (2012) (discussing eighteenth- and early nineteenth-century England). *But see* De Mot et al., *supra* note 466, at 6 (noting that consumers currently "fail to consider the external deterrence benefits of legal insurance").

feminists as well as their friends and neighbors.[664] "[M]any insurance decisions are based on what other people are doing or on what those who one respects believe is an appropriate action to take."[665]

This proposal should appeal to people for other reasons too. Consumers are very motivated by the thought of getting something for free.[666] People who buy civil recourse insurance would get coverage for themselves, but they would also be supporting social justice: the reduction of gender-based violence more generally. Deborah Stone explained that insurance regimes inherently call upon "motives of charity, compassion, civil responsibility, and justice."[667] Buying insurance "often is a highly moral choice . . . because insurance is a form of mutual aid and collective responsibility."[668] It creates "the opportunity to cooperate with and help others" by taxing oneself for the benefit "of others who might suffer from loss when you do not."[669] This message could be the core of a successful marketing campaign. Some consumers like charity-linked products and are willing to pay a premium for them.[670]

The Time's Up fund provides a glimpse into the potential success of such a marketing campaign.[671] If organizations such as the American Association of University Women, National Women's Law Center, and the National Organization for Women became plan sponsors, demand among feminists might be very strong indeed. Demand might be very strong among a broader cross section of the population if groups like unions or employers offered the product.

c. Supply

Given the above information on price and demand, would insurers offer this product? Here I focus on whether for-profit insurance companies might offer this product, although other possibilities exist, including the following: a nonprofit, like the National Women's Law Center;[672] a self-insuring group, such as employees

664. KUNREUTHER ET AL., *supra* note 413, at 108.

665. *Id.* at 107.

666. Avraham, *supra* note 461, at 107 (discussing the value of zero).

667. Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11, 14 (1999).

668. *Id.*

669. *Id.*

670. Daniel W. Elfenbein & Brian McManus, *A Greater Price for a Greater Good? Evidence that Consumers Pay More for Charity-Linked Products.* 2 AM. ECON. J. 28, 54 (2010).

671. *See supra* text accompanying notes 114–16.

672. Nonprofits are sometimes insurers. *See* KUNREUTHER ET AL., *supra* note 413, at 156. Foundations sometimes act as a sponsor and supply start-up funds. *See* Pfennigstorf & Kimball, *supra* note 488, at 426; *see also* Stolz, *supra* note 605, at 471–72 (discussing attorney's creation of a group legal service plan for organization's members).

or students;[673] or a for-profit non-insurance business.[674] I assume the provider would be a for-profit insurance company because they are adept at offering new insurance products, including those that address gender-based violence.[675] Moreover, offering a new insurance product has inherent risks. Richard Ericson and Aaron Doyle's in-depth study of the insurance industry found that the insurance industry has never been deterred by risk in its pursuit of profit, but rather "thrive[s]" on it.[676]

If an insurance company prices the product appropriately, and invests its premiums wisely, it should profit from this product. This particular product should be attractive to insurance companies because the risks to the insured are independent and not highly correlated.[677] Additionally, reserves should be more manageable and stable given the relatively low caps, compared to liability or loss insurance.[678] Companies will have a variety of options for marketing the product, including offering this product as a standalone policy or bundling it with their other insurance products.[679]

---

673. *See* John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 785 (2001) (describing the self-insurance groups, including cooperative insurance associations, dating back to the early 1800s in both the U.S. and Europe); *id.* at 781, 803 (explaining moral hazard and adverse selection were minimized, in part, by "premodern fraternal social rituals and symbols" that "aimed to forge norms of solidarity among members that would discourage the self-interested departure of low-risk insureds from the insurance pool, as well as reduce the incidence of self-seeking claims on the pool"). Self-insurance is also called mutual insurance. The risks of self-insuring are considerable. *Cf.* Wesley T. Graham, *Prepaid Legal Services from the Viewpoint of the Insurance Carrier*, 14 FORUM 825 (1979) (discussing unions self-insuring for their members' legal services).

674. Amway Corporation offered prepaid legal services at one time. *See* LegalClub.com, Inc. v. Dep't of Consumer & Bus. Servs., 50 P.3d 1196, 1200 (Or. Ct. App. 2002) (citing *Hearings on SB 192 before S. Comm. on Bus., Hous. & Fin.*, Exh. D, 65th Or. Leg. Sess. (Feb. 28, 1989) (letter from Amway Corporation to Jim Hill, Chairman)).

675. *See* Argetsinger, *supra* note 60 (describing "reputation risk" insurance that "typically pays for the hiring of a public relations firm" to respond to sexual misconduct allegations and pays for business loss attributable to negative publicity); Telephone Conversation with Ann Cosimano, General Counsel, ARAG (Aug. 29, 2019) (describing ARAG coverage for the named insured to get counsel for a restraining order against anyone, including someone living in the home, and for any insured to get counsel for a restraining order against anyone who is not a co-insured).

676. ERICSON & DOYLE, *supra* note 510, at 285 ("[I]nsurers . . . have always embraced risk.").

677. KUNREUTHER ET AL., *supra* note 413, at 84.

678. CIVIL JUSTICE COUNCIL, *supra* note 124, at 106 (finding fixed costs help with the introduction of this insurance).

679. For example, it could be bundled with renters or homeowners insurance. *Number of Renters Is on the Rise—But Few of Them Have Insurance*, INS. INFO. INST. (Sept. 22, 2014), https://www.iii.org/press-release/number-of-renters-is-on-the-rise-but-few-of-them-have-insurance-092214 (noting 37% of renters and 95% of homeowners have insurance). Sixty-four percent (64%) of Americans are homeowners. *See Quarterly Residential Vacancies and Homeownership, Second Quarter 2019*, U.S. CENSUS BUREAU (2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

Next I address two particular concerns of insurers: moral hazard and adverse selection. As already discussed, these concerns have stymied other insurance proposals advanced by scholars to help gender-based violence survivors.[680] Neither concern is compelling here.

i. Moral Hazard

Insurers worry about moral hazard, and both the insured and the insured's attorney pose risks in this regard with legal expense insurance. The concern with the insured is that the insured will engage in more risky behavior if she has insurance to sue her perpetrator, she will bring frivolous claims, she will refuse to settle when she should, and she will waive any right to attorneys' fees in a settlement. The concern with the lawyer is that payment by the hour will encourage unnecessary work.

(a) The Insured

The concern about the insured's own safety behavior was noted decades ago with respect to crime victim compensation[681] but was found not to be a problem.[682] Civil recourse insurance is even more unlikely to create this type of moral hazard problem. After all, unlike crime victim compensation (or liability or loss insurance), civil recourse insurance does not compensate the survivor for the costs of her injury. Rather civil recourse insurance provides an extremely weak incentive, if any, to engage in risky behavior. Receiving an attorney to file a lawsuit is far removed from winning the lawsuit and collecting the judgment. Civil recourse insurance guarantees coverage for only a small fraction of someone's absolute loss, i.e., the attorney's fees. Therefore, this product itself works like other methods of minimizing moral hazard, such as by leaving some of the risk on the insured with deductibles and coinsurance.[683] Moreover, individuals will still want to minimize their exposure to sexual and domestic violence (as well as other intentional torts) because the experience is so unpleasant, regardless of the distant potential for compensation.

Similarly, insureds are unlikely to file "frivolous" lawsuits. Legal expense insurance in Germany has not produced such an outcome.[684] Before explaining why it is also unlikely to occur here, it is important to clarify the definition of "frivolous." "Frivolous" suits are suits without legal or factual merit, including cases involving fraud, and not cases that would garner only nominal damages. After all, our legal system permits claims for offensive batteries because they are thought to violate

680. *See generally* discussion *supra* Sections III.A.1 and III.B.1.

681. *See* Michael Fooner, *Victim-Induced, Victim-Invited and Victim-Precipitated Criminality: Some Problems in Evaluation of Proposals for Victim Compensation*, 2 ISSUES CRIMINOLOGY 297, 298 (1966) (originally printed in Science).

682. Samuel Cameron, *Victim Compensation Does Not Increase the Supply of Crime*, 16 J. ECON. STUD. 52, 53, 59 (1989) (studying rape and aggravated assault specifically and finding "no evidence" to support claims of moral hazard).

683. Baker, *supra* note 46, at 442.

684. *See supra* note 541.

personal dignity.[685] Damages are not an element of the claim; nominal damages are available.[686] A claim for an offensive battery is not frivolous even if the damages are nominal. Gender-based violence, in particular, has implications far beyond the physical harm it may cause. For example, a slap on a woman's behind has deep significance in terms of the survivor's dignity, autonomy, and equality. Yet the plaintiff may be unable to establish pain and suffering or the requirements for punitive damages.

Protections against frivolous suits, as defined, already exist. Attorneys' ethical rules as well as the criminal prohibitions on perjury and fraud should minimize fraudulent claims.[687] In addition, insurers would presumably require that the claim have merit before providing the insured with funds. In Germany, the insurer's obligation is only triggered when the claim "offers a reasonable prospect for success and does not appear frivolous."[688] Likewise, in the United Kingdom, a claim must have a "reasonable prospect of success."[689] Screening for merit is appropriate.[690]

Contrast legitimate concerns about frivolous actions with the illegitimate concern that "trivial" claims would be pursued and constitute "moral hazard."[691] For example, Preble Stolz said, "If the parties would not spend their own money in enforcing their claim with lawyers, do we want to create a system that would spend, in substance, other people's money for that purpose?"[692] Stolz's argument is wrong on several levels. First, the insurance premium is, in fact, a payment for civil recourse. Second, as Ronen Avraham has argued: "[N]ot every over-consumption (relative to consumption in the absence of insurance) is problematic since the very purpose of insurance coverage is to ensure" such access.[693] "Trivial" suits should

---

685. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965) (discussing how offensive contact for battery satisfies the tort and noting "[s]ince the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed").

686. *Id.* § 13; *see supra* note 82.

687. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(d), 3.1 (AM. BAR ASS'N 2020).

688. Möller, *supra* note 523, at 954 (citing German law and explaining that "[w]hat is required is neither certainty nor even a (more than even) probability of success; a more than remote possibility must be sufficient").

689. *See* FIN. OMBUDSMAN SERV., *supra* note 591 (explaining that means "a 51% or more chance of winning").

690. It is beyond the scope of this Article to consider what a "reasonable prospect of success" should mean in this context. However, it should not exclude coverage when success turns on a credibility assessment or a good-faith argument for the extension of the law.

691. NEIL RICKMAN & JAMES M. ANDERSON, INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES: AN OVERVIEW FOR POLICYMAKERS 14 (2011) ("It is not clear that it is socially beneficial for every viable legal claim to be litigated."); Stolz, *supra* note 605, at 432–33.

692. Stolz, *supra* note 605, at 432–33.

693. *Cf.* Avraham, *supra* note 461, at 67–69 (speaking about health insurance and explaining that problematic moral hazard only exists when over-consumption is due to a "substitution effect," not an "income effect").

only concern the insurer if it has not budgeted for them in pricing the product. Insurers should budget for them because "triviality" is in the eye of the beholder. A claim for a slap on the woman's behind might seem trivial to some, but not to others. Because it is an intentional tort, civil recourse insurance should cover it.

Regulators in the United States should not follow the practice of regulators in the United Kingdom and allow insurers to deny coverage if the cost of proceedings will exceed the amount likely to be won in court (so long as the insurer pays the amount claimed by the policyholder).[694] The U.K. approach is problematic because it undermines the very purpose of the insurance, as survivors often want accountability, revenge, empowerment, or deterrence more than compensation. Moreover, the approach would presumably preclude representation in a good number of cases.[695] Civil recourse theory reminds us that tort law's social value is not determined solely by compensation, a point forgotten by U.K. regulators and some tort theorists.[696] Litigation can be socially desirable even when the costs outweigh the amount recovered (including the value of deterrence). Civil recourse is socially valuable because it gives plaintiffs what they are politically and morally entitled to in a civil society, and economic inefficiency does not eliminate that benefit. If economic efficiency were the only relevant consideration, then one should value access to civil recourse as priceless.

Despite this discussion, it is important to acknowledge that many insureds would be unlikely to pursue meritorious but "trivial" claims. It would depend upon an individualized cost–benefit analysis because legal expense insurance has the built-in equivalent of coinsurance, a well-recognized way to reduce moral hazard.[697] Any claim under a legal expense insurance policy requires the insured to invest her own time in pursuing the lawsuit, thereby providing a disincentive to overclaim. Any coverage cap would also provide a disincentive to overclaiming.[698] If the product is offered with a deductible, then a consumer could choose a price concession in exchange for making her pursuit of low-economic-value claims less likely.[699]

Fears about overclaiming have to be put into a broader perspective. It is far more likely that insureds, especially survivors of gender-based violence, would

---

694. *See* FIN. OMBUDSMAN SERV., *supra* note 591 (reporting regulators "take the view that it's unreasonable to expect [an insurer] to fund a legal action that a prudent, uninsured person wouldn't fund themselves").

695. *See* ABILITY TO PAY, *supra* note 372, at 140 ("For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit . . . would exceed the value of the case.").

696. *See, e.g.*, Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. ECON & POL'Y 701, 709 (2012) (discussing Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982), and his Incentive Divergence Theory).

697. Avraham, *supra* note 461, at 71.

698. *Id.* For example, Germany only permits two claims a year. *See supra* text accompanying notes 534–35.

699. Avraham, *supra* note 461, at 72. There can also be "experience rating," which raises the premiums for people who have filed claims. *See id.* at 72–74.

forego meritorious claims than pursue trivial claims. Recall that insureds generally underclaim because they fear increases in insurance rates.[700] For victims of gender-based violence, any personal and social impediments to reporting will have the most chance of affecting a survivor's decision when her claim is "trivial."[701] In addition, not every trivial claim would end up in litigation or require a large amount of attorney time; they may settle more quickly, or the parties may want to use litigation alternatives, like mediation.[702] Finally, the pursuit of a claim by an injured party, even a "trivial" claim, should help deter gender-based violence generally and thereby indirectly increase insurers' profits.[703] In fact, to the extent that intentional torts, and specifically gender-based violence, would be under-deterred even if civil recourse insurance exists (because not all people would have insurance or use it if they had it), then some level of excess claiming may be advantageous. It can bring up the overall level of claiming to that which is necessary to deter intentional torts such as gender-based violence.[704] That is, insurers' bottom line could benefit from trivial claims because they would help deter intentional torts and reduce the number of claims overall.

Insurers may also be concerned that the insured's desire for revenge would inhibit a willingness to settle, and thereby create a different type of moral hazard problem. An insured may want to drag out the lawsuit to increase the perpetrator's costs and anxiety. Yet, a lawyer can play an important role in helping a client shift away from vengeance toward other objectives.[705] After all, settlement brings the plaintiff its own benefits, such as an assured outcome, freeing the insured's time for other matters, and avoiding the potential difficulties associated with a trial, such as cross-examination.[706] Also, a desire for revenge can dissipate when the perpetrator sincerely apologizes or offers compensation.[707] Nonetheless, a legal expense insurance policy could include a hammer clause that would limit the insurer's

---

700. *See supra* note 614.

701. *See supra* notes 34–35, 37.

702. MINISTRY OF JUSTICE, *supra* note 600, at 6–7. These alternatives might be important if the court system would be overburdened by the litigation of all insureds' intentional tort claims, including those that are "trivial." Civil recourse theory suggests that the government would be obligated to accommodate this demand for court resources. *See infra* text accompanying note 736, 742. This concern, of course, assumes *very* optimistic market penetration and claiming.

703. *See supra* text accompanying notes 491–93.

704. Avraham, *supra* note 461, at 69 (discussing the "first best" efficient outcome); *cf.* Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy*, 62 MERCER L. REV. 449, 456–58 (2011) (recommending awards of more than compensatory damages to achieve adequate overall deterrence because damages have a deterrent effect on intentional tortfeasors, but systemic underdeterrence exists since few tort victims consult a lawyer and have their meritorious cases accepted).

705. *See* Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 509–33 (2009).

706. Hershovitz, *supra* note 283, at 32 (noting that a settlement removes the dilemma of "the choice of compromising their dignity in one way, so that they can vindicate it in another").

707. *See supra* text accompanying note 219.

liability if the insured refuses a settlement offer for an improper purpose or acts in bad faith.[708]

Finally, insurers may worry that insureds would structure their settlements to negate insurers' contractual right of subrogation for attorneys' fees.[709] However, this potential problem is much less pronounced than in other first-party insurance contexts. Insureds will rarely be entitled to attorneys' fees under the "American rule," which dictates that both sides pay their own attorneys' fees.[710] Nonetheless, this problem could be addressed, as it is in other first-party insurance contexts, by allowing the insurance company to have some say in the settlement to ensure its subrogation rights are not adversely affected, or by allowing the insurer to recoup amounts paid to the insured if the insured waives the insurer's ability to utilize its right of subrogation.[711]

(b) The Insured's Lawyer

Insurers may worry that legal expense insurance will create a moral hazard problem for the insured's attorney, even if it does not affect the behavior of the insured. The attorney might accept unmeritorious claims or drag out the legal representation. The former is unlikely, as attorneys are bound by ethical rules and may only file cases that have a basis in law and fact.[712] Attorneys are also ethically obligated not to commit fraud when communicating with the insurance company about the merit of the suit.[713]

But what about lawyers who are paid by the hour and decide to leave no stone unturned? This concern presumes the attorney would lack other more profitable matters. Regardless, at some point, such behavior would also violate the attorney's ethical obligations.[714] In addition, empirical evidence suggests that lawyers who charge by the hour tend to spend only a little more time on matters than lawyers paid on a contingent fee. Kritzer's study noted a difference for low-value cases, but the time difference was only seven hours.[715] Insurers that are worried about attorney moral hazard can always review an attorney's time records to ensure

---

708. This type of clause is common in the United Kingdom and limits the insurer's liability if the insured refuses a settlement offer for an improper purpose or acts in bad faith. *See* Allianz, *Understanding Legal Expenses Insurance*, TELEGRAPH (Feb. 6, 2018), https://www.telegraph.co.uk/business/risk-insights/legal-expenses-insurance-your-rights/ ("If you don't accept an offer that your insurer thinks is reasonable, it may stop providing cover."). Revenge should be considered an improper reason to continue a suit after the defendant admits responsibility and offers a reasonable amount of compensation.

709. Avraham, *supra* note 461, at 81.

710. Michael S. Bailes, *Attorney Fee Shifting: The American Rule vs. the English Rule*, 8 OHIO LAW. 16, 16 (1994).

711. Avraham, *supra* note 461, at 101.

712. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020).

713. *Id.* at r. 4.1, 8.4(c).

714. *Id.* at r. 1.5(a) (suggesting fees must be reasonable). *See generally In re* Fordham, 423 Mass. 481 (1996) (reasonableness of fees depends upon whether the overall amount of work is reasonable).

715. KRITZER, *supra* note 598, at 119–20 (noting the difference was only significant for cases with a value that was under $6,000).

the hours expended are not "unnecessary, unrelated[,] or involved duplication of activity," as federal courts do when awarding statutory attorneys' fees.[716]

Overall, the moral hazard issues do not appear particularly pressing given the nature of the product.[717] This fact gives this Article's proposal a huge advantage over the liability- and loss-insurance proposals; for those, the moral hazard concerns loom large.

ii. Adverse Selection

Adverse selection would occur if more high-risk individuals purchased the civil recourse insurance than the pricing model assumed, thereby increasing the number of claims and making the product less profitable (or perhaps unprofitable). No data currently exists that allows one to predict the likely proportion of high-risk or low-risk individuals who would purchase civil recourse insurance. Insurers could avoid the adverse-selection problem by classifying prospective purchasers into risk pools, such as by asking about age, gender, and income, and then pricing the policies to more accurately reflect risk.[718] Alternatively, insurers could offer deductibles, thereby allowing insureds to self-classify. Lower-risk individuals might purchase cheaper policies with less overall coverage.[719]

The disadvantage of risk pools is that lower-risk individuals would not be cross-subsidizing higher-risk individuals, and thereby keeping the product affordable for higher-risk individuals. Some might consider such cross-subsidization unwelcome redistribution or discriminatory to the low-risk individuals.[720] But consumers who would be economically disadvantaged by community rating might not find it unwelcome if they purchased insurance, at least in part, to reduce intentional torts generally and to facilitate justice for those who are otherwise unable to obtain an attorney.

In addition, "propitious" or "advantageous" selection might offset or eliminate any adverse selection attributable to community rating.[721] One can envision two reasons for advantageous selection. First, assuming some price sensitivity, those with higher incomes may be more inclined to purchase the product

---

716. Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PENN. L. REV. 281, 319 (1977). Insurance companies already perform audits to reduce *ex post* moral hazard, and while such audits can be costly, the threat of random audits may sufficiently reduce the problem. *See* Avraham, *supra* note 461, at 75.

717. As an aside, survivors might experience a moral hazard problem with their own attorneys if the survivors need additional representation beyond the amount provided by insurance. A lawyer might inflate the fees because the client would find it "painful and expensive" to change lawyers "given the lawyer's familiarity with the problem." *See* Stolz, *supra* note 605, at 462. Assuming legal ethics rules did not adequately discourage this practice, *see supra* note 714, insurers (or regulators) could further minimize that temptation by requiring lawyers who receive insurance payments to limit their post-insurance fees to a reasonable amount "as a condition of participating in the insurance plan." *See id.*

718. Avraham, *supra* note 461, at 45.

719. *Id.* at 46–47.

720. *Id.* at 48.

721. *Id.* at 59–60. Swedloff also predicted it for his proposal. *See supra* text accompanying note 451.

even with cross-subsidization, and they may be lower-risk individuals.[722] This type of advantageous risk selection exists with Medigap coverage.[723] Of course, although price sensitivity might help address the adverse selection concern, it could leave those at higher risk, such as those who are young, poor, and people of color, without insurance and access to the courts.[724] Second, consumers with greater risk aversion may be more inclined to purchase the product, and those individuals may also be lower-risk individuals. For instance, older people generally fear crime more,[725] but they are generally at lower risk for crimes against their person.[726]

The risk of adverse selection is often overstated, and so caution must be exercised in drawing conclusions.[727] The fact that this product is designed to be triggered by any intentional tort, and not just gender-based violence, should widen the group who may be interested in purchasing it and help reduce the potential for adverse selection.[728] In addition, several well-known strategies exist to minimize

---

722. *See* Amy E. Bonomi, *Intimate Partner Violence and Neighborhood Income: A Longitudinal Analysis,* 20 VIOLENCE AGAINST WOMEN 42, 42 (2014) (noting that "intimate partner violence rates were highest in the poorest neighborhoods"); Terri L. Weaver et al., *Development and Preliminary Psychometric Evaluation of the Domestic Violence—Related Financial Issues Scale (DV-FI)*, 24 J. INTERPERSONAL VIOLENCE 569, 570 (2009) (explaining why "poor women are more vulnerable to abuse than women from moderate- and upper-income levels"); *see also Sexual Harassment: A Severe and Pervasive Problem*, NEW AMERICA, https://www.newamerica.org/better-life-lab/reports/sexual-harassment-severe-and-pervasive-problem/making-ends-meet-in-the-margins-female-dominated-low-wage-sectors/ (last visited June 24, 2020) (noting "[w]orkers in low-wage, female-dominated industries have the highest reported incidences of sexual harassment and assault by sector").

723. KUNREUTHER ET AL., *supra* note 413, at 79 (citing research by Cutler, Finkelstein, and McGarry). Similarly, low-risk individuals are just as likely to purchase long-term care insurance as high-risk individuals because the low-risk individuals are risk averse. *Id.* at 318.

724. Governmental action to make the insurance affordable or otherwise accessible might address this problem. *See* discussion *infra* Sections IV.C.4.a–c.

725. Rafael Prieto Curiel & Steven Richard Bishop, *Fear of Crime: The Impact of Different Distributions of Victimization*, PALGRAVE COMM., Apr. 17, 2018, at 2, https://www.nature.com/articles/s41599-018-0094-8; D. Carro et al., *Perceived Insecurity in The Public Space: Personal, Social and Environmental Variables*, 44 QUAL QUANT 303, 312 (2010).

726. Heather Warnken & Janet L. Lauritsen, *Who Experiences Violent Victimization and Who Accesses Services?*, at 13 tbl.3 (Apr. 2019), https://ncvc.dspacedirect.org/bitstream/item/1270/CVR%20Article_Who%20Experiences%20Violent%20Victimization%20and%20Who%20Accesses%20Services.pdf?sequence=1 (discussing serious violent victimization).

727. KUNREUTHER ET AL., *supra* note 413, at 80 (calling adverse selection "far from ubiquitous" even when insurers are not allowed to base decisions on certain sorts of information); Avraham, *supra* note 461, at 58 (calling adverse selection "a formidable problem theoretically," but noting "almost no evidence to suggest" it is "a major problem for the insurance industry at large"); Faure & De Mot, *supra* note 594, at 760, 763–64 (discussing study from the Netherlands where adverse selection in legal expense insurance market was found not to exist).

728. Wriggins expressly limited her mandatory domestic violence insurance to victims of domestic violence, claiming that public policy supported the limitation because of

adverse selection and insurers could utilize them. For one, insurers can sell policies to groups. Adverse selection would be minimized if schools, unions, or employers purchased the product for all members of the group.[729] This strategy has worked for legal insurance companies in England and Wales.[730] This strategy may reduce, or even eliminate, any price discrimination attributable to community rating because low-risk individuals might benefit from the product's lower cost due to bulk purchase.[731] Another strategy is to offer legal expense insurance only as a bundled product; standalone products tend to attract a higher percentage of purchasers who will use it.[732]

Finally, the government could mandate or subsidize its purchase[733] or offer the industry profit protection through reinsurance. The next Section will explore some of the possible governmental interventions that would increase the probability that the insurance industry would offer the product. These interventions might be especially important until the industry obtains the historical data for appropriate pricing.

C. The Government's Role

This Section begins by arguing that the government should make sure gender-based survivors have access to civil recourse, i.e., the tort regime. This Section then defends the insurance solution, and government involvement to make it work, instead of a more direct governmental approach, such as expanding Legal Aid. Finally, this Section canvases several potential governmental interventions that would assure the creation of a civil recourse insurance market, including subsidizing premiums, offering civil recourse insurance itself, becoming a reinsurer, and mandating insurance.

1. The Constitutional Argument for Governmental Action

It is beyond the scope of this Article to argue that the government has a constitutional obligation to provide actual access to civil recourse. Those in favor of

---

"the magnitude and extent of domestic violence." Wriggins, *Domestic Violence Torts*, *supra* note 12, at 160. In contrast, this Article suggests that civil recourse insurance should be marketed to all potential victims of intentional torts to help address adverse selection.

729. Avraham, *supra* note 461, at 51. In the United States, employers and unions already offer prepaid legal plans to groups. Juetten, *supra* note 501.

730. Prais, *supra* note 478, at 434.

731. Avraham, *supra* note 461, at 51.

732. *See* CIVIL JUSTICE COUNCIL, *supra* note 124, at 105 (explaining that in England, standalone policies for legal expense insurance tend to encourage more claims and adverse selection). This outcome is not surprising because those who purchase additional insurance tend to make more claims. *See, e.g.*, Liran Einav, Amy Finkelstein & Jonathan Levin, *Beyond Testing: Empirical Models of Insurance Markets*, 2 ANN. REV. ECON. 311, 312 (2010); Allianz, *Understanding Legal Expenses Insurance*, TELEGRAPH (Feb. 6, 2018), https://www.telegraph.co.uk/business/risk-insights/legal-expenses-insurance-your-rights/.

733. It is interesting to consider whether the subsidies should target lower-income or lower-risk individuals, as a subsidy to the latter might encourage their purchases and thereby spread the risk in a way that makes the product affordable to lower-income individuals and still profitable to the insurer. *See* Avraham, *supra* note 461, at 52.

"civil Gideon" laws have made a similar argument,[734] although tort law is typically left out of the categories of law for which the obligation would exist.[735] Goldberg, one of the fathers of civil recourse theory, came close to making the argument with respect to tort law, but he stopped short. Although he argued that the right to tort redress is enshrined in the Fourteenth Amendment, he only claimed there was an affirmative right to a legal system that would provide redress, i.e., judges and laws,[736] and a negative right to prevent undue burdens on people's ability to obtain redress.[737]

It would be valuable for someone to develop the argument that the U.S. Constitution embodies a general right to legal assistance for purposes of accessing the tort system. There is a relevant historical practice: The poor had a right to free counsel in English law, including for tort actions, dating back to at least the 1200s.[738] There is also helpful case law. The Supreme Court, in *DeShaney v. Winnebago County Department of Social Services,* suggested that the state is constitutionally obligated to protect people from private violence when the state limits a person's "freedom to act on his own behalf."[739] Civil recourse theorists have explained that the government removed individuals' right of self-help and replaced it with a system of tort claims and courthouses.[740] If part of the purpose of that system is to deter private violence, but the replacement is inaccessible to many, then arguably due process and equal protection require the government to make it accessible.[741] Goldberg's writing,[742] including his citation to cases like *Gideon v. Wainright* and *Boddie v. Connecticut* to illustrate that the Constitution imposes affirmative obligations on the government at times "to act for the benefit of an individual," lays

---

734. *See, e.g.*, Mark C. Brown, Comment, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon By Avoiding A Civil Strickland*, 159 U. PA. L. REV. 893 (2011).

735. *See generally* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010).

736. Goldberg, *supra* note 18, at 592. Part of Goldberg's argument is backward-looking, with strong evidence that the English constitution obligated the King to provide courts and law, *see id.* at 550–51, although it is not solely backward-looking. *Id.* at 596.

737. *Id.* at 626–27.

738. Scott F. Llewellyn & Brian Hawkins, *Taking the English Right to Counsel Seriously in American "Civil Gideon" Litigation*, 45 U. MICH. J.L. REFORM 635, 642–44 (2012).

739. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 299 (1989).

740. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 973.

741. *Cf., e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that equal protection and due process require the state to give indigents access to a transcript for appellate review in a criminal case); M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996) (holding that equal protection and due process require the state to give indigents access to a transcript for appellate review in a termination of parental rights case).

742. Goldberg, *Redress of Wrongs*, *supra* note 18, at 607 (arguing that "tort law helps maintain and promote a nonhierarchical conception of social ordering"); *see also* Solomon, *supra* note 18, at 1784 & n.105 (citing numerous works by Goldberg and Zipursky that support the idea that "ideals of equality in American political theory generally and in the Fourteenth Amendment specifically" justify the "law of civil recourse").

the foundation for this argument.[743] Although tort law is a private system of civil redress, the government created this system and cannot be permitted to disclaim an obligation to make it accessible to all.[744] The action–inaction dichotomy that sometimes shields the government from constitutional responsibility has no place when discussing access to the government's system of civil redress.

2. The Policy Argument for Governmental Action

Whether or not there is a successful constitutional claim that the government must make the tort system accessible to people, civil recourse theory provides a strong basis for a policy argument to that effect.[745] As this Article has demonstrated, tort law is not only, or even necessarily, about compensation for survivors of gender-based violence; it is about accountability, revenge, empowerment, and deterrence.

The normative claim for meaningful access to civil recourse rests on the fact that the availability of civil recourse is the tort system's raison d'être. The state's creation of private rights of action and its provision of a neutral decision maker is simply insufficient if its laws, and its failure to adopt other laws, make access to the system practically impossible. A state-sponsored system of civil recourse should not be a hoax, a chimera, or a mere illusion. The government has a political and moral obligation to increase access.[746]

Civil recourse theorists should make this argument themselves to quell concerns about the descriptive accuracy of civil recourse theory. After all, the inaccessibility of the system for many with valid claims undercuts its proponents' assertion that civil recourse is integral to justice. Access to the courts is not a

---

743. Goldberg, *Redress of Wrongs*, *supra* note 18, at 593 (citing Gideon v. Wainright, 372 U.S. 335, 343 (1963) and Boddie v. Connecticut, 401 U.S. 371, 383 (1971)). Goldberg notes the descriptive imprecision of "simple dichotomies," like negative-affirmative rights and procedural-substantive due process, see *id.* at 606, and argues for the right to "structural due process"—"a set of related guarantees pertaining to the basic structure of government," including the right to "bodies of law." *Id.* at 594–95. Structural due process rights "involve entitlements to services uniquely associated with government." *Id.* By definition, structural due process rights exclude an obligation to provide attorneys for access to the government-created legal structure because private attorneys can provide legal representation.

744. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 919 (noting "a challenge for tort theory is to explain what is distinctively 'private' about tort, given the state's role"); *see* Chamallas, *supra* note 8, at 530 (noting Goldberg and Zipursky acknowledge the "public aspect of tort law," but suggesting their rhetoric downplays "the significance of the state").

745. Civil recourse theory is useful for this argument even though it does not identify desirable goals of the tort system beyond civil recourse. *See* Zipursky, *Civil Recourse*, *supra* note 18, at 755–56 (recognizing there are normative implications from civil recourse theory, but that the structure itself does not "embed" principles of corrective justice, economic efficiency, etc.).

746. *See infra* text accompanying notes 755–58.

collateral matter,[747] but is as central to the concept of civil recourse as is the law of standing, something Zipursky acknowledges is critical to understanding tort law's grand structure and meaning.[748] A legal system that permits insurance exclusions, protects tortfeasors' assets, and relies on contingent-fee attorneys for access is but a hollow shell for civil recourse. It does not empower those who are harmed; it empowers those who do harm and disempowers the victims.

To be fair, Zipursky and Goldberg recognize the conundrum. They say, "If tort law is designed to empower victims, why does it make the task of responding to wrongs so difficult and cumbersome?"[749] They acknowledge there are "no doubt several explanations,"[750] but none make sense in the context identified here. First, they mention that the barriers may be justified.

> [The barriers] encourage victims to [seek civil recourse] thoughtfully rather than rashly and to consider whether what has been done to them really warrants the elaborate response of a lawsuit. Many wrongs are, in the scheme of things, minor affairs that are better resolved informally or through alternative mechanism such as insurance.[751]

Yet gender-based violence that constitutes an intentional tort is not usually a "minor affair," even if it won't result in a large collectible judgment, nor is it covered by insurance. Such violence cuts to the core of personal dignity, autonomy, and equality. Zipursky and Goldberg's reliance on this rationale is equivalent to the tail wagging the dog, at least in this context. Moreover, a "thoughtful" approach to litigation presumes that the survivor has access to an attorney who can help her intelligently assess options and that those options are real and not a chimera. Yet such advice and real access to the tort system are too often unavailable.

The authors also defend the obstacles by saying, "Alleged wrongdoers also have rights, and to the extent that the barriers placed in the way of tort claimants are part of an effort to preserve those rights, they may well be justified."[752] The authors, however, are referring to procedural and evidentiary rules. The rights of the alleged wrongdoers during the proceedings cannot justify barriers that keep survivors from accessing the system in the first place.

Civil recourse theorists should not defend the obstacles but should make a strong normative claim that the government must fix the problems that undermine the very purpose of a civil recourse system. They have already laid the foundation for a stronger argument. They recognize the public aspect of a tort system, they describe that system "as *aspiring* to achieve a certain sort of justice between private

---

747. *Cf.* Nancy Moore, *Restating Intentional Torts: Problems of Process and Substance in the ALI's Third Restatement of Torts*, 10 J. TORT L. 1, 37 (2017) (arguing that scholars should not "simply ignore these external collateral effects (as well as the internal effects) of characterizing conduct as intentional rather than merely negligent").

748. Zipursky, *Civil Recourse*, *supra* note 18, at 744–45 (arguing that standing requirements are relational).

749. Goldberg & Zipursky, *Oxford*, *supra* note 18, at 65–66.

750. *Id.* at 66.

751. *Id.*

752. *Id.*

parties,"[753] they admit that the system sometimes falls "significantly short" of its ideals, and they acknowledge that efforts to improve the system are "important."[754] Moreover, they ground the state's obligation "to permit and empower those who have been legally wronged to act, civilly, against those who have wronged them"[755] in "a political commitment" as well as a moral commitment.[756] These same justifications support state action to ensure access to that system of redress. Goldberg and Zipursky's words, cited previously to describe civil recourse theory,[757] bear repeating here:

> Part of the state's treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them. Relatedly, a legal and political order that respects an individual's right not to be treated in a certain manner cannot permit persons to invade such rights with impunity; forbidding responsive aggression without providing any avenue of private redress is a way of permitting rights invasions with impunity. This is . . . even true of wrongs that are crimes or infractions, given that enforcement by the state of criminal and regulatory law is discretionary. Our system affords a victim a civil right to hold a wrongdoer answerable to her. A legal right of action in tort against the wrongdoer is that right.[758]

The fact that gender-based violence both results from and sustains gender inequality provides a strong argument for why the government should focus on access to courts for victims of gender-based violence, in particular.[759]

The government already intervenes in insurance markets, both through regulation and subsidies, to promote efficiency and equity[760] and to foster peace of mind and security. Encouraging the development of new insurance products that would provide access to civil recourse in order to promote gender equality is at least as good of a reason for governmental intervention as helping people protect their financial assets, if not a better reason. It would be good for society if the government initiates conversations with the insurance industry about how a public–private partnership could develop a working market for legal expense insurance for intentional person torts.

---

753. *Id.* at 68.

754. *Id.*

755. Zipursky, *Civil Recourse*, *supra* note 18, at 754.

756. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 974.

757. *See supra* text accompanying note 267.

758. *Id.*; *cf.* Solomon, *supra* note 18, at 1807–09 (providing political and moral justifications for a tort system that addresses unintentional injuries).

759. *See* Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT'L L.J. 487, 492–99, 527 (2008) (arguing that a human-rights approach to gender violence recognizes this reality); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 431 (2016) ("Rape is a crime of gender inequality."); *cf.* The Violence Against Women Act of 1990, S. REP. NO. 101-545, at 32–34 (Oct. 19, 1990) (describing violence and its effects on survivors).

760. KUNREUTHER ET AL., *supra* note 413, at 186.

3. The Political Feasibility of a Market-Based Insurance Solution

At this point, one might ask, "Why an insurance solution?" Couldn't the government simply provide an attorney to anyone who suffers sexual assault or domestic violence, or at least anyone who cannot find an attorney to pursue their civil claim, by expanding Legal Aid?

My response is grounded in pragmatism. About half of Americans polled by Gallup think the government is doing too many things that should be left to individuals and businesses, and a whopping 70% think the private sector does things more efficiently than the government.[761] Legal Aid has faced ongoing funding challenges. The current Administration has tried to defund the Legal Services Corporation three years in a row.[762] While Congress has been more supportive, funding for the Legal Services Corporation continues to stagnate.[763] Funding is insufficient to meet the legal needs of this nation's poor. There is currently less than one Legal Aid attorney for every 10,000 people under 200% of the federal poverty level.[764]

A more neo-liberal and politically palatable solution is to buttress the private insurance market.[765] I am not the first to suggest a market-based solution for access to justice issues,[766] but this proposal uniquely aligns the interests of powerful

761. *Government*, GALLUP POLL, https://news.gallup.com/poll/27286/government.aspx (last visited Aug. 6, 2020).

762. *Legal Services Corporation Optimistic About Bipartisan Support in Congress Despite White House Proposal to Defund*, LEGAL SERVS. CORP. (Mar. 18, 2019), https://www.lsc.gov/media-center/press-releases/2019/legal-services-corporation-optimistic-about-bipartisan-support [hereinafter *Legal Services Corporation Optimistic*]. President Trump is the first president to call for the Corporation's elimination. *See* Matt Ford, *What Will Happen to Americans Who Can't Afford an Attorney*, ATLANTIC (Mar. 19, 2017), https://www.theatlantic.com/politics/archive/2017/03/legal-services-corporation/520083/.

763. In 2018, Congress funded the Legal Services Corporation at $415 million. *Legal Services Corporation Optimistic*, *supra* note 762. Historically, the funding has fluctuated greatly, but in FY 2010 the funding was $420 million, a high point. *Legal Services Corporation: Background and Funding*, CONGRESSIONAL RESEARCH SERVICE tbl.2 (Dec. 21, 2016), https://www.everycrsreport.com/reports/RL34016.html#_Toc473714148.

764. *Number of Attorneys for People in Poverty*, JUSTICE INDEX (2016), https://justiceindex.org/2016-findings/attorney-access/#site-navigation.

765. Some will consider it a more efficient solution, too. *See* KUNREUTHER ET AL., *supra* note 413, at 187; *see also supra* note 761.

766. *See, e.g.*, Thomas D. Rowe, Jr., *If We Don't Get Civil Gideon: Trying to Make the Best of the Civil-Justice Market*, 37 FORDHAM URB. L.J. 347, 353 (2010) (recommending "pro-prevailing-plaintiff fee shifting, coupled with a formal offer-of-settlement provision").

lobbying groups, specifically the insurance industry[767] and plaintiffs' attorneys,[768] with those of survivors. This alliance is essential because the lobbyists for women's issues are not particularly well-heeled,[769] crime victims have a collective-action problem,[770] and tort victims are not politically active.[771] But women's groups and crime victims' groups can articulate the moral imperative for governmental action, making government initiatives attractive to politicians on both sides of the aisle.[772] In addition, this insurance product does not pose the typical "politician's dilemma," i.e., that politicians gain more by providing relief after a disaster than supporting mitigation measures prior to a disaster.[773] Here there is largely political upside.[774]

4. Potential Governmental Interventions to Establish and Enhance the Market

Ericson and Doyle observed that "insurance markets are not easy to establish," and the government has "unique capacities" to handle difficulties.[775] Insurance is already a highly regulated market, with "coverage mandates,

---

767. *See* Jake Frankenfield, *Which Industry Spends the Most on Lobbying*, INVESTOPEDIA, https://www.investopedia.com/investing/which-industry-spends-most-lobbying-antm-so/ (last updated May 7, 2020) (noting that "the insurance industry has historically been the second most generous/aggressive industry in lobbying for their interests"). This claim assumes that liability insurers would not oppose efforts to develop the product; yet, even with intentional-tort exclusions, they may fear that they will have to defend more claims if more survivors sue. *See supra* note 103.

768. *See American Assn for Justice*, OPENSECRETS.ORG, https://www.opensecrets.org/ORGS/summary.php?id=D000000065&cycle=A (last visited Oct. 10, 2020) (calling the plaintiffs' bar "a lobbying heavyweight"); Gilles, *supra* note 47, at 707 (calling plaintiffs' lawyers "famously well-organized and influential"); *but cf. id.* at 707–08 (explaining why plaintiffs' lawyers might be reluctant to fight to lower barriers to the enforcement of tort judgments, including inexperience fighting for blood money, reputational costs to attorneys from fighting for blood money, aligning themselves with insurers against the little guy, etc.).

769. *Women's Issues: Lobbying, 2020*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/lobbying.php?cycle=2020&ind=Q08 (reporting total spending of $745,620 in 2020) (last visited Sept. 23, 2020).

770. *See* Levmore & Logue, *supra* note 22, at 313.

771. Gilles, *supra* note 47, at 706 ("[T]ort victims are likely to be focused on their own civil and criminal remedies, not on law reform. And because few victims will ever have another tort claim, they have no continuing stake in reforming the system."). Gilles predicts that consumer groups, who have some political muscle, might align on the side of the perpetrators if efforts were made to enhance the collectability of tort judgments. *See id.* at 709.

772. Audrey Carlson et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html (noting that the #MeToo movement "is still shaking [] power structures in society's most visible sectors"); *cf.* Gilles, *supra* note 47, at 713–14 (describing crime victims as sympathetic lobbyists).

773. KUNREUTHER ET AL., *supra* note 413, at 188 (citing research).

774. Of course, perpetrators may oppose this proposal, but most politicians would not want to be aligned with them. Admittedly, some politicians may oppose any government support of big business, even if temporary, and regardless of how it increases access to justice and deters crime.

775. ERICSON & DOYLE, *supra* note 510, at 293; *see also id.* at 286 (noting that insurers are "exposed to unforeseen investment market risks" when they create new products "without a prior history of underwriting and pricing").

restrictions on pricing and underwriting, tax subsidies to private insurance purchases, prudential regulation of insurers, or in many cases direct government involvement as an insurance provider."[776] The proposals below for governmental action should assist in developing a market for civil recourse insurance. The political feasibility of any particular initiative will depend, at least in part, on whether the insurance industry, plaintiffs' attorneys, and potential tort victims support it. Consequently, this Article does not include proposals that would clearly be opposed by one of these groups, such as requiring prepaid legal plans to offer civil recourse insurance as part of those plans.[777] Also, this Section does not address governmental regulation of the product itself. I assume such regulation would occur, as it does for all insurance products.[778]

a. Insurance Vouchers

Relying upon private insurance to solve the problem of access to the civil legal system raises an obvious problem: Not everyone can afford insurance. In Germany, the price of insurance has left some segments of the population dependent on legal aid.[779] In England, legal aid no longer exists for personal injury suits after the Access to Justice Act of 1999,[780] and so nonprofit companies make legal expense insurance available to low-income households by including the cost in low-interest and no-interest loans.[781] In the United States, the federal or state government could address the unaffordability of legal expense insurance for low-income individuals by subsidizing premiums, offering its own civil recourse insurance, or making lawyers available through Legal Aid. Those possibilities are not mutually exclusive.

A particularly attractive option is a cash transfer payment in the form of an "insurance stamp," not unlike "food stamps."[782] People who qualify would get vouchers to pay for legal expense insurance. The cost to the government of these payments might be offset by the financial benefits from general deterrence, including the reduced burden on the criminal justice system and the reduced need for governmentally subsidized medical care for victims. The cost would also "force the government to internalize some portion of the costs of crime victimization," which might make the government more proactive about the prevention of domestic

776. *See, e.g.*, Einav et al., *supra* note 732, at 329; *see also* Baker, *supra* note 46, at 437 (mentioning "statutes and doctrines that require liability insurers to offer insurance, or that limit liability insurers' authority to handle claims as they please").

777. KUNREUTHER ET AL., *supra* note 413, at 188 (suggesting that such mandates can "impede efficient markets by discouraging insurers from offering products that consumers may truly prefer").

778. *Cf.* Avraham, *supra* note 461, at 33 (noting "insureds require even more protection than other consumers"). Prepaid legal plans are often regulated as if they were insurance. Telephone Conversation with Ann Cosimano, General Counsel, ARAG (Aug. 29, 2019).

779. Raiser, *supra* note 512, at 8640.

780. *See* CIVIL JUSTICE COUNCIL, *supra* note 124, at 10.

781. *See id.* at 124 (explaining that the loans are financed by the following: "high-net-worth individuals and foundations; commercial finance from a number of banks; and philanthropic support specifically for its money advisory services"); *see also id.* at xii (noting lower-income people have difficulty purchasing legal expense insurance).

782. KUNREUTHER ET AL., *supra* note 413, at 187, 190.

and sexual violence.[783] Although the costs of insurance stamps might fall on the federal government and the savings might accrue primarily to the states, this fact should not affect its attractiveness to taxpayers.

Instead of an "insurance stamp," regulators could require that premiums be reduced for a subset of the population. However, that solution would certainly require insurers to raise the premiums for others, which could discourage purchase by those who would have otherwise bought it. Subsidies are usually less likely to distort the market.[784]

b. Federal Civil Recourse Insurance

The government itself could offer civil recourse insurance to fill the gaps if insurers did not make the product available, priced the product in a way that made the product unaffordable to many people, or refused to insure bad risks, i.e., engaged in "lemon dropping." Precedent for this approach exists. In 1971, federal crime insurance became available because private insurers did not find it profitable to offer crime insurance in all areas or at affordable rates in all areas.[785] The government insurance was sold by private insurance agents.[786] While federal crime insurance has been eliminated,[787] the government still offers its own insurance plans today for areas susceptible to natural disasters, such as floods, fires, and hurricanes.[788] Some scholars have recommended reintroducing government-sponsored crime insurance

---

783. Swedloff, *supra* note 22, at 786.

784. KUNREUTHER ET AL., *supra* note 413, at 195.

785. *See* Levmore & Logue, *supra* note 22, at 317 & n.131 (describing the Federal Crime Insurance Program ("FCIP"), whereby "the federal government provided small amounts of robbery and/or burglary insurance ($10,000 for individuals and $15,000 for businesses) to tenants in high-crime areas," and the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), whereby the federal government acted as a reinsurer). High crime rates, adverse selection, and moral hazard all contributed to the need for governmental intervention. *See* REJDA, *supra* note 441, at 332.

786. *See* REJDA, *supra* note 441, at 332; *id.* at 194 (noting that the agents were reluctant to push these policies because of "relatively low commission rates, stringent federal standards for protective devices, and increased availability of crime insurance in the private markets").

787. UPPRA ended in 1983 and FCIP ended in 1996. *Id.* Levmore and Logue surmise that FCIP failed from "lack of adequate marketing" and because it was perceived as "a subsidy for New York City." Levmore & Logue, *supra* note 22, at 317 & n.131. Wriggins reports that Congress terminated the reinsurance program because private insurers returned to the market. *See* Jennifer B. Wriggins, *In Deep: Dilemmas of Federal Flood Insurance Reform*, 5 U.C. IRVINE L. REV. 1443, 1456–57 (2015).

788. REJDA, *supra* note 441, at 193–94; *see also* Joshua Aaron Randlett, *Fair Access to Insurance Requirements: Do "Fair" Property Insurance Premiums for Individual Coastal Property Owners in Massachusetts Equate with Fairness to the Greater Market?*, 15 OCEAN & COASTAL L.J. 127, 134–39 (2010). Wriggins criticizes federal insurance programs that have the government taking over the entire risk. *See, e.g.*, Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in a Warming World*, 119 PA. ST. L. REV. 361, 425 (2014) (disapproving of U.S. flood insurance and comparing it to acceptable federal programs, including one that provided reinsurance to encourage the availability of property insurance in urban areas affected by redlining).

for individuals, noting the difficulty low-income people have obtaining property insurance and significant amounts of life insurance.[789]

If the government became an insurer for those who could not otherwise obtain insurance, the government would essentially be using tax dollars to provide access to civil recourse for those excluded individuals. Such a program might be a more politically feasible solution than expanding Legal Aid. After all, this Article's proposal lacks the Legal Aid label, and it makes private attorneys the beneficiaries.

c. Reinsurance

There is also the possibility that the government would offer reinsurance. Reinsurance is insurance for insurers; it is a way to stop their losses when payouts get too large, thereby stabilizing insurers' profits.[790] The government and the insurer enter an "excess-of-loss treaty" whereby the government covers the losses when a certain cumulative amount is reached during a certain fixed period.[791] This type of arrangement was instituted after 9/11.[792] The government can also serve as a backup for private reinsurance programs.[793]

In exchange for the benefit of reinsurance, the government might require insurers to take certain action. The requirements should not raise objections if any risk associated with the action is placed on the government through the reinsurance. The range of requirements are infinite, but might include a requirement that insurers include this insurance with other types of insurance (such as homeowners or renters) or that civil recourse insurance provide attorneys for restraining order matters as well as tort actions.[794] Reinsurance also makes a lot of sense if the government compels certain populations to purchase the insurance, such as college students.[795]

d. Mandatory Insurance

Finally, the government could mandate that people obtain civil recourse insurance. The government already requires consumers to purchase a number of different types of insurance, including automobile liability insurance,[796] professional

---

789. *See* Levmore & Logue, *supra* note 22, at 317 & n.138.

790. REJDA, *supra* note 441, at 610–11.

791. *Id.* at 613.

792. David Torregrosa, Perry Beider & Susan Willie, *Federal Reinsurance for Terrorism Risk in 2015 and Beyond* 1–2 (Cong. Budget Off., Working Paper No. 4, 2015), http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/50171-TRIA_Working_Paper_1.pdf.

793. ERICSON & DOYLE, *supra* note 510, at 294.

794. *See supra* notes 121, 595.

795. *Cf.* Levmore & Logue, *supra* note 22, at 320 (talking about such a government program in the context of crime coverage).

796. *See, e.g.*, Gilles, *supra* note 47, at 662 (noting that "automobile liability insurance [is] . . . mandated by law in most states").

liability insurance (for licensed professionals),[797] and health insurance.[798] The government could require everyone to purchase insurance or pay a tax, or it could target a smaller group, such as all students attending state college or all residents of public housing. Imposing a requirement on a subset of the population would be akin to a bank requiring home insurance as a condition of a mortgage.

Mandating insurance across a broad population is an excellent way to address adverse selection as well as the free-rider problem. The latter can occur because people get the benefit of enhanced deterrence without purchasing civil recourse insurance themselves; after all, no perpetrator knows which potential victims have civil recourse insurance.[799] As in the health care realm, mandatory insurance can be paired with subsidies for medium- and low-income consumers.[800]

In sum, there are numerous options the government could take. The government should work with insurance companies to determine which governmental action makes most likely the development of legal expense insurance and its purchase by consumers. Because the system of civil recourse is woefully deficient as it is, the government has a moral and political obligation to initiate the conversation.[801]

D. A Potential Drawback: Exposing Survivors to Harm from Insurers

For some, this proposal will raise concerns. I have chosen not to address concerns that are arguably paternalistic. For example, a survivor's tort suit against her perpetrator may be hard for the survivor,[802] or may reduce the chance the state will prevail in a criminal trial.[803] I do not minimize these concerns, or disapprove of systemic changes that would make things better, but I believe it should be the survivor's choice whether the tort system is the right arena for her. Relatedly, some

---

797. *See, e.g.*, R.W. v. Schrein, 642 N.W.2d 505, 516 (Neb. 2002) (holding that Nebraska Hospital Medical Liability Act, which required doctors to have professional liability insurance, did not express a public policy that such insurance cover doctors' commission of sexual abuse).

798. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

799. De Mot et al., *supra* note 466, at 19.

800. *Explaining Health Insurance Reform: Questions About Health Insurance Subsidies*, KFF (Jan. 16, 2020), https://www.kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health/.

801. *See supra* Section IV.C.2. *See generally* GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 18, at 111–46.

802. *See* Perry, *supra* note 350, at 983–87 (discussing the detriments of tort litigation for survivors); Pam Mueller, *Victimhood & Agency: How Taking Charge Takes Its Toll*, 44 PEPP. L. REV. 691, 702 (2017) ("[W]hen a victim proceeds to act more agentically (e.g., filing a civil lawsuit), he is then blamed more."); Bublick & Mindlin, *supra* note 41, at 5–9; Herman, *supra* note 162, at 580 (mentioning how defendants fiercely contested civil claims, often filing a retaliatory lawsuit); Clark, *supra* note 130, at 34 (including comments by a survivor who found it upsetting when the defense insinuated that she was suing for "the money"); Des Rosiers et al., *supra* note 202, at 436–37 (mentioning, inter alia, the time frame it took to litigate the case); *see also supra* note 34 and accompanying text.

803. *See generally* Lininger, *supra* note 10, at 1591 (explaining that "virtually all courts . . . show unqualified support for the premise that lawsuits compromise the credibility of accusers in criminal cases").

survivors may purchase the insurance and then forego using it because they want to avoid the stress and inconvenience of pursuing a claim, or they feel shame and do not want to engage in a public process, or they fear retaliation from the perpetrator.[804] Again, every survivor needs to make the decision that is best for her. While some survivors may not use their civil recourse insurance, it is still right to take down barriers to survivors' participation in the justice system one by one.

However, a legitimate concern is whether civil recourse insurance will have unintended consequences, e.g., harm survivors by establishing a power relationship between the insurance company and the survivor. Insurance has its own "imperfections," including the absence of "human compassion."[805] There are several ways that this product might be problematic for survivors.

First, civil recourse insurance, like other first-party insurance, would undoubtedly impose obligations on the insured. The insured would probably have an obligation to report the claim promptly and to cooperate reasonably with the insurer so that it could determine coverage. During this process, insurers might "mistreat" survivors.[806] Merely having to share the details of one's victimization can be retraumatizing, and retraumatization is more likely if claim adjusters are not trauma informed in their questioning. The insurer might also deny coverage when it should not, leading to betrayal trauma.[807]

Solutions to these problems already exist, but more might be required. Already the survivor has the benefit of law that prohibits bad-faith denial of a claim.[808] In addition, government agencies that regulate insurance or consumer products might field complaints. But lawmakers should also require that a third party determine the claim's merit if there is a dispute between the insurer and the insured, as exists in Germany.[809] Other ways to mitigate this problem include requiring "full and detailed disclosure of the coverage decisions," and having insurance regulators monitor companies.[810] Although insurers would have a market incentive to process claims in a trauma-informed manner (because consumers care about customer service), regulators should require training for claims processors if the market does not produce an adequate result.

Second, and even more troubling, is whether insurers would try to control survivors in a way that would be inconsistent with their autonomy or recovery. The insurance industry is keen on loss prevention.[811] First-party insurers often impose requirements on their insureds to reduce loss. For example, providers of crime

---

804. *See supra* note 34; *see also* Nikki Godden-Rasul, *Retribution, Redress and Harms of Rape: The Role of Tort Law*, *in* RAPE JUSTICE, BEYOND THE CRIMINAL LAW 112, 113–14 (Anastasia Powell et al. eds., 2015).

805. ERICSON & DOYLE, *supra* note 510, at 295.

806. Avraham, *supra* note 461, at 87 ("[I]nsurers are . . . the perpetrators of opportunistic behavior, finding it easy and advantageous to mistreat their insureds once they are locked in a contract.").

807. *See supra* note 470 and accompanying text.

808. *See supra* notes 472–73 and accompanying text.

809. *See supra* text accompanying note 523.

810. *See* Avraham, *supra* note 461, at 88.

811. REJDA, *supra* note 441, at 626.

victim insurance typically require their insureds to install certain crime prevention devices, e.g., locks.[812] Noncompliance becomes a reason to drop a customer or a basis for charging a higher premium.[813] Tom Baker calls these requirements "social control."[814]

Reporting requirements are a very common type of loss prevention. Commercial crime coverage typically requires the insured to notify the insurer of any dishonest act by an employee, regardless of the size of the theft, and the insurer will not cover future crime by that employee.[815] The notification requirement encourages the insured to notify and then terminate the dishonest employee. If the insured does not file a report and the employee reoffends, the insured is without coverage, assuming the insurer learns about the earlier theft.[816] Similarly, homeowners insurance for loss typically requires that "all covered losses must be reported to the police even if a claim is not filed."[817]

In the context of civil recourse insurance, insurance companies might try to impose similar requirements on the insured, which would be quite problematic for survivors. For example, the insurer might require an insured to notify it when she experiences an intentional tort, and then withdraw coverage for any subsequent attack by the same perpetrator. The insurer might also require the insured to report the intentional tort to the police if it constitutes a crime. Reporting has always been difficult for survivors of gender-based violence, in part because of the failures of the criminal justice system, the real prospect of retaliation by the perpetrator, and the hope that things will get better.[818] Although the insured would still have a choice about whether to report and her refusal would only have the consequence of invalidating future coverage, that consequence might feel unfair and coercive. Moreover, insurers might impose even more problematic requirements on their insureds to minimize risks of victimization.[819] For example, might an insurer require the insured to forego certain romantic relationships, go out only at certain times, or engage in other behavior that decreases the insured's statistical risk of attack?

Yet insurers might not engage in onerous "social control" for several reasons. Often such requirements are motivated by a fear of moral hazard, but as discussed above, civil recourse insurance does not provide an incentive to the insured to relax her vigilance.[820] In addition, competition for consumers should

---

812. *See id.* at 332; Baker, *supra* note 46, at 443.

813. Baker, *supra* note 46, at 442; Gerhard Wagner, *Tort Law and Liability Insurance*, 31 GENEVA PAPERS ON RISK & INS. 277, 279 (2006).

814. Baker, *supra* note 46, at 441–42.

815. *See* Robert M. Horkovich, Adam A. Reeves & Peter J. Andrews, *Insurance Coverage for Employee Theft Losses: A Policyholder Primer on Commonly Litigated Issues*, 29 U. MEM. L. REV. 363, 389 (1999).

816. REJDA, *supra* note 441, at 327.

817. *Id.* at 194; *see also* Baker, *supra* note 46, at 442.

818. *See supra* text accompanying notes 34, 254–56.

819. Lemann, *supra* note 277, at 75 (explaining that insurance companies "frequently collect data on their policyholders" and "conduct their own research into new ways of mitigating risk").

820. *See supra* text accompanying note 683.

minimize insurers' inclination to reduce risk by controlling the insured,[821] especially if feminist groups screen the policies they offer or recommend.

A third concern is that civil recourse insurers would have a financial incentive to lobby the government for legal reform that might harm survivors. Insurers would presumably oppose any law reform that broadened survivors' intentional tort claims because such reform would make it more likely that insurers would have to provide the survivor with an attorney.[822] Similarly, insurance companies might seek to have legislatures eliminate or narrow existing tort claims. Although insurers might lobby for the adoption of laws and regulations that would reduce gender-based violence,[823] a good thing, they might be indiscriminate and support measures that would affect survivors' autonomy, a bad thing.

Anyone with a vivid imagination can envision a dystopian society prompted by insurers' desire to lower their risks related to legal expense insurance. But it is wrong to reject civil recourse insurance because of these types of "what ifs." Although there are risks of unintended consequences, there are also checks on law reform, including—not inconsequentially—the democratic process. In addition, it is just as likely that insurers would push for legislation that could reduce victimization without harming survivors' autonomy, such as prevention education targeted at potential perpetrators.

Fourth, insurers might refuse to sell the insurance to certain individuals, and thereby harm those survivors. Insurers already engage in behavior that harms survivors by insisting on exclusions to liability insurance for intentionally caused torts,[824] by engaging in discriminatory actuarial pricing,[825] and by denying loss coverage when a batterer destroys jointly owned property.[826] Predictably, insurers will not want to sell a policy to anyone who is high risk, especially if pricing is not determined by risk pools. Assessing who is a high risk is likely to be fraught with bias and error.[827] Insurers may target for exclusion those with "preexisting conditions,"[828] e.g., anyone who has ever been the victim of gender-based violence

---

821. Lemann, *supra* note 277, at 78.

822. For example, England has the common law tort of harassment. *See* Khorasandjian v. Bush [1993] 25 H.L.R. 392 (Civ. Ct. App.) 392 (appeal taken from United Kingdom) (upholding injunction and extending private nuisance law to recognize harassing phone calls).

823. Baker, *supra* note 46, at 442; *see also* Levmore & Logue, *supra* note 22, at 319 (discussing insurance companies' interest, under their proposal, to "encourag[e] lawmakers to adopt effective crime-reducing measures").

824. *See supra* text accompanying notes 48–57.

825. Emily Watson, *Stop Re-Victimizing the Victims: A Call for Stronger State Laws Prohibiting Insurance Discrimination Against Victims of Domestic Violence*, 23 AM. U. J. GENDER SOC. POL'Y & L. 413, 419–21 (2015); *see also* Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355, 355-56 (1997).

826. *See, e.g.*, Short v. Okla. Farmers Union Ins. Co., 619 P.2d 588, 589–90 (Okla. 1988); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 424 (5th ed. 2012) (explaining that after courts started allowing recovery, insurers added language denying coverage if "any insured" was found to have caused the loss).

827. Wriggins, *supra* note 12, at 156–57.

828. Avraham, *supra* note 461, at 51.

or who is currently in an abusive relationship. The screening could create a large justice gap and leave certain survivors feeling more alone than ever. In addition, if acquiring civil recourse insurance were a precondition to engage in an activity, such as attending college or renting an apartment, then its unavailability might unfairly limit participation in the activity.

To avoid some of these outcomes, governmental regulation of the insurance market would be essential. Governmental regulation has always been concerned with consumer protection.[829] Some legislatures already preclude certain insurance practices that disadvantage domestic violence survivors.[830] Regulators and legislators should be vigilant in ensuring insurers do not impose dangerous or unreasonable conditions on the insured or devise unreasonable methods to minimize claims. The government must also be prepared to fill some of the gaps itself.

CONCLUSION

This Article tackled a problem that has seemed intractable: for most survivors, the U.S. legal system offers civil recourse in theory only. If survivors had access to this victim-controlled, state-sanctioned system, they would be able to attain accountability, revenge, empowerment, and deterrence. However, most survivors are shut out because plaintiffs' lawyers need the prospect of a large collectible judgment to take a case, and survivors' cases rarely qualify.

Previous proposals to use insurance to meet survivors' needs have not proven viable, in part because the insurance industry was never on board. Liability- and loss-insurance solutions posed problems of moral hazard and adverse selection as well as political feasibility. Legal expense insurance, in contrast, lacks these problems and aligns all the key interests. Insurance companies become part of the solution; the market is harnessed to increase justice for survivors of gender-based violence.

Civil recourse insurance appears economically viable, especially if it is marketed to all potential victims of intentional person torts. Nonetheless, the government should use its resources to nurture the product's development and make sure the product is affordable for all. Civil recourse theory itself supports such governmental action.

Any market-based solution can have unintended consequences, but survivors' present inability to access civil recourse causes its own harm, including injustice and undeterred future violence. This Article has proposed ways to minimize the unintended consequences. Its proposal represents a real opportunity to make things better for survivors.

---

829. REJDA, *supra* note 441, at 625, 654–58.
830. JERRY & RICHMOND, *supra* note 826, at 425–26.