Forthcoming in 63 Washington & Lee Law Review No. 2 (2006)

THE JUDGMENT-PROOF SOCIETY

"As the system currently operates, liability is . . . voluntary."[1]

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Introduction: The Myth of Personal Tort Liability

In theory, tort law requires individual tortfeasors to compensate their victims for the wrongs they have negligently or intentionally inflicted on them. Negligent tortfeasors must pay damages from their own assets, unless they have purchased liability insurance in adequate amounts. Intentional tortfeasors do not have the option to insure, because liability insurance almost always excludes intentional torts. Hence they must compensate their victims out of their personal resources.

Supposedly, this system serves the twin objectives of deterring wrongdoing and doing justice. The threat of personal tort liability – or, at a minimum, of increased liability insurance premiums – induces potential tortfeasors to be more careful. When an accident does occur, corrective justice is accomplished by shifting the loss from the victim to the

[1] Lynn M. Lopucki, *The Death of Liability* , 106 Yale 1, 54 (1996).

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wrongdoer. And if the tortfeasor has liability insurance, the welfare loss is spread across the pool of liability insureds, rather than concentrated on the victim.

Explicitly or implicitly, this account of how the tort system regulates the behavior of individuals is standard fare in torts scholarship and torts courses.[3] The truth is dramatically different. Most people in our society face little or no threat of personal liability for any intentional or unintentional torts they might commit. Many tort claims are not large enough to be worth litigating in the first place. But even when it comes to larger, litigable claims, many Americans are "judgment-proof": they lack sufficient assets (or sufficient *collectible* assets) to pay the judgment in full (or even in substantial part).[4]

Knowing that they can collect at best a fraction of the plaintiff's claim even if they litigate and win, plaintiff's attorneys typically decline to litigate meritorious tort claims against uninsured or underinsured individuals. In the absence of liability insurance, plaintiffs are effectively barred from bringing suit unless the tortfeasor is an asset-rich corporation, or an affluent individual who neglects to take elementary precautions to protect his or her assets from tort liability.[5] And precisely because it is so easy to achieve judgment-proof status, individuals frequently fail to purchase adequate -- or any –

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[3] See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 Law & Soc'y Rev. 275, 282 (hereinafter "*Blood Money"*) ("At least as taught in law school, tort law assumes in the first instance that it is defendants themselves who pay").

[4] See Steven Shavell, *The Judgment-Proof Problem* , 6 Int'l Rev. L. & Econ. 45 (1986); Steven Shavell, Economic Analysis of Accident Law 167-170 (1987).

[5] See Tom Baker, *Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law* 11 (unpublished manuscript on file with the author) ("liability insurance has become an element of tort liability for all but the wealthiest potential defendants)".

liability insurance.[6]

Perhaps this description seems unremarkable. After all, everyone knows that plaintiff's lawyers prefer to sue "deep pockets" such as liability insurers and big companies, and, at the other extreme, that it is pointless to sue persons living at the subsistence level. True. But what is not generally understood is that most Americans would have much *deeper* pockets were it not for a multitude of legal rules that shelter the lion's share of their income and assets from collection by tort plaintiffs (and other creditors). Most Americans are judgment-proof not because we are poor, but because state and federal laws *entitle* us to be judgment-proof. The paradoxical result is that contemporary America, one of the most affluent societies in human history, is simultaneously -- and largely by operation of law -- a judgment-proof society.

This article is about how our laws have made being judgment-proof the rule rather than the exception; about what this implies for the standard deterrence, corrective justice, and loss-spreading accounts of tort law; and about whether anything should be done to lower the legal barriers to enforcing and collecting tort judgments from individual tortfeasors. The article proceeds as follows: Part I offers a preliminary overview of the judgment-proof problem, and of the principal legal barriers to collecting the personal income and wealth of American tortfeasors. The thrust of the argument is that these barriers greatly

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[6] See Alan O. Sykes, *Judicial Limitations on the Discretion of Liability Insurers to Settle or Litigate: An Economic Critique* , 72 Tex. L. Rev. 1345, 1361 (1994) ("Individuals who are entirely judgment proof . . . have no reason to purchase insurance at all--it is irrational to insure against loss if you have nothing to lose."); Shavell, Economic Analysis of Accident Law, at 240-241.

reduce the threat of personal tort liability – what tort lawyers call "blood money" liability[7] -- for individuals across the spectrum of income and wealth. Part II examines the biggest of these barriers – the exemptions for income, homesteads, trusts, and retirement funds, and the availability of discharge in bankruptcy. Part III asks why -- barriers to collection notwithstanding -- individuals with assets (particularly homeowners) ordinarily carry significant amounts of liability insurance, and considers what this tells us about the residual risk of personal tort liability. Part IV evaluates the case for lowering the barriers to enforcing tort liability in order to reduce the judgment-proof problem, and responds to a range of plausible objections to this proposal. Part V explores an alternative strategy – mandating that individuals purchase liability insurance in adequate amounts. Part VI considers the political obstacles to ameliorating the judgment-proof problem by reforms of these kinds.

I. Rethinking the Judgment-Proof Problem

A. How Big Is the Judgment-Proof Problem, and Why Should We Care?

Let's begin with a closer look at what it means to be "judgment-proof." Ex ante, a potential tortfeasor is judgment-proof to the extent that his or her assets and income are insufficient to compensate potential victims in accord with the normal rules for determining damages.[8] As this definition implies, being judgment-proof is a matter of degree, and is contingent on the magnitude of the expected harm. A person with $20,000

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[7] *Blood Money,* 35 Law & Soc. Rev. at 276.

[8] Ex post, a person is judgment-proof to the extent that his or her assets and income are insufficient to compensate the actual victim.

in assets is not judgment-proof if he or she tortiously causes $10,000 in damages. Let the compensable damages be $100,000, however, and this same tortfeasor is mostly (80%) judgment-proof. Let them be $1 million, and the tortfeasor is 98% judgment-proof.

As Steven Shavell has explained, the practical importance of the judgment-proof issue "depends on the size of losses that injurers may cause in relation to their assets."[9] Obviously, most Americans cannot pay a $1 million tort judgment in full. (The post-judgment interest alone would exceed the after-tax income of most individuals).[10] But because seven-figure tort claims are rare, the gap this creates in the tort system is relatively small – and in any event unavoidable.

Equally obviously, almost everyone could pay a $1,000 claim in full – if not in a lump sum, then in periodic installments. Claims of that magnitude, however, are normally too small to be worth litigating under the standard contingent-fee arrangement, which typically gives the plaintiff's attorney one-third of the judgment or settlement.[11] The rule of thumb here can be expressed as a formula: unless the amount in controversy is at least three times the plaintiff's attorney's expected costs of litigation and collection, a tort

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[9] Economic Analysis of Accident Law 167.

[10] Most states have enacted statutes authorizing post-judgment interest on money judgments. See Brian P. Miller, Comment, *Statutory Post-Judgment Interest: The Effect of Legislative Change after Judgment and Suggestions for Construction,* 1994 B.Y.U. L. Rev. 601.

[11] See 1 Robert L. Rossi, Attorney's Fees § 2:9, at 112-13 (2d ed. 1995).

claim is not litigable.[12] As a rough estimate, claims below a threshold of $5,000 are likely to fall into this "unlitigable" category.[13]

This point is an important one: millions of low-level torts are committed each year, and those who commit them, regardless of their assets and income, are *litigation-proof* with regard to these wrongs. Given the large numbers of torts that involve significant harm, and yet fall below the litigation-proof threshold, efforts to lower that threshold certainly deserve further study.[14]

This article, however, focuses on *litigable* claims – i.e., claims that would be worth litigating if the alleged tortfeasor had collectible assets sufficient to pay the expected judgment in full.[15] As already suggested, ordinarily these are claims that exceed $5,000. My descriptive submission as to these claims is twofold: (1) in the absence of liability insurance, most Americans are highly judgment-proof with regard to most tort claims that

[12] Many states do offer "small claims" courts in which individuals can represent themselves in cases involving no more than a few thousand dollars. Little is known about how well these courts work, but it seems clear that most victims of "small" torts do not seek redress in these fora.

[13] See Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States 86 (2004) (in survey of attorneys, median answer to minimum damages attorney would require before taking an automobile accident case was $5000). The threshold will vary with the complexity and closeness of the case. See Kritzer at 87 (noting that many plaintiff's firms refrain from litigating malpractice claims under $100,000).

[14] For example, it would seem in the best interest of a tort victim, rather than simply forgoing suit, to pay a contingent fee of sixty percent or more to induce an attorney to litigate a small case. Yet fees of this magnitude appear to be unheard-of and would be unlawful in some jurisdictions. Alternatively, proposals to make tort claims more freely alienable might facilitate the enforcement of small claims. See, e.g., Marc J. Shukaitis, *A Market in Personal Injury Tort Claims,* 16 J. Legal Stud. 329 (1987) (arguing that plaintiffs should be allowed to sell personal injury claims).

[15] On occasion, tort victims are willing to finance litigation for vindication, revenge, or some other non-pecuniary purpose. In the context of bodily-injury torts, these cases seem very infrequent. In other contexts, such as defamation, they may be relatively common.

exceed this threshold of litigability;[16] and (2) this result is primarily attributable to legal rules that shelter assets and income from collection, rather than to simple inability to pay.

Assume for the moment that these assertions are correct. What follows? First, the judgment-proof problem is far bigger and more serious than prior torts scholarship has recognized. Second, the deterrence, corrective-justice, and loss-spreading functions of tort law are badly compromised by the omnipresence of judgment-proof tortfeasors. If deterrence, corrective justice, and loss-spreading are taken seriously, a strong case can be made that the legal barriers to enforcing tort claims should be far lower than they are now.

The proposition that judgment-proof tortfeasors pose a problem for each of the three leading "principled" accounts of tort law is easily demonstrated. From an efficiency/deterrence standpoint, judgment-proof persons are problematic because the tort system cannot effectively deter them from engaging in tortious conduct.[17] Because their maximum exposure to tort liability is less than the expected damages should they tortiously cause harm, judgment-proof persons have diminished incentives to take

[16] Small and medium tort claims are more frequent than large ones: there are far more fender-benders than fatal automobile accidents. But small claims fall below the threshold of litigability, and judgment-proofing rules frequently insulate individuals from liability for medium-sized claims as well as larger ones. An individual with $15,000 in collectible assets faces, at most, liability proportional to harm done only for tort claims within the narrow range of $5,000 to $15,000.

[17] Steven Shavell, Economic Analysis of Accident Law 167-68 (1987).

efficient precautions.[18] In the extreme case, potential injurers who are completely judgment-proof (or litigation-proof) simply face no threat of tort liability at all.[19]

Judgment-proof tortfeasors are no less problematic from the standpoint of corrective justice. Although the tort system can in theory declare that a judgment-proof injurer has done wrong and should rectify that wrong by compensating his or her victim, it cannot *enforce* "the duty of wrongdoers in corrective justice . . . to repair the wrongful losses for which they are responsible."[20] Even when a tortfeasor has enough collectible assets to make litigation worthwhile, insofar as those assets are smaller than the expected judgment, corrective justice cannot be fully done.[21] If indeed corrective justice obliges tortfeasors to compensate their victims, legal rules that shelter tortfeasors' assets and income from collection seem anomalous.

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[18] See Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 Tex. L. Rev. 1375, 1375 (1994). For example, imagine a homeowner who could avoid a 1% chance of a $20,000 slip-and-fall injury to visitors to the premises by spending $90 on snow and ice removal. Because these precautions reduce accident costs by $200 at a cost of only $90, it is negligent to omit them. But if the homeowner's collectible assets are less than $9000, the homeowner's expected liability will be less than $90 (1% x $9000), and the homeowner may not take the precautions.

[19] For deterrence purposes, the interplay between judgment-proof and litigation-proof status can be thought of in terms of the range of claims over which a person faces a threat of tort liability, and the magnitude of that threat over this range. For example, a person with only $20,000 in collectible assets will normally face no threat of liability on claims below $5,000; may face a roughly proportional threat of liability on claims between $5,000 and $20,000; and will face an increasingly smaller-than-proportional threat of liability on claims over $20,000.

[20] Jules Coleman, Risks and Wrongs 324 (1992).

[21] See, e.g., Gary Schwartz, *Auto No-Fault and First Party Insurance: Advantages and Problems,* 73 S Cal R 611 669-70 (2000) (suggesting that "tort law fundamentally fails in its goal of providing corrective justice" when a negligent actor "neither provides compensation to the victim directly, nor arranges for any insurance policy that can afford this compensation"); Ellen Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 Tex 1721, 1748 (1997) (describing the ability of judgment-proof wrongdoers to escape "the burden of recompensing the full harm caused by intentional conduct" as "inconsistent with most versions of corrective justice.")

From the standpoint of accident compensation through loss-spreading, judgment-proof persons might not appear to pose a problem. When a victim's loss is compensated out of an injurer's personal assets, that loss has been *shifted*, rather than spread. Indirectly, however, judgment-proof persons pose a problem for loss-spreading. The principal mechanism for spreading tortiously-caused losses is liability insurance. To the extent they are judgment-proof, individuals have no incentive to purchase liability insurance.

Given the judgment-proof problem's tendency to subvert accident-cost minimization, the rectification of wrongs, and loss-spreading, torts scholars have paid surprisingly little attention to its causes and extent.[22] Ironically, the best existing treatment of the actual extent and causes of the judgment-proof problem was written not by a torts scholar but by a corporate bankruptcy scholar, Professor Lynn LoPucki. Although Lopucki's principal focus in his 1996 article *The Death of Liability* was on strategies by which large corporations can make themselves judgment-proof, he also described numerous judgment-proofing devices available to individuals and small businesses. He argued that the liability "system employs a complex web of social, economic, and legal constructs to

[22] The canonical law and economics analysis of the judgment-proof problem is Steven Shavell, *The Judgment-Proof Problem* , 6 Int'l Rev. L. & Econ. 45 (1986). See also Comment, *The Case of the Disappearing Defendant: An Economic Analysis* , 132 U Pa L Rev 145 (1983); Matias K. Polborn, *Mandatory Insurance and the Judgment-Proof Problem,* 18 Int'l Rev L. & Econ. 141 (1998). None of these articles attempts to determine the prevalence of the judgment-proof problem, and all of them treat being judgment-proof as simply a matter of having insufficient assets (rather than insufficient *collectible* assets). In more recent work on the judgment-proof problem, Professor Shavell notes that individuals and firms "sometimes are able to shield assets from liability," but does not investigate how widespread the shielding of assets is, or the degree to which legal rules facilitate it. Steven Shavell, *Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment Proof Problem,* John M Olin Center for Law, Economics, and Business Discussion Paper No. 456 (Feb. 2004), at 24, available online at http://www.law.harvard.edu/programs/olin_center/. See also Shavell, Economic Analysis of Accident Law 168 (noting that the judgment-proof problem is "exacerbated if parties have the opportunity to shield assets").

determine who can or cannot pay,"[23] and asserted that "[p]robably most individuals and businesses are either judgment proof, or capable of rendering themselves so between commencement of a civil action against them and the entry of judgment."[24] On this foundation, LoPucki developed his principal thesis – that large corporations will increasingly be able to avoid exposure to tort liability through judgment-proofing strategies such as asset securitization, manipulation of subsidiaries, and Chapter 11 bankruptcy.[25] When even large corporations exit the tort system (and cease buying liability insurance), he warned, we will witness "the death of liability."

LoPucki's apocalyptic predictions spawned a vigorous debate among corporation-law scholars.[26] The controversy, however, concerned whether large corporations will adopt judgment-proofing strategies along the lines predicted by LoPucki (an issue outside the purview of this Article, which deals exclusively with judgment-proof *individuals*). Absent from that debate was any further exploration of LoPucki's arresting observations about how individuals and small businesses could (and routinely did) engage in judgment-proofing.

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[23] 106 Yale LJ at 4.

[24] 106 Yale LJ at 4-5. See also Kent D. Syverud, *On the Demand for Liability Insurance*, 72 Tex L Rev 1629, 1640 n.37 (1994) ("Most individual defendants in common types of tort litigation--including automobile accident litigation--lack significant collectible assets other than their insurance policies.")

[25] See 106 Yale LJ at 14-37.

[26] See James J. White, *Corporate Judgment Proofing: A Response to Lynn Lopucki's The Death of Liability*, 107 Yale LJ 1363, 1364 (1998). Stephen Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 Stan L Rev 1 (1999). For LoPucki's responses, see Lynn LoPucki, *The Essential Structure of Judgment Proofing*, 51 Stan. L. Rev. 147 (1999) (responding to White); Lynn LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 Stan. L. Rev. 55 (1999).

One might have expected torts scholars to pick up on these aspects of LoPucki's seminal work. Instead, they have mostly ignored it. By and large, the torts literature treats the judgment-proof problem both as a matter of distinctly secondary importance, and as a fact of life – that is, simply a function of how much wealth actors possess – rather than a variable that is profoundly influenced by legal rules and strategic behavior in response to those rules.[27] Unsurprisingly, torts scholars tend to focus on those contexts – from products liability to medical malpractice to automobile accidents – that generate large numbers of claims against defendants who have liability insurance, substantial collectible assets, or both. The fact that large numbers of other claims are kept out of the tort system by the judgment-proof problem goes unremarked, or is attributed to poverty, rather than to legal barriers to collecting tort judgments.[28]

The result is that torts scholars frequently proceed on false descriptive assumptions about the actual operation of our tort system. We write and teach as if, when a tort is committed, the ordinary result is that the victim has the option to sue the injurer for money damages. But many tort victims simply do not have that option, because the tortfeasors who injured them are judgment-proof and uninsured; and many others can

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[27] A Westlaw search for judgment /2 proof /50 corrective /2 justice yielded only nine law review articles, none of which makes more than passing reference to the judgment-proof problem. (May 15, 2005, in lrev database). By contrast, a Westlaw search for judgment /2 proof /50 deter! yielded 392 law review articles. As this much larger number of references suggests, scholars make frequent reference to Shavell's insight that judgment-proof problems tend to impair deterrence. See, e.g., Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children ?*, 40 Santa Clara L Rev 991, 1005 (2000) ("for judgment-proof defendants . . . tort law is essentially irrelevant"). At least in the context of tort law, however, very few scholars have focused on the prevalence of judgment-proof individuals in our society, and the legal causes of that phenomenon.

[28] See, e.g., Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 Fordham L Rev 1811, 1844 (2004) (acknowledging that the judgment-proof problem calls into question the realism of corrective justice accounts of tort law, but implying that the judgment-proof problem is attributable to "[m]assive inequalities of wealth and power.")

expect to recover only a small fraction of their losses, because their tortfeasors are mostly judgment-proof and underinsured. As LoPucki intimated – and as this Article will explore in depth -- this situation is emphatically not a "given": it is the result of a series of *legal* choices made by our society about the enforceability of torts judgments against individuals. Those choices – including, for example, rules exempting various types of assets and income from collection, rules allowing tort claims to be discharged in bankruptcy, and rules giving secured creditors priority over tort claimants – make the judgment-proof problem enormously larger. While some Americans are judgment-proof *in fact,* far more Americans are judgment-proof *in law* – i.e., they have sufficient assets, but those assets are not *collectible* under existing law.

To some readers, this characterization of tort law in operation may seem incredible on its face. After all, the American tort system is by far the largest in the world; its direct costs alone are estimated to have been $246 billion in 2003 ($846 per capita).[29] Moreover, Americans are the largest consumers of liability insurance as well (spending roughly 2% of GNP on it).[30] But there is no inconsistency. The point is not that our tort system is small – but rather that our tort system would be far bigger absent the legal barriers to the collection of tort judgments.[31] A vast array of torts go unredressed, because most of the

[29] Insurance Information Institute (based on a Tillinghast study), available online at http://www.iii.org/media/hottopics/insurance/liability/.

[30] See Syverud, supra, 72 Tex L Rev at 1629-30. The 2% number seems to have remained fairly stable for some time. For 2003, the Insurance Information Institute reports that U.S. tort costs were 2.23% of GDP. http://www.iii.org/media/facts/statsbyissue/litigiousness/.

[31] The most recent cost estimates for the U.S. tort system by the Towers-Perrin-Tillinghast actuarial firm support this picture. See U.S. Torts Costs: 2004 Update, Trends and Findings on the Costs of the U.S. Tort System, at 18 App. 4, available online at www.towersperrin.com/tillinghast/publications/reports/Tort_2004/Tort.pdf . As of 2003, commercial

wealth and income in our affluent society is (or can readily be moved) outside tort law's reach. As we will see, the judgment-proofing strategies available to individuals have been enormously popular and successful. In large part, that is because many of these strategies are, as it were, automatic. Individuals who accumulate wealth in customary forms such as homes and retirement plans do not need to resort to more complex strategies such as asset-protection trusts. Their assets are sheltered by operation of law.

In asserting that the individual judgment-proof problem is largely due to legal rules that shelter collectible assets, I don't mean to deny that there are other important barriers (legal and non-legal) to the collection of tort claims. In addition to the obstacle posed by litigation costs, which we have already encountered, many victims simply cannot identify the person who wronged them, face serious problems of proof, or fail to realize they have suffered legally cognizable harm.[32] There is also good evidence that, for various reasons, many tort victims are reluctant to contact a lawyer, and hence their claims never enter the tort system.[33]

(corporate) tort liability constituted $135 billion, or roughly 55% of the $246 billion U.S. tort system. Personal liability costs, at $ 84.2 billion, were 34%, and medical malpractice costs, at $27 billion, 11%. *Of the $84 billion in personal liability costs, the study estimates that a mere 2% ($1.68 billion) represents payments from the personal assets of uninsured and underinsured defendants*. Id. at 18 App. 4. By contrast, over 32% of corporate tort liability – more than $45 billion -- was recovered from the assets (including self-insurance reserves) of corporate defendants. Id. at 18 App. 4.

[32] See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev 869, 874 n.7 (1998); Shavell, Economic Analysis of Accident Law 168.

[33] See William Felstiner, Richard Abel, and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Claiming, and Blaming*, 15 Law & Soc'y Rev. 629 (1981); Richard Abel, *The Real Tort Crisis – Too Few Claims* , 48 Ohio St LJ 447 (1987); Deborah R. Hensler, *The Real World of Tort Litigation*, in Everyday Practices and Trouble Cases 157-58 (1998).

Moreover, a disproportionately high percentage of violent and property crimes in our society – acts that also constitute intentional torts[34] -- are committed by offenders who are judgment-proof in fact. According to the Justice Department's 2003 National Crime Victimization Survey, there were an estimated 18.6 million property crimes (burglary, motor vehicle theft, and theft), 5.4 million violent crimes (rape, sexual assault, robbery, aggravated assault, and simple assault), and 185,000 personal thefts (pocket picking and purse snatching).[35] The costs of these crime-torts may well exceed the costs of all unintentional torts. According to a new study by DOJ's Office for Victims of Crime, personal crime is estimated to cost $105 billion annually in medical costs, lost earnings, and other direct pecuniary costs; when pain and suffering and lost quality of life are included (as they would be in the torts system), the costs rise to an estimated $450 billion annually.[36] By comparison, the National Safety Council's estimate for the costs of *all* fatal and nonfatal accidental injuries in the United States in 2003 was $608 billion.[37]

The persons who commit these "crime-torts" are, statistically speaking, overwhelmingly indigent. Indeed, criminal defendants nowadays are represented by court-appointed

[34] The property crimes constitute the torts of conversion or trespass to chattels; the violent crimes, assault and battery, intentional infliction of emotional distress, and so on.

[35] Available online at www.ojp.usdoj.gov/bjs/abstract/cvusst.htm.

[36] *Victim Costs and Consequences: A New Look* (summary and full text available online at http://www.aardvarc.org/victim/crimecosts.shtml.) Violent crimes account for $426 billion of the total, property crime only $24 billion (that is, little more than 5%). However, because these figures include deaths and injuries from drunk driving, they include some unintentionally-caused losses.

[37] National Safety Council, Injury Facts 2 (2004 ed.). The data cited in text are also available online at http://www.nsc.org/product/samplechapters/if/injuryfactspreview.pdf.

counsel in approximately 80% of cases.[38] There is also reason to think that the poor commit unintentional torts at a higher rate than the non-poor. For example, auto accident rates are generally higher in low-income urban areas than higher-income suburban ones.[39] The high incidence of intentional and unintentional torts by indigent persons creates a large judgment-proof problem for the tort system, quite apart from legal rules.

Yet the law makes a difference even here. Persons living below or near the poverty line undoubtedly have low incomes by American standards, but it is legal rules that almost completely insulate those incomes from tort claimants. In 2003, the Census Bureau reported that almost 36 million Americans (12.5% of the population) were below the poverty line.[40] Virtually all of the income received by persons below the poverty line is sheltered from tort claimants by legal rules. Entitlements such as Social Security and welfare are exempt from collection; exemptions for personal property, automobiles, and other possessions shelter a significant fraction of the very modest assets low-income persons tend to possess; and federal law shields at least seventy-five percent of workers' wages from garnishment.[41] While there is obviously an upper bound on what percentage of a low-income person's income can feasibly be diverted to make payments to a tort victim, in many instances the line drawn by existing law falls well short of that limit.

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[38] See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 8 (1997).

[39] Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 Va. L. Rev. 403, 420 (1985).

[40] http://money.cnn.com/2004/08/26/news/economy/poverty_survey/. The Census Bureau defined the poverty threshold in 2003 as $18,810 for a family of four; $14,680 for a family of three; $12,015 for a family of two; and $9,393 for an individual.

[41] See infra at --.

If you doubt that, consider a type of debt that *is* vigorously enforced even against low-income debtors: student loans. Since 1998, federal law has made it extremely difficult for individuals to default on student loans. The Education Department is authorized to "seize parts of debtors' pay checks, tax refunds and Social Security payments without a court order, a power that only the Internal Revenue Service, among federal agencies, regularly wields."[42] Beyond that, student loans are non-dischargeable in bankruptcy (except in cases of "undue hardship").[43] The results of these policies have been dramatic: the annual rate of collections more than doubled between 1998 and 2004, when it exceeded $5.7 billion in defaulted student loans. A recent Wall Street Journal feature showed the lengths to which current law goes: it concerned the Department's ongoing collection (through a private collection agency) of $69 a month from the Social Security disability payments of an Oklahoma AIDS patient.[44]

Imagine how the landscape of intentional torts would look if federal and state law treated tortfeasors, regardless of income, the way it currently treats persons who default on their student loans. Hardship provisions might ensure that low-income tortfeasors would not starve or be thrown into the streets.[45] But a substantial percentage of their assets and

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[42] John Hechinger, *U.S. Gets Tough on Failure to Repay Student Loans*, WSJ A1, 1/06/05.

[43] 11 U.S.C.A. § 523(a)(8).

[44] Id.

[45] The most widely adopted test for determining "undue hardship" in student loan cases requires "(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student

income, even if it took the form of welfare benefits or minimum-wage earnings, would be subject to collection by a tort judgment creditor. Whether you find that scenario appealing or disturbing, the point is that *law*, not poverty alone, is responsible for the fact that low-income tortfeasors are virtually never sued in tort.

My main concern in this article, of course, is not to subject low-income Americans to a realistic threat of tort liability – although that might well be good policy, on both deterrence and corrective justice grounds. As things stand, the poor have nothing to fear from tort law. Hence their victims – who are typically poor as well -- are largely deprived of the protection tort law supposedly provides, and left to rely on the criminal justice system (or self-help).[46] But whether or not the poor should be included in the tort system, to a remarkable degree our legal practices expand the judgment-proof category to sweep in the middle-class and even the affluent. Countless tort claims arise each year in which the tortfeasor's identity is known, 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) – and yet the legal barriers to tort judgment collection result in no (or a greatly diminished) recovery.[47] We are now

loans; and (3) that the debtor has made good faith efforts to repay the loans." *In re Gerhardt*, 348 F3d 89, 91 (5th Cir. 2003).

[46] Indeed, the victim's rights movement in criminal law is in part motivated by the perception that tort law is of little help to most crime victims. See, e.g., Lynne Henderson, *Revisiting Victim's Rights*, 1999 Utah L Rev 383, 411 ("Perhaps because civil litigation is expensive and time consuming, and few have the resources to sue their assailants, together with the fact that many--but hardly all--who are guilty of criminal offenses are essentially judgment-proof, the focus of corrective justice has shifted to the criminal process.")
~~.~~ In recent years, Congress and state legislatures have greatly increased the availability of restitution to victims of crime – a development that has ameliorated the judgment-proof problem in tort law to some extent. This trend is discussed infra at --.

[47] In many cases, the blow is cushioned to some extent by liability insurance purchased by the tortfeasor either voluntarily or pursuant to a legal mandate. Nevertheless, although hard data are lacking, the sum of

in a position to get an introductory overview of the legal rules that create these startling results.

B. The Legal Barriers To Collecting Tort Claims: An Overview

Civil money judgments are not self-executing. When a plaintiff obtains a judgment, the court does not order the defendant to pay; it merely issues an authoritative declaration that the defendant owes the plaintiff a debt in the amount of the judgment.[48] As a result, unless the defendant has adequate liability insurance, tort claimants must be prepared to undertake post-judgment litigation to collect their judgments. The key issue in that litigation will not be whether the defendant has assets but whether the defendant has *collectible* assets – that is, assets subject to collection under state and federal law.[49]

The gulf between assets and collectible assets stems from several causes – all of them legal in nature.[50] To begin with, a series of legal exemptions, state and federal, insulate many assets from debt collection.[51] The most important exemptions are the garnishment

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cases involving uninsured tortfeasors and cases involving underinsured tortfeasors is unquestionably very large.

[48] Michael J. Herbert, Understanding Bankruptcy 30 (2000) (hereinafter "Understanding Bankruptcy"). [cite Laycock Remedies Casebook instead]

[49] In practice, this point is of fundamental importance. As one tort lawyer put it, "I was taught on my first day of practice there are three things: liability, damages, collectibility. I need collectibility first. I need damages second. I'm a good lawyer, I'll prove liability." Baker, *Insurance as Tort Regulation*, supra note 5, at 3.

[50] I will sometimes use the term "assets" to include income as well as wealth.

[51] I will use the term "exemption" broadly, to include any legal rule that insulates a particular type of asset from a tort judgment creditor.

exemption, which protects 75% or more of wages; the homestead exemption, which protects home equity up to the amount specified in each state statute; the retirement plan exemption, which in most states protects all retirement savings held in a tax-qualified retirement account; and the trust exemption, which (under some circumstances) protects wealth held in trust for the benefit of the tortfeasor. [52] These exemptions – each of which we will take an in-depth look at in Part II -- greatly reduce the collectible assets and income of most individual tortfeasors.[53]

Exemptions from debt collection almost always apply whether the "debt" originated in a tort claim or stems from a contractual relationship. In an important sense, therefore, the judgment-proof problem is not peculiar to tort law. Many a contract creditor has lamented the existence of exemptions from collection, and the judgment-proof problem undoubtedly undermines the efficacy of breach-of-contract remedies in some contexts. [54]

Yet this first-cut parity between tort and contract claims is itself a legal rule that aggravates the judgment-proof problem faced by tort victims. To be a tort claimant is to be a putative *creditor* of the alleged tortfeasor. Like other creditors, a tort claimant's goals are to obtain a lien on the debtor's assets in order to liquidate them in satisfaction of

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[52] See infra at --.

[53] In addition to these substantive rules, debtors – including tort judgment debtors -- enjoy considerably more procedural protection as a result of a line of Supreme Court cases placing procedural due process restrictions on pre-judgment remedies such as garnishment and replevin. See *Sniadach v. Family Finance Corp.*, 395 US 337 (1969); *Lynch v Household Finance Corp*, 405 US 538 (1972); *Fuentes v Shevin*, 407 US 67 (1972); *North Georgia Finishing Inc v Di-Chem Inc*, 419 US 601 (1975).

[54] See Oren Bar-Gill and Omri Ben-Sharar, *Credible Coercion*, 83 Tex L Rev 717, 724 (2005) ("th[e] judgment-proof problem is a key factor affecting the credibility of a threat to breach a contract as well as the credibility of any other threat to inflict an illegal outcome").

the claim, and to obtain priority over the claims of other creditors to these assets.[55] But it is much harder for tort claimants to succeed as creditors. Whereas tort victims are normally in no position to investigate the financial status of potential tortfeasors prior to being harmed by them, contract creditors can assess the creditworthiness of those with whom they deal. Moreover, many contract creditors are able to protect themselves by obtaining a security interest in property belonging to the debtor.

These differences suggest that exemptions from collectibility should be narrower in tort than in contract, and that tort victims should have priority over contract creditors with regard to non-exempt assets. Generally speaking, however, American law refuses to draw such distinctions. With rare exceptions, exemption laws apply with full force to torts – even intentional ones. Beyond that, as we are about to see, tort claimants actually fare *worse* than contract claimants both before and after judgment.

Prior to winning a favorable judgment, tort claims are deemed unliquidated – that is, of uncertain amount – as well as unsecured. As a result, the powerful pre-judgment remedies of attachment and garnishment,[56] which are often available for contract claims, are almost always unavailable for tort claims.[57] Tort claimants would gain considerable

[55] See Thomas D. Crandall, Richard B. Hagedorn, and Frank W. Smith, Jr., The Law of Debtors and Creditors 6-79 (1991) (hereinafter “Crandall et al.”).

[56] Pre-judgment attachment enables the creditor to freeze the debtor’s assets, by means of a court order directing the sheriff to seize the specified property pending resolution of the litigation. Crandall et al. at 6-31. Pre-judgment garnishment enables the creditor to freeze assets of the debtor that are held by third parties (e.g., the debtor’s bank), or monies owed the debtor by third parties (e.g., the debtor’s employer). Id. at 6-47.

[57] *See* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 Wash L. Rev. 257, 276 n.79 (1996) (listing illustrative state statutes limiting pre-judgment

leverage if they could attach or garnish even a portion of a tortfeasor's personal assets prior to judgment.[58] Conversely, in the absence of pre-judgment remedies, tortfeasors typically have several years after being sued during which to rearrange their assets to minimize their exposure to tort liability.[59]

Even after obtaining a judgment, tort victims usually do not become secured creditors until their attorneys take affirmative post-judgment action to place liens on tortfeasors' assets.[60] By contrast, other secured creditors (e.g. mortgage lenders) ordinarily have prior claims against a tortfeasor's assets that they perfected shortly after their "deals" were made. Consequently, under the first-in-time, first-in-right rule, the tort victim's lien will generally be subordinated to the claims of other secured creditors.[61] In effect, then, these prior security interests operate as further exemptions from collectibility in tort: only property that is neither exempt by law, nor subject to a prior security interest recognized by law, is available to satisfy the tort judgment creditor's claim.

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remedies to contract claims); Crandall et al. at 6-36 (pre-judgment attachment); *id*. at 6-53 (pre-judgment garnishment) (hereinafter "Crandall et al."). Some states allow tort claimants to seek prejudgment attachment, but typically only upon a showing that the defendant is hiding assets, about to engage in a fraudulent conveyance, or the like. See, e.g., Colo. R. Civ. P. 102. A few states allow pre-judgment attachment in tort cases. See, e.g., Ill. Comp. Stat. Ann. 5/4-101 (West 1992).

[58] In addition, prejudgment attachment gives the plaintiff an attachment lien in the attached property, thereby conferring secured creditor status on the plaintiff. 67 Wash L Rev at 283.

[59] Even if pre-judgment attachment is available, many statutes include exceptions for wages and property exempt from execution. Wasserman, 67 Wash L Rev, at 270-71.

[60] See Understanding Bankruptcy at 30.

[61] See Understanding Bankruptcy at 27.

Although these hurdles for tort claimants are daunting, they are only half the story. Individual debtors also have the option of filing for bankruptcy if that would be more advantageous to them than simply relying on exemptions outside bankruptcy. From a tortfeasor's perspective, bankruptcy offers two major advantages. The first is the "automatic stay": merely by filing a bankruptcy petition in bankruptcy court, the debtor automatically obtains a restraining order forbidding the commencement or continuation of virtually all non-criminal legal proceedings against the debtor or the debtor's property – including any action to enforce a tort judgment.[62] The second is "discharge": at the conclusion of the bankruptcy proceeding, the bankruptcy court normally awards the debtor a "discharge" ~~of whatever debts remain unpaid at that point~~ that extinguishes unpaid pre-petition debts and bars creditors from seeking to collect pre-petition obligations.[63] Discharge allows bankruptcy to operate as a fresh start that shields the debtor's ~~entire~~ future income stream from pre-bankruptcy creditors.[64] The threat of discharge gives unintentional tortfeasors a powerful advantage in settlement negotiations with a tort plaintiff.[65]

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[62] Understanding Bankruptcy 106.

[63] See Understanding Bankruptcy 207.

[64] Chapter 7 discharge shields all of the debtor's post-petition earnings; Chapter 13 discharge shields the debtor's post-discharge earnings, but not the debtor's earnings during the several years when the debtor's Chapter 13 repayment plan is in effect. [cite]

[65] ~~Most intentional tort claims are non-dischargeable. See infra at --. Even intentional tortfeasors, however, may gain leverage from the delaying effects of the automatic stay.~~ When a settlement cannot be reached, the tortfeasor simply files for bankruptcy. Tort liability constitutes a significant fraction of involuntary debt in individual bankruptcies. See Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 295-96 (1989) (stating that "[t]he number of tort creditors is small -- only 33 creditors in the whole sample -- but together they are owed more than 18% of all the reluctant debt listed in bankruptcy").

Of course, there are costs associated with bankruptcy as well. The legal costs of filing for bankruptcy under Chapter 7 – the most widely used method -- are modest, though they are likely to increase under the 2005 bankruptcy legislation.[66] Far more important is the *quid pro quo* Chapter 7 demands for the benefits it gives the debtor: the debtor must give up all non-exempt property to be liquidated for the benefit of creditors.[67] For the many tortfeasors who have little non-exempt property, however, this burden is a light one.[68]

The Bankruptcy Code also offers most debtors another choice: Chapter 13, under which the debtor also obtains an automatic stay, and, eventually, a~~n even broader~~ discharge that is potentially even broader than under Chapter 7.[69] Moreover, under Chapter 13 the debtor is not required to give up non-exempt property – for example, a home in which the debtor's equity exceeds the applicable homestead exemption. In exchange for these benefits, the debtor must make payments to creditors from the debtor's "disposable income" for three to five years, pursuant to a payment plan approved by the bankruptcy

[66] See Jeanne Sahadi, *Bankruptcy Fees Could Skyrocket*, April 14, 2005, available online at http://money.cnn.com/2005/04/12/pf/bankruptcy_fees/ (fees of $1000-$1500 have been typical in Chapter 7 cases, but are expected to increase substantially as a result of BAPCPA).

[67] Douglas G. Baird, Elements of Bankruptcy 37-38 (3d ed. 2001) (hereinafter "Elements of Bankruptcy").

[68] Plaintiff's attorneys may sometimes gain settlement leverage from bankruptcy's intangible costs, which include impairment of the debtor's ability to obtain unsecured credit and reputational harm in the community.

[69] Elements of Bankruptcy 54. Debtors may not file for Chapter 13 if their debts exceed the amounts specified in Code Section 109.

court, prior to obtaining discharge.[70] Thus, Chapter 13 tends to be more attractive to debtors who have substantial non-exempt property they want to keep.

From 1978 until the 2005 bankruptcy reform legislation (the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")),[71] the Bankruptcy Code allowed debtors to choose Chapter 7 regardless of their income, subject to a narrow "abuse" of bankruptcy exception applicable only to petitions involving "primarily consumer debts."[72] BAPCPA greatly expands the abuse of bankruptcy exception: It will steer many debtors with above-median incomes into Chapter 13, even if they would prefer Chapter 7, and tighten the standards to which debtors will be held in fashioning payment plans under Chapter 13.[73] These changes will improve the bargaining position of tort victims facing tortfeasors who threaten to file for bankruptcy – *but only if those tortfeasors have consumer debts that exceed their tort liability*. Under BAPCPA, as under prior law, dismissal for abuse of bankruptcy is available only in cases involving primarily consumer debts – and tort judgments have been held not to constitute consumer debts.[74]

Even after BAPCPA, then, the bankruptcy deck remains stacked against tort claimants. Most unintentional tortfeasors will still be eligible for a Chapter 7 discharge, and will

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[70] Id.

[71] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[72] See infra notes -- and accompanying text (discussing section 707(b) abuse of bankruptcy test).

[73] See infra notes --- and accompanying text (explaining the BAPCPA means test).

[74] See cases cited infra note ---.

have few non-exempt assets. These tortfeasors can credibly threaten to file Chapter 7 bankruptcy, in which event the plaintiff's attorney's expected recovery is likely to be less than the costs of litigating and collecting in bankruptcy. Faced with that threat, and in the absence of liability insurance, plaintiff's attorneys will decline to take the case in the first place.

If the tortfeasor is likely to be ineligible for Chapter 7 under BAPCPA, the situation becomes more complicated. The tort victim may be able to extract some settlement money because the tortfeasor would have to pay something to the tort victim pursuant to the Chapter 13 payment plan. But even in Chapter 13 cases (as in Chapter 7 ones), tortfeasors can almost always time their filings so as to ensure that tort claimants are merely unsecured creditors in bankruptcy.[75] And if the tortfeasor must file under Chapter 13, then the tortfeasor will ordinarily have other unsecured creditors as well -- in which event each creditor's expected payout in bankruptcy is likely to be a small fraction of the amount owed. The result is that the tortfeasor will frequently be able to use the threat of Chapter 13 to deter the tort victim from bringing suit (or force a lowball settlement).

Above and beyond the obstacles created by exemptions and bankruptcy, tort claimants are at a disadvantage for a reason rooted in the nature of their claims. To some extent,

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[75] If the tortfeasor files for bankruptcy before the tort plaintiff gets a judgment, the plaintiff is an unsecured creditor whose wrong is considered a "claim" for bankruptcy purposes, and is therefore dischargeable. See Understanding Bankruptcy 162 (2000). If the tortfeasor files for bankruptcy after the tort plaintiff gets a judgment, but before the plaintiff obtains a judicial lien against the tortfeasor's assets, the plaintiff is still considered an unsecured creditor. If the tortfeasor files for bankruptcy within 90 days after the plaintiff obtains a judicial lien, the lien will be treated as an avoidable preference in bankruptcy. Id. at 31. Avoidance will once again relegate the tort judgment creditor to unsecured creditor status. Only in the unlikely event that the tortfeasor files for bankruptcy more than 90 days after the plaintiff obtains a judicial lien will the plaintiff become a secured creditor with an unavoidable lien. Id. at 198.

potential tort victims can protect themselves from losses by purchasing first-party insurance. But they cannot *strategize* in advance about how to maximize their recoveries in tort. Potential tortfeasors, by contrast, can engage in judgment-proofing – advance planning to shelter their assets and income from the potential threat of tort liability.[76] These strategies can take many forms, from converting wealth to exempt assets, to transferring non-exempt assets to family members, trusts, or family limited partnerships, to using business organizations to reduce the individual's exposure to liability.[77]

Understandably, most tortfeasors do not fully exploit these opportunities: for poor and working-class individuals, who are already fully protected by exemptions and bankruptcy, nothing would be gained; and for the middle class, it is typically cheaper to protect non-exempt assets by buying liability insurance than by hiring an asset protection lawyer. But for the affluent, and particularly for persons in high-risk occupations, asset protection planning is increasingly important as a substitute for (or in addition to) the purchase of liability insurance.

Still, in the grand scheme of things, the biggest inflator of the judgment-proof problem is not tailor-made asset protection, but the off-the-rack variety created by state and federal legislatures. Every potential tortfeasor enjoys *automatic* asset protection in the form of

[76] Moreover, of all their creditors, potential tortfeasors are least likely to be concerned about maintaining good relations with tort victims.

[77] With the exception of spendthrift trusts and asset protection trusts, this Article does not address the range of judgment-proofing techniques available to individuals. For a good introduction to a wide variety of them, see Robert J. Mintz, Asset Protection for Physicians and High-Risk Business Owners (2002), available free online at www.rjmintz.com.

exemptions from collection (valid even against intentional torts), and in the form of an optional bankruptcy discharge (valid against all but intentional torts). We might think of this as the "democratization" of asset-protection privileges. The upshot, as Part II will demonstrate, is that in most states individuals are entitled to commit torts while keeping much of their home equity, their retirement savings, most or all of their income, and their trust fund (if they have one). Granted, these entitlements do not completely eliminate the threat of tort liability. As we will see in Part III, the residual threat is enough to induce many individuals to purchase substantial quantities of liability insurance in some contexts. But these purchases would be far higher were it not for the legal barriers to collecting tort judgments from the personal assets of tortfeasors.

II. The Principal Barriers to Collecting Tort Claims

We are now in a position to work through the most important barriers to tort collection in more detail, focusing one-at-a-time on the "big four" categories of largely-exempt assets: earned income, home equity, retirement accounts, and trusts. In each instance, we will consider the impact of these exemptions outside bankruptcy. Then, in Part II-E, we will examine how these exemptions can be used in conjunction with bankruptcy (or the threat thereof). Part II-F will then step back and offer a revised overview of the judgment-proof problem.

A. How Tortfeasors' Income Is Insulated From Tort Claims

The most important "asset" most people own is their human capital – their marketable skills, and the income stream those skills can generate. In 2003, the aggregate after-tax personal disposable income of Americans amounted to an estimated $8.216 trillion.[78] The median per capita income in the United States was roughly $23,000,[79] and the poverty line for a single individual was around $9,400. In a world in which 1.2 billion people live on $1/day, and another 2.8 billion live on less than $2/day, these income levels must be seen as far above basic subsistence.[80] Even if one shifts from subsistence to some implicit threshold of "decency" or "adequacy" in food, shelter, housing, education, and so forth, it seems clear that the overwhelming majority of Americans are well above that line – and could therefore afford to pay much of their income to satisfy a tort judgment without suffering undue hardship or deprivation.[81] Nevertheless, as we will now explore, American law shelters most income from tort claimants in several mutually reinforcing ways.

Exempt Income

Several important categories of income are completely exempt from collection by tort judgment creditors. Federal government social benefits, including social security,

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[78] 2004 Statistical Abstract of the United States 430, No. 647.

[79] U.S. Bureau of the Census, *Money Income in the United States: 2003.* Web: www.census.gov.

[80] Measuring Global Poverty, available online at www.infoplease.com/ipa/A0908762.html.

[81] Apparently about 40% of adults living in poverty in the United States live in "extreme poverty," defined as income less than half the poverty level. See Reading Between the Lines: Women's Poverty in the United States 2003, available online at www.legalmomentum.org (12.4% of women and 8.9% of men lived in poverty, while 5.1% of women and 3.8% of men lived in extreme poverty). The "extreme poverty" line might be one way to define what constitutes "hardship" for tort judgment-collection purposes.

disability, and health insurance, equaled $1.332 *trillion* in 2003.[82] Under federal law, these transfer payments may not be used to satisfy most types of judgments, including tort judgments.[83] Similarly, following the example set by the federal bankruptcy exemptions, many states exempt state welfare payments, unemployment compensation, disability benefits, and workers' compensation benefits from collection.[84]

Consider the implications of just the Social Security exemptions. Approximately two-thirds of Americans over age 65 rely on Social Security for over half their income; one-third rely on Social Security for over 90% of their income; and the median recipient relies on Social Security for 67% of income.[85] Thus, the principal income source for tens of millions of elderly Americans is 100% exempt from tort liability. In addition, as we will see in Part II-D, there are also severe restrictions on the collectibility of tax-qualified retirement funds, both before and after they are paid out to the beneficiary. These types of retirement payments, which amount to hundreds of billions of dollars of annual income, represent the principal source of supplemental income for Social Security recipients. The effect is that the fastest-growing (and, on average, highest net-worth) demographic group in the United States – the elderly – enjoys both its public and its

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[82] 2004 Statistical Abstract 432, No. 650 (hereinafter "2004 SA").

[83] See 42 USC sec 407(a) ("none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

[84] Section 522(d)(10) of the Bankruptcy Code exempts from the bankruptcy estate a variety of benefits, including workers' compensation, disability, illness, or unemployment benefits, alimony, and most payments under retirement and welfare plans. This exemption is only available to individuals in states that have not opted out of the federal bankruptcy exemptions. However, some opt-out states have used 522(d)(10) as a model in crafting their own exemptions. See, e.g., Kansas Stat Ann secs. 60-2312.

[85] Michael Ettlinger and Jeff Chapman, Social Security and the Income of the Elderly, Economic Policy Institute Brief, available online at http://www.epi.org/content.cfm/ib206.

supplemental private retirement income virtually immune from tort liability.[86] Granted, the elderly also commit fewer torts than most other demographic groups. But as the population ages, these exclusion will become increasingly important.

Restrictions on Garnishment

Since 1968, the traditional remedy of garnishment, which enables judgment creditors to collect from the debtor's wages before they are paid to the debtor, has been sharply limited by federal law.[87] The Consumer Credit Protection Act provides that garnishment may not exceed the *lesser* of 25% of an individuals's weekly disposable earnings, or the individual's disposable earnings in excess of thirty times the federal minimum hourly wage.[88] "Earnings" are broadly defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program."[89] The CCPA provides that States may – and a number do – impose more stringent limitations on garnishment. For example, some states use a higher multiple of the minimum wage, or

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[86] For 2002, the highest median net worth group (by age) was persons between 55 and 65, at $181,500, followed by those 65-75, at $176,300, and those over 75, at $151,400. By contrast, the under-35 median was $11,600, the 35-45 median was $77,600, and the 45-55 median was $133,000. 2004 SA 457, No. 694.

[87] Prior to adoption of the CCPA, there was tremendous variation among state garnishment laws. See Handbook on Assignment and Garnishment of Wages (CCH 1966) (collecting state laws). For example, Wisconsin sheltered a maximum of 50% of wages, while New York sheltered 90%, and Massachusetts sheltered a flat $50/week.

[88] 15 USCA sec. 1673(a). The CCPA makes exceptions for debts for state or federal taxes, and for court-ordered child support. Id. sec. 1673(b).

[89] 15 USC sec. 1672.

exempt a higher percentage of income;[90] Florida exempts *all* of the income of the "head of a family" from garnishment (unless the individual agrees otherwise); and Texas forbids garnishment altogether.[91]

The effect of these federal and state provisions is that garnishment offers the successful tort claimant only a stream of relatively small payments in most instances. Consider a tortfeasor from a household at the median in money income (around $43,000 for 2002).[92] After taxes, less than $10,000 per year would be available for garnishment. And even that number overstates the available recovery in most cases. Most households contain more than one wage-earner. But in most jurisdictions spouses are not liable, without more, for torts committed by the other spouse.[93] Consequently, in most cases only the individual tortfeasor's income would be subject to garnishment. The average hourly private-sector wage in 2003 was $15.70, or about $628/week for full-time workers.[94] After taxes, garnishment would be unlikely to yield more than $125/week.

Still, $125/week is roughly $6000/year, or about $4000/year to the plaintiff and $2000/year to the plaintiff's attorney. Even after considering the transaction costs of

[90] See, e.g., 740 Ill. Comp. Stat. 170/4 (2004) (exempting the greater of eighty-five percent of earnings or forty-five times the minimum hourly wage).

[91] See Fla. Stat. 222.11 (exempting the first $500 of earnings unconditionally, and exempting earnings above $500 a week unless the person "has agreed otherwise in writing"); Tex. Prop. Code Ann. § 42.001(b)(1) (2000) (prohibiting wage garnishment in favor of creditors).

[92] 2004 SA 443, No. 666.

[93] See Robert Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors,* 17 Bankr. Dev. J. 105, 190 n.397 (2000) (collecting cases). [RA: check to see whether the statement in text holds true in community property states].

[94] http://www.factcheck.org/article249.html (citing BLS average hourly earnings data).

garnishment – such as monitoring payments from employers, and renewing the writ of garnishment periodically – these returns might seem sufficient to induce some plaintiff's attorneys to sue uninsured median workers who commit torts. Recall, however, that the plaintiff's attorney must invest in the litigation from the beginning, and that collection via garnishment implies a gradual stream of small payments. This significantly reduces its attractiveness. For successful plaintiff's attorneys who expect a return of hundreds or even thousands of dollars per hour, [95] few garnishment cases will be profitable.

But even if high-flying plaintiff's attorneys are uninterested, one might think that a lower-end segment of the plaintiff's bar would emerge, specializing in cases that require garnishment or other blood-money collection. Even if these firms did not wish to pursue collection themselves, they could contract it out to collection firms, or (with the consent of clients) assign judgments to collection specialists for a fixed sum.[96] And of course, in some cases, the threat of garnishment might induce a tortfeasor to settle for a lump sum.

I have not undertaken an independent investigation of the size of the blood-money tort bar, and further research on this topic would clearly be worthwhile. Judging from the available evidence, there does not appear to be an extensive legal-services market for tort claims against defendants whose main collectible asset is earned income subject to

[95] See Lester Brickman, *Effective Hourly Rates of Contingency Fee Lawyers: Competing Data And Non-Competitive Fees*, 81 Wash. U.L.Q. 653 (2003).

[96] Cf. Susan Hwang, *Once-Ignored Consumer Debts Are Focus of Booming Industry* , WSJ Oct. 24, 2004 A1 (describing the rise of new "debt-buying companies," which, "[u]nlike old-fashioned collection agencies, which pursue debtors on behalf of a client company and keep a set percentage of what they gather, . . . typically acquire large portfolios of bad debt at a discount").

garnishment.[97] Given a high enough garnishable income, no doubt some plaintiff's attorneys would take cases involving substantial injuries.

But there is a simple counter-move that sharply limits the ability of plaintiff's attorneys to use the threat of garnishment against well-paid unintentional tortfeasors: the threat that the defendant will file for bankruptcy and will obtain a discharge of the plaintiff's tort claim, eradicating any risk of future garnishment. Tortfeasors who earn high salaries, faced with the possible loss of 25% of their after-tax income to garnishment, will often find it in their interest to seek a discharge in bankruptcy, or to threaten bankruptcy to reduce their settlement exposure. Bankruptcy, in short, is the trump card that explains why even well-paid tortfeasors are unlikely to be sued in the absence of liability insurance (or other collectible, non-exempt assets).

Other restrictions on the efficacy of garnishment (and other post-judgment remedies)

The CCPA limits on garnishment, and the threat of bankruptcy, are not the only problems with this post-judgment remedy. Garnishment only works well when there is a third party payor who can be identified in advance and served with a court order. In many circumstances, it is not practical to garnish a tortfeasor's income. The tortfeasor might be paid in cash (e.g., waiters and waitresses), or paid by a variety of customers rather than a single employer (e.g., independent contractors), making garnishment impracticable. In

[97] See infra, at – (discussing Professor Baker's finding that most personal injury lawyers in Connecticut are reluctant to take blood-money cases).

an age of outsourcing, independent contractors, and under-the-table payments to millions of low-paid workers, garnishment poses no threat at all to a significant fraction of the workforce.[98]

B. How Tortfeasors' Real and Personal Property Is Insulated From Tort Claims

Real and personal property is the second major component of personal wealth. The most important assets within these categories are home equity, automobiles, and interest-bearing accounts.[99] Today, home equity represents over $9 trillion in value,[100] with automobile equity adding another $1.3 trillion.[101] Approximately 67% of American households now own their own home, fully 86% own a motor vehicle, and 65% have an interest-earning account.[102] In addition, of course, there is a catch-all category of

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[98] The wages of many low-income and part-time workers are also 100% exempt under the CCPA's alternative minimum-wage exemption, which shields 30 hours/week at the minimum wage. At the current minimum wage of $5.15/hr, the first $154.50 of weekly income is exemption from garnishment.

[99] Another important~~—and often exempted—~~ exempt asset is unmatured cash value life insurance policies. See, e.g., Iowa Code sec. 627.6(7) (unlimited exemption for life insurance cash value); Colo. Rev. Stat. § 13-54- 102(l)(I)(A) ($25,000). In most states, the life insurance cash value exemption is unlimited. See Buist M. Anderson, Anderson on Life Insurance 21.4, at 606-07 (1991). Space limitations lead me to omit ~~any~~ extended treatment of this type of exemption. Professor Robert T. Danforth may well be right, however, that this exemption is one of the two most important (the other being the homestead exemption). See 53 Hastings LJ at 341.

[100] The National Association of Home Builders, using Census Bureau data, estimated that Americans had $4.1 trillion in home equity in their homes in 2000, and that this amounted to nearly half of the net worth of the average homeowning American family. http://www.picketfence-vt-fsbo.com/homeequity.html. Since then, home equity has grown rapidly. According to the Federal Reserve, unborrowed home equity in September 2004 was a record $9.3 trillion. James F. Smith, *There is no housing bubble in the U.S.A.,* Business Economics Apr. 2005, available online at www.findarticles.com.

[101] 2004 SA 458, No. 696.

[102] 2004 SA 456, No. 691. These figures are as of 2000. In addition, 27% of households own stocks or mutual funds, 23% have an IRA or Keogh account, and 30% have a 401K or thrift savings plan. Id.

personal property (furniture, appliances, jewelry, and cash) that could be used to satisfy a tort judgment.

The barriers to collecting each of these forms of wealth are formidable. But before exploring them, it will be useful to get a better sense for the distribution of these assets in the United States. Wealthy as our society is, in 2000 the median home equity among homeowners was only $59,000, the median auto equity among auto owners was less than $6,000, and the median value of interest-bearing accounts among holders of such accounts was $4,000.[103] Median household net worth in the United States in 2002 was about $86,000 (far smaller than the average net worth of about $396,000).[104] The median for non-white and Hispanic households is far smaller – a mere $17,000; and even that sum exceeds the $12,000 median net worth of households headed by a person under age 35.[105]

As these numbers imply, although private wealth in the United States runs well over $40 trillion, that wealth is concentrated at the top.[106] The top 8% of households hold 57% of all private wealth; the top 18% hold 76%; the top 37% hold 93%, and the top 52% hold 98.5%.[107] The middle third of households hold only about 3% of total wealth. And the

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[103] 2004 SA 456, No. 692.

[104] 2004 SA 457, No. 694.

[105] 2004 SA 457, No. 694.

[106] Jane Kim and Ron Lieber, *Higher Rates Start to Bite Consumers*, WSJ D1 (Aug. 18,2005) (according to the Federal Reserve, from 1999 to 2005 household net worth increased from $42 trillion to about $49 trillion; consumer debt increased over the same period from $6.5 trillion to nearly $11 trillion).

[107] U.S. Census Bureau, Asset Ownership of Households 2000, available online at http://www.census.gov/hhes/www/wealth/1998_2000/wlth00-4.html.

bottom 15% have *negative* net wealth of over $250 billion (that is, about –1.5% of total wealth).[108] A tort victim who is injured by someone from the "bottom half," in other words, is unlikely to find significant wealth, even in the absence of exemptions. And even modest exemptions from collection will suffice to shelter the wealth of many middle-class individuals.

Property Exemption Laws

Every state has property exemption laws that protect some personal assets of debtors from creditors, including judgment creditors.[109] These state laws have a long history: by the late nineteenth century, most states had exemption laws that included exemptions for homesteads and various itemized types of personal property.[110] From the beginning, many of these laws applied to tort claims as well as contract claims.[111] Nowadays, that is true of the overwhelming majority of exemption laws. [112]

[108] See id.

[109] My account here is indebted to Richard M. Hynes, Anup Malani, and Eric A. Posner, *The Political Economy of Property Exemption Laws*, 47 J Law & Econ. 19, 23-24 (2004).

[110] In some states, including Texas and Florida, the homestead exemption is included in the state Constitution, thus making it impervious to ordinary legislative revision. Some other states, such as Colorado, have constitutional provisions calling for generous exemptions. See Colo. Const. Art. 18, sec. 1 (1876) ("The general assembly shall pass liberal homestead and exemption laws.")

[111] In the nineteenth (and early twentieth) century, many exemption laws applied to all "debts contracted." The courts were split on the interpretation of such language. See Note, *Public Lands – Homestead Exemption – Debts Contracted,* 2 Minn L Rev 159-160 (1918) (collecting cases).

[112] Indiana law, for example, provided for over a century that property exemptions applied to contract claims, but not tort claims. *Smith v. Wood,* 83 Ind. 522 (1882). In 1986, however, the Indiana legislature amended the statute to include tort claims. Ind.Code § 34-2-28-1 (Supp.1987) (emphasis supplied). See *In re Ondras*, 846 F2d 33 (7th Cir. 1988).

When Congress enacted the first long-lived bankruptcy law in 1898, it incorporated these state property exemptions: an individual who filed for bankruptcy could obtain a discharge from most debts while retaining whatever property was exempt under the laws of state in which he or she resided. The Bankruptcy Act of 1978 altered this system to some extent. It “established a set of federal exemptions and permitted debtors to choose between these federal exemptions and the exemptions of the state in which they reside, unless that state had by statute "opted out" of the federal system, in which case the debtors would have to use that state's exemptions.”[113] Roughly two thirds of the states have opted out.

State exemption laws run the gamut from extremely generous to stingy. Consider the homestead exemption: as of 1996, seven states did not limit the homestead exemption by dollar amount; nine states exempted more than $100,000; eight states exempted between $50,000 and $100,000; four states exempted between $30,000 and $50,000; twelve states exempted less than $30,000 (the amount then allowed under the federal exemption); and five states had no homestead exemption.[114] Thus, almost half the states (twenty-four) exempted at least $50,000 in home equity: in these states, the median homeowner’s $59,000 of home equity was almost completely protected. Conversely, in just over one-third of the states the exemption represented less than half of the median home equity, leaving significant potential exposure to creditors.

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[113] 47 J Law and Econ, at 24.

[114] These dollar amounts are for married couples, for whom the federal government and most states double the exemptions. 47 J Law & Econ at 25.

It is more complicated to compare personal property exemptions. However, Hynes, Malani, and Eric Posner estimate the mean personal property exemption at $6,187 as if 1996.[115] When combined with their estimated mean 1996 homestead exemption of $48,595, the resulting total (approximately $55,000) represents about 77% of the 1998 median household net worth of $71,300[116] – a percentage very reminiscent of the CCPA's 75% exemption for earned income. However, whereas the CCPA sets a uniform 75% floor in all states, the combined homestead and personal property exemptions vary widely across states.[117]

In light of these variations, one would predict that a resident of, say, Pennsylvania (combined exemptions $300) is more likely to be sued than a resident of, say, Massachusetts (combined exemptions $101,400).[118] However, another factor reduces the variation somewhat. In at least fifteen states, a conveyance to a married couple creates an estate in land known as "tenancy by the entirety."[119] The hallmark of tenancy by the entirety is that only a joint creditor of *both* tenant-spouses can foreclose on the property.

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[115] 47 J Law & Econ at 27 Table 1.

[116] See The Journal of Blacks in Higher Education, http://www.jbhe.com/news_views/45_racial_wealth_gap.html.

[117] The combined value of the exemptions in 1996 was less than $10,000 in four states, between $10,000 and $20,000 in another eleven states, between $20,000 and $30,000 in six states, between $30,000 and $50,000 in five states, between $50,000 and $100,000 in eight states, and over $100,000 in sixteen states. See 47 J Law & Econ at 26-27 Table 1 (listing data from which these figures can be derived).

[118] I know of no study comparing tort litigation rates by state against exemptions by state, but that might be a promising way to estimate the importance of exemptions.

[119] See 47 J Law & Econ at 26-27 Table 1 (listing states with the strong form of tenancy by the entirety I describe in text)..

Consequently, a tort victim who was wronged by only one spouse – for example, a medical malpractice claimant – cannot foreclose on a judgment lien until the tenancy by the entirety is terminated (e.g., by sale or divorce).[120]

In short, tenancy by the entirety operates much like an unlimited homestead exemption.[121] Interestingly, many of the states that have minimal homestead exemptions are among those with a strong form of tenancy by the entirety: this includes four of the five no-exemption states, and six of the twelve states with exemptions of less than $30,000 as of 1996.[122] The bottom line is that all but seven states have either a $30,000-plus homestead exemption or tenancy by the entirety.[123]

Barriers to Collecting from Non-Exempt Home Equity

We have seen that in most states, a majority of the net worth of home-owning families at the median is exempted from collection by tort claimants. As we will now address, the

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[120] Most bankruptcy courts have held that a tenancy by the entirety persists after one of the tenants files for bankruptcy. See *In re Spears*, 308 B R 793 (Bankr WD Mich 2004) (rejecting these decisions, but holding that only *joint* claims may be asserted against the interest held by the bankruptcy trustee in property formerly owned by the debtor as a tenant by the entirety).

[121] See 47 JLE at 31 n. 20. Beyond that, "unlike a homestead, tenancy by the entirety is not limited to the family home. An unlimited amount of commercial or investment property can be held by the entirety and thus inaccessible to creditors of only the husband, or only the wife." Turnier & McCouch, Materials on Family Wealth Management 790 (2005).

[122] See 47 JLE at 26-27 Table 1.

[123] Just as tenancy by the entirety is of no help to unmarried tortfeasors, in some states single persons may not claim the homestead exemption. See Crandall et al at 6-151 (citing Hawkland & Loiseaux, Debtor-Creditor Relations 366 (2d ed. 1979).

barriers to collecting from *non-exempt* home equity and personal property are also very high.

Consider a $100,000 tortfeasor who owns a home worth $200,000, subject to a mortgage of $90,000, in a state with a $50,000 homestead exemption. The mortgage lender, of course, will have priority over the tort judgment creditor. Nevertheless, there would appear to be $60,000 in non-exempt home equity available for collection.

To collect that $60,000, however, is easier said than done. In most states, the tort judgment creditor must initiate a foreclosure action to force the sale of the tortfeasor's home. Unfortunately, foreclosure sales typically bring substantially less than fair market value.[124] Because the mortgage lender gets paid first, the risk that home equity will disappear falls primarily on the tort plaintiff. If the home nets only $160,000 at a foreclosure sale, our hypothetical tort victim will receive only $20,000.

To be sure, the threat of foreclosure can give a tort judgment creditor substantial leverage against tortfeasors with substantial non-exempt home equity. To avoid having their homes placed on the auction block, some tortfeasors may be willing to settle by borrowing against their home equity and transferring the proceeds to the tort victim. As we will consider next, however, home equity loans are more likely to be part of the problem for tort judgment creditors than part of the solution.

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[124] Stephen Wechsler, *Through the Looking Glass: Foreclosure by Sale as de facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure and Subsequent Resale* , 70 Cornell L Rev 850, 884-886 (1985).

A tortfeasor who has non-exempt home equity when suit is filed can usually make that home equity disappear long before the tort plaintiff can obtain a judgment and convert it to a judgment lien. As of 2003, when Texas voters finally approved a constitutional amendment allowing home equity loans, every state in the Union permits homeowners to borrow against their home equity for virtually any purpose a lender will tolerate.[125] Thanks to low interest rates and tax deductibility, homeowners have gobbled up home equity loans and lines of credit. In 2004 alone, approximately $432 billion of new home equity loans were originated.[126]

Tort defendants can easily use home equity loans to minimize their exposure to tort liability. Imagine a tortfeasor with $50,000 in home equity in a state with a stingy $30,000 homestead exemption. Upon being sued, the tortfeasor takes out a $20,000 home equity loan, and uses the proceeds to pay off credit card debt. The home equity lender obtains a second mortgage, and consequently has priority over the tort claimant. Meanwhile, the homeowner's non-exempt home equity has vanished.[127]

Barriers to Collecting Other Personal Property

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[125] See http://www.smrresearch.com/heoutlook04.html (describing the Texas legislation).

[126] Ruth Simon, *Home Equity Loans Hit Record Levels*, WSJ D1, 1/20/05. According to Economy.com, the total amount of home equity Americans accessed in 2004 – including capital gains and new loans – was $705 billion, up from $266 billion in 1999. James R. Hagerty and Ruth Simon, *As Prices Rise, Homeowners Go Deep in Debt to Buy Real Estate,* WSJ A1, at A10 (5/23/05).

[127] After the tort victim obtains a judgment lien, the balance of power shifts, because the lien effectively bars the tortfeasor from selling, borrowing, or refinancing until the lien is released.

Space does not permit a full treatment of the ins-and-outs of collecting tort judgments from the other personal property of tortfeasors. To capture the flavor of the problem, there is no better way than to focus on cash – to which savings accounts, automobiles, jewelry, and almost anything else can readily be converted. Here a different post-judgment remedy (and its weaknesses) comes to the fore. In most states, a judgment creditor can obtain a writ of execution from the clerk of the court that issued the judgment.[128] The writ will direct the local sheriff to "levy upon" (that is, seize) enough of the debtor's non-exempt personal property to satisfy the judgment. Usually, the sheriff sells the seized property and turns over the proceeds to the judgment creditor. In the case of cash, the sheriff can simply turn the money over to the judgment creditor.

Unfortunately, the writ of execution is usually doomed to failure when it comes to cash or other highly liquid assets. Because the sheriff is, in the eyes of the law, merely collecting a debt, his authority to use physical force to wrest cash from the judgment debtor will be sharply limited. In addition, the Fourth Amendment's prohibition on unreasonable searches and seizures requires the sheriff to obtain a warrant issued by a judge upon probable cause before searching and seizing the judgment debtor's person or home. In recent years, several courts have held that writs of execution do not qualify as warrants, because they are issued *pro forma* by the clerk of court, rather than issued by a judge after review of the validity of the creditor's claim.[129] Consequently, the sheriff cannot enforce the writ by entering the debtor's home unless the debtor consents. If the debtor

[128] Understanding Bankruptcy 31.

[129] See, e.g., *State v. Hinchey*, 220 Neb. 825, 374 NW 2d 14 (1985); *Dorwart v Caraway*, 966 P2d 1121 (Mont. 1998).

refuses, the sheriff must apply for an execution warrant by filing an affidavit reciting that property subject to execution is located in the debtor's home. But by the time the judge issues a warrant the debtor may well have spent the money or hidden it elsewhere. In short, a judgment creditor's legal right to seize a debtor's cash is usually worthless in practice.

C. How The Affluent Use Trusts To Insulate Their Wealth From Tort Claims

When it comes to wealthy individuals, the United States leads the world. A 2004 study found that 7.5 *million* American households had a net worth of $1 million or more – and it excluded the value of primary residences.[130] One would expect that, even in the absence of liability insurance, a tort judgment creditor could expect to collect substantial sums from these wealthy individuals. In reality, affluent individuals who engage in advance asset protection planning can shield millions of dollars in assets from tort judgment creditors. These strategies are not costless, requiring as they do the services of lawyers, accountants, trustees, and other intermediaries. For many wealthy persons, however, the costs are a bargain compared to the costs of tort litigation and the risk of a large tort judgment.[131] Indeed, there is an entire cottage industry of asset protection

[130] Robert Frank, Millionaire Ranks Hit New High, WSJ D1 5/25/05.

[131] Of course, the wealthy can use liability insurance to cover both tort liability and direct litigation defense costs. But the indirect costs of litigation (time, inconvenience, disruption, loss of privacy, reputational harm, etc.) can be very large – and purchasing liability insurance can actually increase the risk of being sued and incurring those costs.

specialists whose core mission is to systematically devise ways to shelter their clients' assets from civil liability. Their services are increasingly in demand.[132]

Spendthrift Trusts

One time-honored and widely used asset protection strategy employs trusts. A property-owner (the "settlor") transfers *legal* title to the property to a trustee, while directing the trustee (usually in writing) to manage or invest the property for the benefit of one or more "beneficiaries." Unless the transfer of property to the trust was a fraudulent conveyance, the settlor's creditors cannot reach the "corpus" of the trust – because the settlor has parted with both legal and equitable ownership.[133] Moreover, the beneficiary's creditors will not be able to reach the trust's assets because they have not yet been distributed to the beneficiary, who normally has no immediate right to receive them. All but a few states have traditionally permitted such "spendthrift trusts,"[134] which typically provide that the beneficiary's interest may not be voluntarily or involuntarily transferred before payment by the trustee.[135] There is, however, an equally settled exception: spendthrift trusts cannot be "self-settled" -- the settlor of the trust cannot also

[132] In a recent survey of individuals with more than $1 million in assets, 35% of those surveyed had some form of asset protection plan, compared with just 17% in 2000. And of those who did not have a plan in place, 61% expressed an interest in creating one. Wall Street Journal, Oct. 14, 2003.

[133] The fraudulent conveyance doctrine is discussed infra at --.

[134] Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?,* 85 Cornell L Rev 1035, 1042 (2000).

[135] Gerry W. Beyer, Wills, Trusts, and Estates: Examples and Explanations (2d ed.) 348 (2002).

be a beneficiary. Thus, a wealthy individual can establish a spendthrift trust for a spouse or other family members, but not for himself or herself. [136]

The Maryland Court of Appeals' recent decision in *Duvall v. McGee*[137] illustrates the stubbornness with which American courts have adhered to the spendthrift trust doctrine in the face of powerful arguments by tort victims. After James McGee was convicted of felony murder for his participation in the robbery-murder of Katherine Ryon, the administrator of her estate (Duvall) obtained a tort judgment against him for battery and conversion. Duvall then tried to enforce the judgment by invading the $877,000 corpus of a spendthrift trust McGee's mother had established for McGee's benefit.[138] He argued that the spendthrift trust doctrine should be limited to commercial creditors, who can protect themselves by consulting the public records in which trusts must be listed. Although this argument has been endorsed by distinguished trust scholars,[139] the Maryland Court of Appeals flatly rejected it. The court reasoned that the rule rests not on notice, but on the proposition that the settlor's interest in dictating how (and for whose

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[136] Bankruptcy Code Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable" in bankruptcy. "Therefore, if a bankrupt debtor is the beneficiary of a trust that includes an enforceable spendthrift provision, the debtor's beneficial interest and the underlying property supporting that interest remain beyond the reach of creditors." John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 Wash & Lee L Rev 159, 206-207 (2004). Here, too, federal bankruptcy law defers to state law, preventing creditors from reaching trust assets that they could not seize in a nonbankruptcy action in state court.

[137] 826 A2d 416 (2003). The decedent's representative was represented by Allen W. Cohen of Annapolis, MD. I thank Attorney Cohen for agreeing to discuss *Duvall* with me, and for his illuminating explanations of various features of the litigation.

[138] 826 A2d at 417.

[139] See 826 A2d at 422-23 (discussing the positions taken in Scott on Trusts and Bogert on Trusts and Trustees).

benefit) the settlor's property will be used outweighs the interests of *ordinary* creditors of the beneficiary. Like contract claimants (and unlike claimants for alimony and child support), tort victims are ordinary creditors who are merely owed "a debt" – not "a duty" that would justify disregarding the spendthrift provision.[140]

Of course, once a beneficiary receives payments from a spendthrift trust, those funds are subject to collection remedies.[141] But multiple obstacles to effective collection remain. Spendthrift trusts frequently include a provision giving the trustee broad discretion over whether, when, and how much to pay the beneficiary.[142] If the trustee believes that a distribution will be seized by a tort judgment creditor, the trustee can defer it until the threat of collection recedes. Or the trustee can make payments on behalf of the beneficiary to third parties who have supplied the beneficiary's needs. The tort victim has no right to recoup these trust funds, because there has been no distribution to the beneficiary.[143] Even if the trustee does make periodic payments to the beneficiary, it will not be easy for the tort judgment creditor to seize those payments. The beneficiary can simply cash the trustee's check, and spend or hide the money. Unless the beneficiary

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[140] 826 A2d at 429-430. This is an extraordinarily revealing statement. It is, of course, hornbook law that *every* tort involves a breach by the tortfeasor of a duty imposed by law. But because the tort victim has obtained a judgment, the court treats this breach of duty as irrelevant. The tort victim has become a "mere judgment creditor . . . of the beneficiary." Id. at 426.

[141] Beyer, at 348.

[142] Telephone conversation with Allen W. Cohen, attorney for Duvall, 7/26/04.

[143] See Beyer, at 355.

makes a mistake (e.g., depositing the funds in a garnishable account) he or she should be able to defeat collection.[144]

The (Largely Ineffective) Doctrine of Fraudulent Conveyances

The longstanding rule that creditors may challenge fraudulent conveyances sometimes stands as an effective obstacle to the schemes of tortfeasor-settlors -- but generally not if the tortfeasor plans in advance. In its original form, the doctrine of fraudulent conveyances reached only cases of actual fraud – that is, transfers made with *intent* to defraud, hinder, or delay creditors. Almost every state has adopted the early twentieth-century Uniform Fraudulent Conveyance Act (UFCA) or its successor, the Uniform Fraudulent Transfer Act (UFTA).[145] These statutes enlarge the common-law foundation to include *constructive* fraud, which does not require proof of fraudulent intent.[146]

Wealthy individuals who establish a *bona fide* trust for the benefit of other family members before the settlors are sued or threatened with suit are unlikely to lose on actual

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[144] See Beyer, at 348.

[145] Unif. Fraudulent Conveyance Act, 7A-2 U.L.A. 2 (1918); Unif. Fraudulent Transfer Act, 7A-2 U.L.A. 266 (1999).

[146] The UFTA protects more creditors than the UFCA. At common law, and under the UFCA, only present – as contrasted with future – creditors could challenge a conveyance on grounds of constructive fraud. The UFTA alters this result by providing that fraudulent transfers are void as to a creditor "whether the creditor's claim arose before or after the transfer was made or the obligation was incurred." UFTA Sec. 4.

fraud grounds.[147] The more likely roadblock to an asset-protection trust is the doctrine of constructive fraud. The first requirement for constructive fraud -- that the debtor failed to receive reasonably equivalent value for the transferred property – will obviously be satisfied when a settlor establishes a trust.[148] The second, sometimes known as the "insolvency" requirement, snares debtors who knew or should have known, at the time of the transfer, that they would incur debts beyond their ability to pay as they became due.[149] Tortfeasors who establish trusts after committing a tort (or being sued) are likely to run afoul of this requirement as well.

By contrast, tort claimants have little chance of success in piercing trusts established before the settlor committed the tort in question (or before suit was brought). Imagine a physician who establishes a family trust soon after entering practice, and who commits malpractice several years later. Under the "insolvency" test, the physician is likely to prevail: [150] many physicians are never sued for malpractice; many of those who are sued are exonerated at trial; and even of those who lose, many have incomes high enough that they could pay a judgment "when due." If (as many states require) the physician carries some professional liability insurance, it is even less likely that the physician "should have

[147] Actual fraud is determined using the traditional badges of fraud, which include factors such as whether the debtor retained possession or control of the transferred property, whether the transfer was of substantially all of the debtor's assets, whether the debtor had been threatened with suit before the transfer, and whether the debtor received reasonably equivalent value for the assets transferred. UFTA sec. 4.

[148] See UFTA sec. 4(a).

[149] Id.

[150] The fraudulent conveyance claim may also be barred by UFTA's four-year statute of limitations. See UFTA sec. 9.

known" at the time the trust was established that an excess judgment would render him or her insolvent.[151]

The bottom line, then, is that fraudulent transfer law is relatively tough if the tortfeasor transfers assets after committing a tort (and particularly after a tort claim is filed), but relatively lax if the tortfeasor transfers assets before a tort occurs. Once again, the planning advantage that potential tortfeasors enjoy turns out to be decisive.

Offshore Asset Protection Trusts

From the standpoint of asset-protection planning, the rule against self-settled spendthrift trusts is a major drawback to the basic spendthrift trust strategy. To avoid this and other unfavorable aspects of American law, an increasing number of wealthy individuals have turned to offshore asset protection trusts ("OAPTs") located in countries that have enacted extremely debtor-friendly legislation. Few jurisdictions are more debtor-friendly than the Cook Islands, an English-speaking enclave located near New Zealand in the South Pacific. Consider the obstacle course for creditors erected by the Cook Islands' International Trusts Act of 1984[152]:

* Self-settled spendthrift trusts are fully enforceable;

[151] See John E. Sullivan III, Future Creditors and Fraudulent Transfers, 22 Del. J. Corp. L. 955, 995-98 (1997).

[152] My account of OAPTs and related issues draws heavily on Stewart Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L Rev 1035 (2000).

* The Cook Islands courts won't recognize a U.S. fraudulent conveyance judgment,[153] because U.S. fraudulent conveyance law is inconsistent with the Act.

* If the U.S. judgment creditor litigates the fraudulent conveyance claim in the Cook Islands, the creditor must prove beyond a reasonable doubt that the settlor acted with actual intent to defraud, and that the transfer rendered the settlor insolvent.[154]

* Because a transfer is not deemed fraudulent if it took place before the creditor's claim arose, a tort victim cannot possibly succeed if the OAPT was established before the tort occurred.

* Creditors must bring suit in the Cook Islands within one year from the date of the fraudulent transfer. Because it is virtually impossible to litigate a tort case to judgment in a year, this provision will be fatal unless the trust was established *after* the tort judgment was awarded.

Like the Cook Islands, many other offshore jurisdictions authorize self-settled trusts, dilute fraudulent transfer law, and refuse to enforce foreign judgments. Setting up an offshore asset protection trust is not cheap – attorneys who specialize in the field normally charge $15,000-$30,000, and administrative costs for the foreign trustee are

[153] Because the trust is not a party to the tort judgment, the plaintiff must advance a fraudulent conveyance claim against the trust.

[154] Section 13(B).

likely to be several thousand dollars per year.[155] But persons who want to shelter a million dollars or more may find these fees worth paying to minimize the risk that they will lose the bulk of their wealth. Current estimates are that American settlors have deposited more than $1 trillion in assets in offshore trusts.[156]

American judgment creditors have tried to fight back, but with only modest success. Under the Supreme Court's decision in *Hanson v Denckla*,[157] due process would probably preclude an American state court from asserting personal jurisdiction over an OAPT trustee who has not solicited business outside the trustee's own jurisdiction.[158] In the absence of personal jurisdiction, the American can use civil contempt sanctions to pressure the settlor to use trust assets to repay judgment creditors. To forestall this tactic, however, self-settled offshore trusts typically include a "duress" provision directing the trustee not to make any distributions to the settlor-beneficiary if that person is under "duress" – defined to include court orders.[159] The settlor can then argue that contempt for failure to comply with a turnover order is excused by impossibility.

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[155] 32 Vand. J. Transnat'l Law 779, 798 (1999). For the adventurous, cut-rate options are also available; one website offers Panamanian OAPTs for only $999. See http://www.offshore-manual.com/PanamanianTrust.html.

[156] Sterk, supra, 85 Cornell L. Rev. at 1051.

[157] 357 U.S. 235 (1958).

[158] 85 Cornell L. Rev. at 1090. This result is particularly likely if the settlor directs the OAPT trustee to hold only cash or intangible investments, rather than tangible property that could serve as a basis for *in rem* jurisdiction if located within the forum state. Id. at 1093-97.

[159] See Duncan Osborne & Jack Owen, Jr., *Asset Protection: Trust Planning* SK032 ALI-ABA 21, 62 (2004).

In recent cases, the Ninth and Eleventh Circuits have refused to honor duress provisions, and held settlors in contempt, after finding that they retained sufficient control over the trust to repatriate assets in compliance with the court's order.[160] In one of these cases, the settlors retained broad powers as "protectors" of the trust; and in the other, the settlor retained the power to remove the trustee.[161] Settlors who do not reserve such powers may have a better chance of prevailing on a duress claim. On the other hand, the Eleventh Circuit held in the alternative that an impossibility defense will not succeed when the settlor has created the impossibility by adopting duress provisions.[162] If other courts agree with that reasoning, duress provisions will invariably fail.

But even if courts are willing to use their contempt powers to coerce compliance with turnover orders, the effectiveness of this remedy is open to question. Civil contempt is supposed to be coercive, not punitive. Consequently, most courts are likely to release a determined debtor who refuses to comply after a substantial period of incarceration.[163] Other debtors may simply flee, secure in the knowledge that failure to comply with a court's order to turn over assets is usually not an extraditable offense.[164]

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[160] See *Federal Trade Commission v. Affordable Media, LLC*, 179 F3d 1228 (9th Cir. 1999); *In re Lawrence*, 279 F3d 1294 (11th Cir. 2002).

[161] See *Affordable Media*, 179 F3d at 1242; *Lawrence*, 279 F3d at 1299.
[162] Id. at 1300.

[163] See *Lawrence*, at 1301 ("If the bankruptcy judge determines that, although Lawrence has the ability to turn over the Trust *res,* he will steadfastly refuse to do so, the judge will be obligated to release Lawrence because the subject incarceration would no longer serve the civil purpose of coercion.")

[164] See Comment, *Fair Trial vs. Free Speech: Canadian Publication Bans versus the United States Media*, 2 Sw. J.L. & Trade 203, 221-22 (1995) (contempt of court not listed as an extraditable offense in treaty between United States and Canada).

Some bankruptcy courts have also denied discharge to debtors who have used OAPTs to avoid creditor claims.[165] This policy may deter some individuals from adopting an OAPT, because they are unwilling to have a tort judgment hanging over their heads indefinitely.[166] On the other hand, intentional torts are non-dischargeable whether or not the tortfeasor has established an OAPT – and fear of liability for intentional torts (e.g. securities fraud) probably accounts for a large segment of the OAPT market.

Overall, it seems clear that American courts are hostile to OAPTs and are likely to do whatever they can to assist tort judgment creditors in gaining access to funds located in these asset protection shelters. Under existing law, however, the courts' powers are insufficient to overcome the advantages OAPTs offer many wealthy individuals.[167]

D. How Retirement Funds Are Insulated From Tort Claims

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[165] See, e.g., *Marine Midland Bank v. Portnoy (In re Portnoy)*, 201 B.R. 685, 692-701 (Bankr. S.D.N.Y. 1996) (relying on the "continuous concealment" doctrine to deny discharge under section 727(a)(2) of the Code, even though the initial transfer to an OAPT occurred more than a year before the petition was filed).

[166] Sterk, supra, 85 Cornell L Rev. at 1112.

[167] In recent years, the traditional rule that spendthrift trusts cannot be self-settled has also begun eroding within the United States. Since 1997, five states, including Alaska, Delaware, Nevada, Rhode Island, and Utah, have adopted statutes authorizing self-settled spendthrift trusts. Sterk, 85 Cornell L Rev at 1112. But it is far from clear whether they will actually have much effect, because there is serious uncertainty over whether other states will honor self-settled spendthrift trusts. See id. at 1078-1089. If, as Professor Sterk predicts, most state courts "are unlikely to enforce the spendthrift provisions in self-settled asset protection trusts, regardless of the effect that those provisions might have under the law of the trust situs," id. at 1089, these domestic rivals to OAPTs will wither away.

Since its inception in 1935, Social Security has been designed to ensure that elderly ex-workers do not live in poverty during their retirement years.[168] Most workers, however, aspire to a post-retirement standard of living that not only avoids poverty, but enables them to maintain the lifestyle they enjoyed during their working years. For its part, Congress has long tinkered with the federal tax code to encourage employers, employees, and (more recently) the self-employed to supplement Social Security with a variety of private, tax-qualified retirement plans.[169] These tax-favored accounts are often referred to as "qualified" retirement plans.[170] In the Employee Retirement Income Security Act of 1974 ("ERISA"), Congress imposed vesting, participation, and other regulatory requirements on many (but not all) types of qualified plans. In so doing, Congress also drew on (and democratized) spendthrift trust law: most Americans now have a "trust fund" – their tax-qualified retirement savings.

The cumulative savings in qualified plans are enormous – exceeding even the value of home equity. According to the Employee Benefit Research Inst.,[171] in 2002 total retirement plan assets stood at $10.13 trillion, including $1.54 trillion in private defined benefit plans, $1.97 trillion in private defined contribution plans, $2.45 trillion in individual retirement accounts (IRAs) and Keogh plans, $1.31 trillion in private insured

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[168] Pub. L. No. 74-271, 49 Stat. 620.

[169] For the history of tax preferences for retirement plans, see James A. Wooten, The Employee Retirement Income Security Act of 1974: A Political History ch.1 (2004).

[170] To simplify considerably, the most common form tax benefits take is that contributions to a tax-preferred plan are tax deductible, and neither the contributions nor earnings thereon constitute taxable income to the beneficiary until retirement benefits commence.

[171] Facts from EBRI, available at http://www.ebri.org/facts/0904fact.pdf.

plans, $1.96 trillion in retirement plan assets of state and local governments, and $897 billion in federal government plans. It is only a slight exaggeration to say that *none* of these funds are available to satisfy a tort judgment while they are held in a qualified retirement plan or account. Even after the beneficiary begins to receive payments, retirement monies are uncollectible as a matter of law in many states, and difficult to collect as a practical matter in the others. This section will describe the complicated – and increasingly seamless -- web of state and federal laws that shelter retirement funds.[172]

But before turning to the legal arcana of exemptions, ERISA, and the rest, consider the following example. After O.J. Simpson was acquitted of the 1994 murders of Nicole Brown Simpson and Ron Goldman, the Brown and Goldman families brought civil suits against Simpson for wrongful death and battery. In February 1997, a civil jury found that Simpson had killed both victims "willfully and wrongfully, with oppression and malice,"[173] and awarded a total of $33.5 million in compensatory and punitive damages. Simpson appealed, arguing that the judgment would financially ruin him. As the California Court of Appeals explained, however, "this award will not destroy Simpson economically. *He has pension funds worth $ 4.1 million that are exempt from execution to pay this award.*"[174] That is still true today: Simpson's pension funds – which began paying him approximately $300,000 per year when he reached age 55 in 2002 – were and

[172] For fuller treatments of these issues, see John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 Wash & Lee L Rev 159 (2004); Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors* , 74 Ind. L.J. 355 (1999).

[173] *Rufo v. Simpson* , 86 Cal. App. 4th 573, 581 (Cal App. 2001).

[174] Id. at 625 (emphasis added).

are beyond the reach of his tort creditors. Simpson is a resident of Florida, and under Florida law payments from a qualified retirement plan are exempt from collection.[175]

What legal rules are responsible for results such as this? The story begins even before ERISA (the Employee Retirement Income Security Act of 1974), with the application of traditional spendthrift trust doctrines to employer-sponsored retirement plans. Many courts held that retirement funds held in trust for employees were exempt from collection, provided that the trusts contained restrictions on alienation sufficient to qualify them as spendthrift trusts.[176] (Implicit in these rulings was a rejection of the argument that, unlike a gratuitous spendthrift trust, retirement plans should be viewed as part of an employee's bargained-for compensation – and hence "self-settled"). Based as they were on traditional trust principles, these rulings applied only to funds held in trust. Once retirement payments to the beneficiary commenced, creditors could attempt to collect them. Here again, however, federal law set an expansive precedent: the CCPA's definition of "earnings," 75% of which are exempt from garnishment, "includes periodic payments pursuant to a pension or retirement program."[177]

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[175] See F.S.A. § 222.21 ("any money or other assets payable to" a participant in a qualified retirement "fund or account is exempt from all claims of creditors").

[176] See, e.g., *Matter of Witlin*, 640 F2d 661 (5th Cir. 1981); *Hoffman Chevrolet v. Washington County Nat'l Sav. Bank,* 467 A.2d 758, 766 (1983) (holding that "a spendthrift trust can effectively protect retirement benefits"); *Hildreth Press Employees Federal Credit Union v Connecticut General Life Ins. Co.*, 295 A2d 54 (Conn. App. 1972) (refusing to allow garnishment of pension fund on spendthrift trust grounds).

[177] 15 USCA sec. 1672(a).

In enacting ERISA, Congress's overriding objective was to increase the likelihood that employees would actually receive retirement benefits promised by their employers. Consistent with this goal, ERISA's anti-alienation provision, Section 206(d), provides that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The Supreme Court has held that section 206(d) – which reads like a typical spendthrift-trust provision -- bars attempts to collect judgments from pension plan benefits by garnishment or imposition of a constructive trust. [178] The statute, the Court explained in *Guidry v Sheet Metal Workers Nat'l Pension Fund*, "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them."[179] One consequence of that "policy choice," however, has been to exempt from collection retirement plans that seem almost indistinguishable from self-settled trusts.[180]

In the aftermath of *Guidry*, the question arose whether ERISA also bars alienation of benefits *after* they are distributed to the beneficiary. Although one court of appeals has

[178] *Guidry v Sheet Metal Workers Nat'l Pension Fund* 493 US 365, 372 (1989).

[179] Id. at 376. As the Court pointed out, "the garnishment of retirement benefits is [also] prohibited by the Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. § 407 (1982 ed.); the Railroad Retirement Act, as amended, 47 Stat. 438, 45 U.S.C. § 231m(a) (1982 ed., Supp. V); the Civil Service Retirement Act, 5 U.S.C. § 8346(a); and the Veterans' Benefits Act, 38 U.S.C. § 3101(a) (1982 ed.)." Id. at 370 n. 13.

[180] See *Raymond B. Yates, M.D., P.C. v. Hendon*. 124 S Ct 1330 (2004). The issue in *Yates* was whether a physician could claim the protection of ERISA's anti-alienation provision for his retirement plan benefits, despite the fact that he was sole shareholder and president of the professional corporation that maintained the retirement plan. Reasoning that Congress intended working owners to be able to participate in ERISA plans on equal terms with other employees, the Supreme Court held that a working owner may invoke the protections of ERISA so long as the plan covers one or more employees other than the business owner and his or her spouse. Id. at 1344. This seems analogous to a rule that a self-settled trust is permissible, so long as the settlor and the settlor's spouse are not the *sole* beneficiaries.

so held,[181] the weight of authority is that ERISA permits post-payment garnishment.[182] So, for example, ERISA allows a tort judgment creditor to garnish a checking account into which a tortfeasor has deposited payments from a pension plan. Savvy tortfeasors, however, will not choose "direct deposit" of their pension payments – they will convert those payments to hard-to-collect cash whenever possible.

Moreover, although ERISA permits creditors to pursue retirement benefits after disbursement to the beneficiary, these payments are still exempt from collection to the extent provided by state law.[183] Almost every state exemption statute includes a provision covering retirement plans. In some states, these exemptions are limited to funds held in trust for the debtor by a retirement plan.[184] Many states, however, including California, Florida, and Texas, exempt from collection *both* funds held in trust and payments distributed to the plan participant,[185] and the trend in recent years has been to adopt these broader exemptions.[186]

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[181] *United States v Smith* , 47 F3d 681, 682-84 (4th Cir. 1995) (§ 1056(d)(1) bars alienation of post-retirement annuity benefits after distribution to the beneficiary).

[182] See *Hoult v. Hoult*, 373 F3d 47 (1st Cir. 2004); *Wright v. Riveland*, 219 F.3d 905, 919-21 (9th Cir. 2000); *Robbins v. DeBuono*, 218 F.3d 197, 203 (2d Cir. 2000); *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 39 F.3d 1078, 1081-83 (10th Cir. 1994) (en banc); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54-56 (3d Cir. 1994). As the Court of Appeals in *Guidry* pointed out, Congress has expressly provided that Social Security and veterans' benefits are exempt from collection even after payment to the beneficiary. See 42 U.S.C. § 407(a) (Social Security "moneys paid or payable" may not be attached or garnished); 38 U.S.C. § 5301(a) (veterans' benefits "shall not be liable to attachment ... either before or after receipt by the beneficiary.")

[183] *Guidry*, 39 F.3d at 1083.

[184] See, e.g., NY CPLR sec. 5205(c) (McKinney 1998) (exempting from satisfaction of a money judgment all property held in a trust created by a person other than the judgment debtor); NJ State Ann sec. 25:2-1 (West 1998) (exempting qualifying trusts from claims of creditors).

[185] See Cal. Civ. Proc. Code sec. 704.115(b),(d); *Bergman v. Bergman* , 888 S.W.2d 580, 582 (Tex. Ct. App. 1994).

ERISA applies to many types of tax-preferred retirement plans, but does not encompass IRAs and Keogh plans.[187] Most states (including California, Florida, Illinois, Michigan, New York, and Texas), however, exempt 100% of monies held in retirement plans, defined broadly to include IRAs and Keogh plans.[188] Moreover, the same state statutes that forbid post-payment garnishment of retirement benefits usually apply to both ERISA and non-ERISA plans. Thus, outside bankruptcy, funds in both ERISA and non-ERISA plans are sheltered from collection before payment to the beneficiary, and frequently sheltered from collection even after payment is made.

Let's now consider the treatment of retirement savings in bankruptcy, first under the 1978 Code, and then under BAPCPA. Code Section 541(c)(2) entitles a debtor to *exclude* from the bankruptcy estate any interest in a trust that contains a transfer restriction enforceable under "applicable nonbankruptcy law." In *Patterson v. Shumate*,[189] the Supreme Court held that ERISA's anti-alienation provision qualified as "applicable nonbankruptcy law,"

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[186] For example, prior to 1991 Connecticut law exempted payments from a retirement plan, but only to the same extent as wages (that is, 75%). Since 1991, Connecticut law has exempted all payments from a retirement plan. See CGSA 52-352(b)(m).

[187] Exemptions for IRAs have become increasingly common in recent years, while IRAs have become extremely popular. According to one recent estimate, as of 2005 Americans held $3.5 trillion in IRAs, and assets held in IRAs are increasing on average 13% a year. Kelly Greene, *How Retirees Are Blowing Their Nest Eggs,* WSJ R1, at R3 (June 27, 2005) (quoting an estimate by the Investment Company Institute, a mutual-fund industry group). Some 45 million households (or 40% of the total) now have at least one IRA, and the median value of a traditional IRA account (of which there are 37 million) is $24,000. Id.

[188] Source: Brown, Ahern, & Maclean, Bankruptcy Exemption Manual App. C. A handful of states limit these exemptions "to the extent reasonably necessary for support;" another handful have dollar caps on the exemption, ranging from $500,000 (Nevada) to an annual income of $17,500 (Virginia); and a few states appear to have no exemption.

[189] 504 US 753 (1992).

and therefore excluded funds held in an ERISA-qualified plan from the bankruptcy estate. Because assets that are excluded from the bankruptcy estate are not available for distribution to creditors, this exclusion is functionally equivalent to an exemption.

The bankruptcy treatment of retirement accounts not covered by ERISA, such as IRAs and Keoghs, is more complex, but almost as debtor-friendly. If, as is now the case in many jurisdictions, state law provides that IRAs and Keoghs are exempt from collection, that exemption (like any other) will apply in bankruptcy.[190] Alternatively, if applicable state law restricts the debtor's ability to transfer retirement funds, those funds will be excluded from the bankruptcy estate by Section 541(c)(2).[191] Finally, in the small minority of states that have not opted out of the federal bankruptcy exemptions, debtors may use Code Section 522(d)(10(e), which exempts the debtor's right to receive "a payment" under a retirement plan, but only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[192]

BAPCPA has further expanded the protection of retirement funds in bankruptcy under federal law, by amending section 522 to provide for a preemptive federal retirement-fund exemption that applies even in opt-out states. New Section 522(b)(3)(C) exempts "retirement funds to the extent that those funds are in a fund or account that is exempt

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[190] See, e.g., *In re Watson*, 192 B.R. 238 (Bkrtcy.D.Nev.1996); *In re Ritter*, 190 B.R. 323 (Bkrtcy.N.D.Ill.1995).

[191] See *In re Yuhas*, 104 F.3d 612, 616 (3d Cir.1997); *In re Meehan*, 102 F.3d 1209, 1211 (11th Cir.1997).

[192] The Supreme Court recently held that this provision applies to IRAs. *Rousey v. Jacoway*, No. 03-1407 (Apr. 4, 2005).

from taxation" under the Internal Revenue Code. This exemption includes *every* major type of tax-qualified retirement fund: defined benefit and defined contribution plans, annuity plans, IRAs and Roth IRAs, Keoghs, etc.[193] The *only* limitation on the protection of tax-qualified funds in bankruptcy is an inflation-adjusted $1 million cap on IRAs.[194] Thus, under the post-BAPCPA Code, unintentional tortfeasors can completely shield their retirement assets until they receive a discharge in bankruptcy. Intentional tortfeasors who file for bankruptcy will not be able to discharge their tort liabilities, but they will be able to shield their retirement assets in bankruptcy. Once intentional torfeasors begin actually receiving benefits, those payments will nominally be subject to collection. But as we have seen, in many states retirement benefit payments remain exempt from collection even after they are distributed to the beneficiary.

E. Bankruptcy (or the Threat of Bankruptcy) as a Torts-Evasion Strategy

From 1978 to 2005, federal bankruptcy law made it easier than ever before for tortfeasors to use bankruptcy to avoid tort liability. To some extent, the enactment of BAPCPA will increase the costs and reduce the benefits of bankruptcy – although it remains to be seen how these changes play out in practice. We will first examine the key torts-avoidance strategies under the 1978 Code, which have indirectly shaped the culture and practices of the torts system for almost thirty years. We will then consider the likely impact of the 2005 reform legislation.

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[193] See William Houston Brown and Lawrence Ahern III, Bankruptcy Reform Legislation with Analysis 50, available in Westlaw BAPCA database.

[194] New Code section 522(n).

The Treatment of Exempt Property in Bankruptcy

As explained in Part I, the Code gave debtors a choice between filing under Chapter 7 (a "liquidation" bankruptcy) and filing under Chapter 13 (a "payment plan" bankruptcy). Both routes share a fundamental tilt against tort judgment creditors: bankruptcy law gives full effect to state property exemption laws. Consequently, whether they elect Chapter 7 or Chapter 13, unintentional and intentional tortfeasors can expect to keep their exempt property. Under the Code, therefore, choosing bankruptcy almost never makes a tortfeasor worse off.

Chapter 7: Discharge for Anyone Who Applies

Against this backdrop, let's look now at how Chapter 7 makes debtors *better off*. The automatic stay stops collection efforts in their tracks, and the attendant delay gives tortfeasors additional leverage. More importantly, a Chapter 7 discharge extinguishes unintentional tort judgments insofar as they are not satisfied from- the bankruptcy estate. For working tortfeasors, therefore, the biggest attraction of Chapter 7 is that it protects the 25% of their paychecks that would otherwise be garnishable in most states.[195]

One might think, however, that tortfeasors with incomes high enough to pay most of their debts would not be eligible for Chapter 7 in the first place. Unfortunately for tort victims,

[195] This protection attaches even before discharge, because the debtor's post-petition income is not part of the bankruptcy estate that is available to satisfy creditors' claims. [cite]

under the 1978 Code *any individual* – regardless of solvency, income, or ability to repay – was eligible for Chapter 7 discharge, provided he or she gave up all non-exempt assets.[196] Consequently, except for non-dischargeable intentional torts, a Chapter 7 discharge was available to tortfeasors even if their income would enable them to pay a tort judgment without hardship. To be sure, some tort victims were still able to extract token settlements, because Chapter 7 bankruptcy imposes costs on tortfeasor-debtors. But filing fees and attorney's fees have long been modest (usually no more than a total of $2000),[197] and the credit-related costs of bankruptcy have clearly fallen over the past thirty years.[198] Under the 1978 Code, then, unintentional tortfeasors with few non-exempt assets faced virtually no threat of liability.

For unintentional tortfeasors who *do* have significant non-exempt assets, the bankruptcy picture has been more complicated. The greater a debtor's non-exempt assets, the higher the cost of obtaining a Chapter 7 discharge. On the other hand, insofar as higher levels of non-exempt assets are correlated with higher incomes subject to garnishment, the gains from bankruptcy will also be greater. Consequently, Chapter 7 has often been advantageous even for tortfeasors with substantial non-exempt assets, provided they also had relatively high incomes. Tort victims can expect to recover something in such cases – but considerably less than if discharge were not available.

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[196] See Elements of Bankruptcy 8. See also Michelle J. White, *Why Don't More Households File for Bankruptcy?,* 14 J.L. ECON. & ORG. 205 (1998) (estimating that at least 15% of households would gain from filing for bankruptcy).

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[198] Indeed, we now have an entire sub-branch of the credit industry that specializes in loans to persons who have been through bankruptcy. See WSJ page 1 story 11/5/04.

The Narrow Non-Dischargeable Torts Exclusion

We have seen that Chapter 7 is a powerful torts-evasion tool for many tortfeasors. It is now time for a closer look at the exclusion of certain tort claims from dischargeability. Section 523(a)(6) excludes claims for "willful and malicious injury" by the debtor to the person or property of another.[199] Depending on how it is interpreted, this provision could exclude both intentional and some unintentional torts from Chapter 7 discharge. Until recently, the lower federal courts were split over whether this language requires an act *intended* to cause injury, or merely an intentional act that *results* in injury.[200] In *Kawaauhau v. Geiger,*[201] the Supreme Court unanimously ruled that only torts done with actual intent to cause injury are nondischargeable under the "willful and malicious injury" exception.[202] As a matter of statutory interpretation, the Court's decision seems clearly right. As the opinion pointed out, the broader reading adopted by some lower courts would mean that a traffic accident caused by deliberately making a left turn, or a

[199] Sec. 523(a)(6). Chapter 7 also contains several other exclusions from discharge: section 523(a)(2) prevents discharge of debts incurred by fraud, false pretenses, or misrepresentation; section 523(a)(4) excludes claims arising from defalcation in a fiduciary capacity, or from embezzlement or larceny; and section 523(a)(9) (added in 1984), excludes claims for wrongful death or personal injury from driving while intoxicated. These exclusions, while important in particular cases, are quite narrow in scope.

[200] *Perkins v. Scharffe*, 817 F2d 392, 393 (6th Cir. 1987).

[201] 523 U.S. 57 (1998).

[202] 523 US at 61. It should be noted, however, that *Kawaauhau* leaves open an important question: suppose a tortfeasor intends to injure the victim, but that a greater-than-foreseen injury results? The ordinary tort rule is that an intentional tortfeasor is liable for the unforeseeable consequences of his or her intentional wrongs. See, e.g., *Vosburg v. Putney* , . Because there is language in *Kawaauhau* roughly equating "willful and malicious injury" with an "intentional tort," 523 US at 61, one might predict that the Court will resolve this question in favor of tort victims.

knowing breach of contract, constitute "willful and malicious" injuries.[203] The Court's interpretation is also supported by the House and Senate Reports on the 1978 Code, which explain that "'willful' means deliberate or intentional," and assert that section 523(a)(6) overrules lower court cases that "apply a 'reckless disregard' standard."[204] But although the statute may be clear, the appropriateness of the statutory policy is not.[205]

The "Abuse of Bankruptcy" Debate

Having lost the non-dischargeability battle over unintentional torts, tort victims turned instead to the "abuse of bankruptcy" argument. The core idea was simple: that it is an abuse of the bankruptcy fresh start for a tortfeasor with substantial disposable income to seek a Chapter 7 discharge for the primary purpose of evading a tort judgment. The harder question, however, is whether there is any reliable statutory basis in the Code for this argument.

The first potential vehicle is Code Section 707(b) – added in 1984 at the behest of the credit card industry -- which authorizes the bankruptcy court to dismiss a petition without granting discharge in cases of "substantial abuse."[206] Numerous courts have found "substantial abuse" in situations in which a debtor could without undue hardship repay

[203] 523 U.S. at 62.

[204] H.R.Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5963, 6320-21; S.Rep. No. 989, 95th Cong., 1st Sess. 79, *reprinted in id.* at 5865.

[205] See infra Part IV.

[206] 11 U.S.C. § 707(b)(1) (2000). "Substantial abuse" has been replaced with "abuse" in the Code as amended by BAPCPA. 11 U.S.C.A. § 707(b)(1).

creditors a large part of the debts that Chapter 7 would discharge.[207] Unfortunately, 707(b) also provides that the "substantial abuse" test applies only to cases in which the debtor's liabilities are "primarily consumer debts."[208] The Code, in turn, defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose."[209] The few courts to rule on the issue have held that tort judgments are not consumer debts, and therefore that 707(b) does not help tort judgment creditors.[210] Section 707(b) thus stands as a striking example of the political impotence of tort victims as compared to consumer lenders.[211]

Excluded from section 707(b)'s protection, tort judgment creditors turned instead to Section 707(a), which provides that the court may dismiss a bankruptcy petition "for cause," and enumerates three situations that constitute "cause": (1) unreasonable delay by the debtor that is prejudicial to creditors, (2) failure to pay required fees, and (3) failure to file schedules of debts and assets within the required time.[212] Although each of

[207] For example, in *In re Vesnesky*, 115 BR 843 (Bankr. W.D. Pa. 1990), two school-teachers with a combined income of $57,000-plus (in 1988), sought bankruptcy to escape about $35,000 in unsecured debts. The court found that allowing discharge would constitute a "substantial abuse" because the debtors could have paid off all or most of these debts from their salaries merely by modestly reducing their monthly expenses. Id. at 848-49.

[208] 11 U.S.C. § 707(b)(1) (2000).

[209] 11 U.S.C. § 101(8).

[210] See *In re Marshalek*, 158 B.R. 704, 707 (Bankr. N.D. Ohio 1993) (holding that tort liability arising from a vehicular accident was not a "consumer debt," and therefore that the debtor's petition was not subject to dismissal under § 707(b); *In re White,* 49 B.R. 869 (Bankr.W.D.N.C.1985) (same).

[211] This is not to claim that § 707(b) was a big victory for creditors. David Skeel notes that consumer bankruptcy advocates viewed the 1984 amendments as "a major success," not only because they defeated a stronger means-testing proposal, but also because the "substantial abuse" standard does not significantly constrain the discretion of bankruptcy judges. David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 196 (2001).

[212] 11 USC sec. 707(a).

these enumerated "cause[s]" for dismissal is procedural, some courts have held that section 707(a) also authorizes dismissal for "cause" of any petition filed in "bad faith" – and that a debtor's ability to pay, combined with other indicia of unfairness to creditors, can establish bad faith.[213] Other courts have interpreted "cause" more narrowly.[214] The weight of authority appears to be that dismissal for bad faith is appropriate in "egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."[215] This test provides tort victims with protection against the worst abuses, but may not reach cases in which the debtor does not conceal assets or manipulate income, yet invokes Chapter 7 for the purpose of sheltering disposable income that could be used to satisfy a tort judgment.[216]

As a matter of policy, it seems absurd that debtors should be denied Chapter 7 protection if they can repay large "consumer debts" without undue strain, yet afforded Chapter 7 protection although they could easily pay at least part of a tort judgment. As a matter of

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[213] See, e.g., *Cassell v. Kurily*, 1999 U.S. Dist. Lexis 13349 (dismissing the Chapter 7 petition of a surgeon who was able to pay the malpractice judgment against him, had no other major debts, was continuing to pay his other creditors, and stipulated that his sole reason for filing was to avoid the judgment).

[214] *In re Huckfeldt* , 39 F3d 829, 831 (8th Cir. 1994) (holding that "cause" should be "limited to extreme misconduct falling outside the purview of more specific Code provisions, such as using bankruptcy as a "scorched earth" tactic against a diligent creditor, or using bankruptcy as a refuge from another court's jurisdiction"). The Ninth Circuit has construed section 707(a) even more narrowly, holding that bad faith per se cannot constitute "cause" to dismiss a Chapter 7 bankruptcy petition. *In re Padilla*, 222 F3d 1184 (9th Cir. 2000).

[215] *In re Zick,* 931 F.2d 1124, 1128 (6th Cir.1991).

[216] See, e.g., *In re Keobapha* , 279 BR 49 (Bankr. D. Conn. 2002) (allowing discharge to a debtor with modest disposable income whose sole debt was a large wrongful death claim).

statutory interpretation, however, it is unclear who has the better of the argument.[217] The case law suggests that the judiciary has more sympathy than Congress for the predicament of tort victims whose tortfeasors file for bankruptcy.[218] But despite this boost from judges, Chapter 7 has been a nightmare for victims of unintentional torts, because ability to pay a tort judgment, without more, does not bar discharge.

Super-discharge in Chapter 13

For another important category of tortfeasors, however, Chapter 7 is not nearly as attractive. Intentional tortfeasors cannot discharge their tort debts in Chapter 7 (though they may be able to shed other unsecured debts). Enter the other route to bankruptcy discharge: Chapter 13, which requires at least three years of planned payments to creditors, but which, under the 1978 Code, also offered the notorious "superdischarge." A debtor who completed payments under a Chapter 13 plan received a discharge that encompassed claims for willful or malicious injury and money or property obtained by fraud.[219]

Interestingly, although the Code leaves no doubt that debtors can obtain a Chapter 13 discharge of willful and malicious torts, several courts have invoked Chapter 13's

[217] See Katie Thein Kimlinger & William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors,* 13 Bankr.Dev. J. 61 (1996).

[218] Of course, bankruptcy judges also have self-interested reasons to interpret the Code as giving them discretion to deny discharge on grounds of bad faith or the like. Discretion is one form of power, and power is part of judges' non-pecuniary compensation.

[219] Crandall et al. at 17-69.

requirement that each debtor file a plan in "good faith" to limit the ability of intentional tortfeasors to obtain discharge.[220] A debtor whose primary debt is a tort judgment that would be non-dischargeable under Chapter 7, and whose Chapter 13 plan proposes to make only minimal repayments, is likely to fail this "good faith" requirement.[221] Here again, the courts softened the harsh treatment meted out to tort victims by the pro-debtor 1978 Congress. Nevertheless, under the 1978 Code, many intentional tortfeasors were able to obtain a discharge under Chapter 13.

Combining Bankruptcy and Asset Protection Strategies

Strategies such as trusts and asset transfers are designed to protect existing *wealth* (and the passive income thereon) from creditors. Bankruptcy, by contrast, is a strategy that works best to protect the debtor's future *earned income* stream from pre-bankruptcy debts. But these strategies are not mutually exclusive. Potential tortfeasors can use asset protection to make their wealth harder for plaintiff's lawyers to reach, while holding in reserve the threat of bankruptcy should the plaintiff sue. Exemption-maximizing is a particularly popular technique. By shifting assets from non-exempt to exempt categories, the tortfeasor lowers the plaintiff's expected gain from litigation both in and outside

[220] See, e.g., *In re Lemaire* 898 F2d 1346, 1349 (8th Cir. 1990) (en banc) (holding that in determining good faith, "factors such as the type of debt sought to be discharged and whether the debt is nondischargeable in Chapter 7 . . . are particularly relevant."). But see *Matter of Smith,* 848 F2d 813, 819 (7th Cir. 1988) (the Code requires only that the Chapter 13 plan be " '*proposed* in good faith'..., not that the debt was *incurred* in good faith") (emphasis supplied).

[221] See, e.g., *In re Mattson,* 241 B.R. 629. 634 (Bankr. D. Minn. 1999); *In re Tornheim,* 239 B.R. 677, 688-87 (E.D.N.Y.1999); *In re Ramji,* 166 B.R. 288, 290 (Bankr.S.D.Texas 1993).

bankruptcy. (The homestead exemption is the most widely used vehicle for this purpose.)

One might argue that fraudulent conveyance law should block these strategies, at least if the debtor is insolvent when the assets are converted to exempt types.[222] Most courts, however, hold that it is not fraudulent for "an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt, for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors."[223] This rule does not apply if there is "extrinsic evidence of fraud," such as misleading or deceiving creditors about the debtor's position.[224] But the mere conversion of assets from non-exempt to exempt categories is not a fraudulent conveyance, even if done for the sole purpose of defeating collection.

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[222] Many of the disputes concerning conversion of assets from non-exempt to exempt types of property arise in the context of bankruptcy. Section 727(a)(2) of the Code provides that the bankruptcy court shall deny discharge if, within one year of filing the petition, the debtor transfers property "with intent to hinder, delay, or defraud a creditor." Whether discharge should be denied on this ground is a question of federal law. However, the prior question of whether the exemption is available under state law is controlled by state law in opt-out states. *In re Crater*, 286 BR 756, 763 (Bankr. D. Ariz. 2002). See, e.g., *Sholden v. Dietz,* 217 F.3d 1006 (8th Cir. 2000) (holding that a conveyance would be treated as fraudulent, and hence outside the homestead exemption, under Minnesota law); *Havoco of America, Ltd. v. Hill,* 197 F.3d 1135, 1144 (11th Cir.1999) (certifying to the Florida Supreme Court the question whether the Florida Constitution exempts a homestead, where the debtor acquired the homestead using nonexempt funds with the specific intent of hindering, delaying or defrauding creditors).

[223] *Forsberg v. Security State Bank*, 15 F.2d 499, 501 (8th Cir. 1926). The legislative history of the 1978 Code endorses this rule: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." H.R.Rep. No. 595, 95th Cong., 1st Sess. 361 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5963, 6317; S.Rep. No. 989, 95th Cong., 2d Sess. 76, *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5862.

[224] *In re Johnson*, 880 F.2d 78, 82 (8th Cir. 1989).

The recent bankruptcy decision in *In re Crater*[225] exemplifies this strategy. After being sued, the Craters sold their principal non-exempt asset -- $40,000 in stock -- and used the proceeds to pay down a second mortgage on their home, thereby increasing their exempt equity under Arizona's $100,000 homestead exemption from $25,000 to $65,000. They then filed for bankruptcy in Chapter 7. The bankruptcy court rejected the plaintiff's fraudulent transfer claim and granted discharge, reasoning that the Craters were permissibly attempting to maximize the value of exempt property by timing the payment of a valid debt.[226]

When tortfeasors relocate to unlimited-exemption states, the results of exemption-maximizing can be especially dramatic. For instance, in *Havoco of America v. Hill* Havoco won a $15 million tort judgment against Hill.[227] Two days before the judgment became enforceable, Hill – a long-time resident of Tennessee – paid $650,000 in cash for a home in Destin, Florida. The Florida Supreme Court held that, under the express terms of the Florida Constitution, "the use of the homestead exemption to shield assets from the claims of creditors is not conduct sufficient in and of itself to forfeit the exemption,"[228] even if the debtor acts with the specific intent to defraud creditors.[229]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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[225] *In re Crater*, 286 BR 756, 763 (Bankr. D. Ariz. 2002).

[226] Id.

[227] *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018, 1019 (Fla. 2001).

[228] 790 So. 2d at 1028.

[229] 790 So 2d at 1030. See also *Conseco Services, LLC v Cuneo*, 2005 WL 545011 (Fla App 3d Dist 2005).

We have just taken a whirlwind tour of the highly pro-debtor (and hence, highly pro-tortfeasor) provisions of the Bankruptcy Code of 1978. This year, with the enactment of BAPCPA, the pendulum swung back somewhat in favor of tort victims and other creditors. As we will see, however, even after BAPCPA many of the bankruptcy-related obstacles to collecting tort judgments are as formidable as ever.

i. The Means Test

From the standpoint of tort victims, one might think the most important feature of BAPCPA is its controversial requirement that debtors whose income is greater than the state median income pass a means test in order to qualify for discharge under Chapter 7. Under the means test, the debtor is usually ineligible for Chapter 7 if the debtor's disposable income, after taxes and payments on secured and priority debts, is greater than $100/month.[230] Debtors with income in excess of that level must choose between dismissal of their petition, or being shifted to a five-year repayment plan in Chapter 13.[231]

If it applied to all individual debtors, this means test would significantly alter the balance of power between many tortfeasors and their victims. High-income tortfeasors with few non-exempt assets – persons for whom Chapter 7 has been

[230] See 11 U.S.C.A. § 707(b)(2)(A)(i) (the court shall presume abuse if the debtor's monthly disposable income "multiplied by 60 is not less than the lesser of--**(I)** 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or **(II)** $10,000").

[231] 11 U.S.C.A. § 707(b)(1) (2005). Moreover, the criteria for determining disposable income are much less generous to debtors than under prior law, which defined disposable income as income "which is not reasonably necessary" to "the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2)(A) (2000).

ideal -- would be forced to use Chapter 13 or forgo bankruptcy.[232] Under Chapter 13, the tort victim would share with other creditors in the tortfeasor's disposable income for five years – and the CCPA limits on garnishment do not apply to Chapter 13 plans.[233] Tort victims would no longer face the threat that a high-earning unintentional tortfeasor could reduce their recovery to a pittance by filing under Chapter 7.

Regrettably, however, BAPCPA's means test does not apply to all individual debtors. Instead, Congress grafted the means test onto section 707(b) – the abuse of bankruptcy provision we have already encountered – while retaining that section's proviso that it applies exclusively to "a case filed by an individual debtor under this chapter whose debts are primarily consumer debts."[234] Nor does BAPCPA alter the Code's definition of "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." In light of the pre-BAPCPA case law holding that tort judgments are not "consumer debt," it will be difficult for tort victims to argue that BAPCPA's means test applies to tortfeasors whose debt consists principally of one or more

[232] Of course, most debtors who file for bankruptcy are below the median income level for their state. Only "[s]ome 3.5 percent of creditors who filed for Chapter 7 would be forced to shift their case to a Chapter 13 filing based on the new income standards imposed by the bill, according to a 1998 study sponsored by the American Bankruptcy Institute, a research group." Riva Atlas & Eric Dash, *Bracing for a Bankruptcy Rush*, N.Y. Times, Mar. 11, 2005, at C1.

[233] The CCPA's limits on garnishment are expressly inapplicable to Chapter 13 bankruptcies. 15 U.S.C.A. § 1673(b)(1)(B). States apparently remain free, however, to create state exemptions that track the CCPA and *do* apply in bankruptcy. See *In re Jones*, 318 BR 841, 847 (Bankr. S.D. Ohio 2005) (holding that Ohio exemption law incorporates the CCPA limits and makes them applicable in bankruptcy).

[234] 11 U.S.C.A. § 707(b)(1) (2005).

tort judgments.[235] Once again, then, Congress appears to have excluded tort victims from the protections against bankruptcy abuse enjoyed by more politically potent groups such as credit card lenders.

To be sure, the exclusion is not total. BAPCPA's means test will force high-income tortfeasors who have more consumer debt than tort liability into Chapter 13,[236] thereby increasing some tort victims' recoveries. But although BAPCPA's selective elimination of Chapter-7-on-demand helps some tort victims, the vast majority still face the same old Chapter 7 threat. As already noted, high-income tortfeasors with more tort liability than consumer debt may freely choose Chapter 7. In addition, all tortfeasors with incomes below their state's median retain the right to elect Chapter 7 without means testing. In all likelihood, there are many more unintentional tortfeasors below the median

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[235] Still, there is some room for argument. In light of the statutory definition of consumer debts as debts "incurred . . . primarily for a personal, family, or household purpose," the courts have distinguished between consumer debts and business debts incurred for the purpose of making a profit. See, e.g., In re Stewart, 175 F.3d 796, 808 (10th Cir. 1999) (distinguishing consumer debt from "non-consumer debt" "incurred with a 'profit motive'"). If that distinction were applied to tort judgments, the purpose of the activity in which the tortfeasor was engaged would presumably be decisive. For example, a tortfeasor who negligently injured someone while driving to the store for groceries would thereby "incur" a consumer debt, whereas if the tortfeasor were an employee who drove negligently while on the job, the resulting tort liability would be non-consumer debt. The sparse case law on point rejects this argument on the ground that the Code's reference to consumer debt as "incurred" for a consumer "purpose" implies that consumer debt is by definition *voluntary* debt *purposely* acquired – hence excluding tort liability, which is imposed involuntarily by operation of law. See *In re Marshalek*, 158 B.R. at 707 (arguing that, to qualify as consumer debt, the indebtedness "must necessarily be voluntarily "incurred" by the debtor for the purposes specified in § 101(8)"); *In re White,* 49 B.R. at 872 ("to be a consumer debt within the meaning of § 101(7) the liability must have been acquired first and foremost to achieve a personal aim or objective"). Perhaps this reasoning is correct, but extending the purpose-oriented approach seems a plausible alternative.

[236] Courts have interpreted the "primarily consumer debts" requirement to mean that more than half of the debtor's scheduled debts are consumer debts. See, e.g., In re Stewart, 175 F.3d at 808 (defining "'primarily' in the context of § 707(b) as meaning consumer debt exceeding fifty percent of the total debt"); In re Kelly, 841 F.2d 908, 913 (9th Cir. 1988) (same). For purposes of this calculation, both secured and unsecured debts are included. See In re Price, 353 F.3d 1135, 1139 (9th Cir. 2005) (holding that consumer debt includes "all secured debt incurred for personal, family, or household purposes"). For example, a tortfeasor who listed a $100,000 tort judgment, a $100,000 mortgage and some credit card debt would have "primarily consumer debts."

than above it. Even if not, it appears that under BAPCPA only the tortfeasor's income – and not that of the tortfeasor's spouse – counts for purposes of applying the means test.[237] Obviously, far fewer than half of individual workers have incomes at the *household* median for the state in which they reside. Moreover, Social Security benefits are excluded from BAPCPA's definition of income – meaning that the elderly will be able to elect Chapter 7 unless their private income alone exceeds the state household median.[238] The bottom line, then, is that BAPCPA's expanded abuse-of-bankruptcy provisions will help only a small minority of tort victims.

ii. Restrictions on Homestead Exemptions

BAPCPA also places new limits on the use of property exemptions in bankruptcy. In order to elect a state's exemptions, a debtor must have lived in that state for two years prior to the bankruptcy.[239] In addition, regardless of the level of state exemptions, a debtor may not exempt more than $125,000 in equity in a homestead acquired within 1,215 days (about 3 1/3 years) of filing for bankruptcy.[240] And, to the extent the homestead was obtained through

[237] William Houston Brown & Lawrence Ahern III, 2005 Bankruptcy Reform Legislation with Analysis 25 (2005).

[238] 11 U.S.C.A. § 101(10A).

[239] Section 522(b)(3)(A).

[240] 2005 Code Section 522(p).

fraudulent conversion of nonexempt assets during the 10-year period before the filing, the exemption is reduced by the amount attributed to the fraud.[241]

These provisions will certainly deter tortfeasors from moving to exemption-rich states like Florida and Texas shortly before filing for bankruptcy. Some tortfeasors, however, may move in anticipation of litigation. If the plaintiff goes forward with the suit, the tortfeasor can litigate, confident in the knowledge that most tort cases take several years to go to trial. By that time, BAPCPA's restrictions on homestead exemptions will no longer apply to the tortfeasor's Texas or Florida residence.

As for the fraudulent conversion provision, it seems highly unlikely that Congress meant to declare all conversion of non-exempt to exempt assets fraudulent if it occurred within ten years of filing for bankruptcy. Indeed, the new Code requires that the conversion of non-exempt property be made "with the intent to hinder, delay, or defraud a creditor," which suggests that merely converting assets from non-exempt to exempt is not enough.[242] If this analysis is correct, the provision probably does little more than restate the extrinsic-fraud test most courts currently use to police exemption-maximization.[243]

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241 2005 Code Section 522(o).

242 2005 Code Section 522(o).

243 See Charles J. Tabb, Top Twenty Issues in the History of Consumer Bankruptcy, Univ. of Illinois Law School Working Paper No. 48 (Nov. 1, 2005), at 9, available online at law.bepress.com/uiuclwps/papers/art48 (stating that BAPCPA § 522(0) "does not elaborate as to what constitutes 'intent to hinder, delay or defraud,' so presumably the old case law will remain relevant").

iii. Narrowing the Chapter 13 Super-Discharge

The new legislation also cuts back significantly on the scope of the Chapter 13 discharge. Most torts that are non-dischargeable under Chapter 7, including drunk driving and willful or malicious personal injuries, will now be non-dischargeable under Chapter 13 as well.[244] Criminal restitution awards are also made nondischargeable.[245]

These provisions obviously help tort victims, who previously faced a significant risk that even intentional tortfeasors could obtain a discharge under Chapter 13 with only modest payments. But BAPCPA does nothing about the greater barriers to intentional-tort collection posed by state exemption laws – which continue to apply with full force in bankruptcy. Indeed, as we have already seen, BAPCPA actually worsens the exemption picture by creating a sweeping new federal bankruptcy exemption for all tax-qualified retirement funds.

iv. Avoidance of Fraudulent Transfers to Self-Settled Trusts

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[244] 2005 Code Section 1328(a).

[245] Id. For discussion of the importance of criminal restitution as a partial substitute for intentional tort liability, see infra at --.

The final important change in the Code is new §548(e), which allows a trustee in bankruptcy to avoid the debtor's transfer of an interest in property made within 10 years of the filing if the debtor made the transfer to a self-settled trust or similar device for the debtor's benefit and with actual intent to hinder, delay, or defraud any creditor. Because it requires actual intent to defraud, this provision actually seems less stringent than existing state fraudulent conveyance law. It seems unlikely, therefore, that it will stop potential tortfeasors from using self-settled trusts in conjunction with bankruptcy.[246]

Overall, BAPCPA amounts to a grudging and partial retreat from the 1978 Code's harsh treatment of tort victims. Had Congress seen fit to apply BAPCPA's Chapter 7 means test to cases involving primarily *tort* debts, rather than solely to cases involving primarily *consumer* debts, BAPCPA would have been a milestone in lowering the barriers to collecting tort judgments. Instead, BAPCPA represents only a modest step in that direction.[247] As I will argue in Part IV, far more remains to be done.

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[246] Congress rejected a proposal by Senator Charles Schumer, Democrat of New York, to limit the exemption of asset protection trusts. Stephen Labaton, Bankruptcy Bill Set for Passage, NYT A1 (3/9/05). Schumer's amendment would have allowed the trustee to avoid *any* transfer to a trust within 10 years in excess of $125,000 if the debtor was the beneficiary of the transfer.

[247] In addition to the substantive changes discussed in text, it should be noted that BAPCPA made a series of procedural changes (ranging from requiring pre-bankruptcy credit counseling, 11 U.S.C.A. § 109(h)(1), to requiring additional paperwork such as tax returns, 11 U.S.C.A. § 521(e)(2)(A)(I)) that will substantially increase the costs of *every* bankruptcy filing. See Charles J. Tabb, Consumer Bankruptcy after the Fall: United States Law under S. 256, Univ. of Illinois Law School Working Paper No. 47, at 27-28 (Nov. 1, 2005), available online at law.bepress.com/uiuclwps/papers/art47 (describing the various "entry barriers" to bankruptcy created by BAPCPA). Any increase in the costs of filing for bankruptcy should translate into an increase in the settlement value of tort claims against tortfeasors for whom bankruptcy is an option.

F. Who Isn't Judgment-Proof?

The list of legal barriers to enforcing tort claims and collecting tort judgments is a long one:

(a) exemptions from collection, especially for earnings, homesteads and retirement funds;

(b) procedural limits on post-judgment remedies, which make it impracticable to collect personal property (including liquid assets such as cash).

(c) the rule against prejudgment attachment in tort cases;

(d) bankruptcy stay and discharge;

(e) limits on fraudulent conveyance law;

(f) the rule enforcing spendthrift trust provisions; and

(g) the absence of legal prohibitions on the establishment of offshore asset protection trusts by American citizens.

The cumulative impact of these legal rules is very great.[248] Even in our affluent society, these legal rules enable most individuals, at every income level, to escape – or at least deeply discount -- the threat of tort liability.

For low-income and working-class Americans, the combination of restrictions on garnishments, exemptions from collection, and low-cost Chapter 7 bankruptcy all but

[248] Interestingly, the great majority of these legal rules are of statutory rather than common law origin. This is consistent with the pattern we saw in bankruptcy law, in which Congress seems less protective of creditors, and in particular of tort victims, than the bankruptcy courts are. Pro-debtor populism seems far more powerful than pro-tort victim populism.

eliminates negligence claims. When it comes to intentional torts, the third leg of this stool – Chapter 7 discharge – is missing, but restrictions on garnishment and exemptions from collection still apply.

Middle-class people are also heavily judgment-proof. After taking into account both exemptions and the ability to file for bankruptcy, middle-class, unintentional tortfeasors often are left with minimal collectible assets. Nevertheless, many middle-class households have significant non-exempt assets, and the residual threat of tort liability may make it worthwhile for them to purchase moderate amounts of liability insurance. In addition, because intentional torts have long been difficult to discharge in bankruptcy (and under BAPCPA will be per se non-dischargeable), fear of personal liability for intentional torts may still have considerable deterrent impact on middle-class individuals.

The wealthy, for whom exemptions and bankruptcy are least likely to result in minimal collectible assets, have the option of using trusts and other devices to shelter virtually all of their income and assets from tort liability – including liability for intentional torts. For some risks, liability insurance may be a low-cost alternative to the expenses of maintaining shelters. But the explosive growth of asset protection planning suggests that wealthy individuals are increasingly convinced that liability insurance does not provide sufficiently complete protection,[249] and/or is more expensive than sheltering wealth.[250]

[249] Wealthy individuals who are eager to avoid the non-pecuniary costs of being sued (lost time, invasion of privacy, etc.) may also be reluctant to purchase large amounts of liability insurance. As Kent Syverud puts it, "liability insurance promotes liability," by increasing the risk that the insured will be sued. Syverud, supra, 72 Tex. L. Rev. at 1633.

[250] See Gretchen Morgenson, *Loophole draws fire in bankruptcy debate; U.S. revision would let rich protect assets*, Int'l Herald Tribune 20 (Mar. 4, 2005) (suggesting that asset protection trusts have become

III. Liability Insurance and the Judgment-Proof Problem

In Our Judgment-Proof Society, Why Buy Liability Insurance?

The evidence presented in Part II suggests that most Americans don't have very much to fear from tort liability, and that those who do can engage in advance planning (or purchase modest amounts of liability insurance) to minimize their exposure. Despite Professor LoPucki's fears of corporate judgment-proofing, corporations pay roughly $100 billion per year for liability insurance to protect their corporate assets. But why do *individual* Americans spend tens of billions per year on personal-lines liability insurance? Why not just go bare and rely on the barriers to collection and/or asset protection planning? As we will see, the answer to this question turns out to be a bit complicated.

To be sure, one part of the answer is straightforward: some types of coverage, such as automobile liability insurance, are mandated by law in most states. Yet legal mandates cannot explain why most individuals purchase as much liability insurance as they do. The statutory minimums for auto liability insurance are startlingly low: as of 2004, forty-six states required coverage of $25,000 per person/$50,000 per occurrence *or less*, and forty-eight states had not increased their minimums since 1996.[251] Moreover, there was

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increasingly popular in recent years among physicians and corporate executives worried about new legal liabilities).

[251] As of 1996, 4 states required 10/20, 1 state 12.5/25, 8 states 15/30, 11 states 20/40, 24 states 25/50, 1 state 30/60, and 1 state 50/100. O'Connell, Carroll, Horowitz, Abrahamse, & Jamieson, *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 Md L Rev 160, 214 (1996). As of 2005, the numbers were 4 states 10/20, 1 state 12.5/25, 7 states 15/30, 10 states 20/40, 24 states 25/50, 2 states 30/60, and 2 states 50/100. http://info.insure.com/auto/minimum.html (updated Nov. 2004).

a robust market for auto liability insurance long before mandatory liability insurance laws took hold in the 1970s.[252]

The remaining puzzle, then, is why so many Americans voluntarily purchase liability insurance (or higher policy limits than are required by law). One explanation is simply that many people buy liability insurance out of a sense of responsibility to compensate those they accidentally and wrongfully injure. Casual empiricism suggests that, while this moral sentiment is an important motivation for some people, it carries little or no weight with others.

Another, more universally applicable explanation can be found in the fact that the legal barriers to collecting a tort judgment make most Americans largely – *but not entirely* – judgment-proof. Absent liability insurance, a middle-class individual with $50,000 in annual income, and $25,000 in non-exempt assets would still face significant exposure to tort liability: pay roughly $1000/month in garnishment, or declare bankruptcy and lose the non-exempt assets.[253] By purchasing, say, $100,000 in automobile liability insurance and $100,000 in personal liability insurance (as part of homeowners' coverage), the

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In forty-six of the states, these minimums were mandated by law. In the other four states (New Hampshire, South Carolina, Virginia, and Wisconsin) the "minimums" were optional. See id.

[252] See Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 Conn. Ins. LJ 521, 527 (1998) (more than $250 million in auto liability insurance premiums was written as early as 1929); Alma Cohen & Rajiv Dehejia, The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities, 47 J.L. & Econ. 357, 362 Table 1 (2004) (listing only three states with compulsory auto liability insurance laws as of 1969, and twenty states that adopted such laws during the 1970s). As of 2004, forty-six states mandated the purchase of auto liability insurance. Id.

[253] This assumes that the household's non-exempt assets cannot be converted into exempt assets, as would be true if the household has already used up its exemptions.

insured individual can greatly reduce exposure to this risk. Only in the unlikely event that the insured tortiously caused personal injuries in excess of these policy limits would the insured's personal assets be exposed.

If auto and homeowners' liability insurance were as expensive as medical malpractice insurance, few Americans would follow this strategy. In fact, however, these types of liability insurance are relatively inexpensive. Moreover, the marginal cost of liability insurance falls as higher levels of coverage are purchased, because the probability of a large loss is smaller.[254] In the auto insurance market, for example, it is inexpensive to purchase several times more than the mandatory minimum, and insurers market the additional coverage fairly aggressively to middle-class insureds. Insurance agents typically recommend that homeowner-insureds purchase substantially more than the minimum auto liability coverage – and many do.[255]

We can conclude, therefore, that the discounted but not *de minimis* risk of personal tort liability furnishes one reason for middle-class and affluent individuals to purchase liability insurance. A second reason is supplied by the insurer's duty to defend the

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[254] The legal-defense component of liability insurance (which may account for more than one-third of its cost) is also front-loaded: although it costs more on average to defend a $500,000 claim than a $50,000 claim, it ordinarily doesn't cost ten times as much. See Jeff Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. Tex. L. Rev. 421, 462 (2001) (legal defense costs represent about 35% of legal malpractice liability costs).

[255] As of 1991, thirty-four percent of all drivers bought $100,000 or more in liability insurance. See Stephen J. Carroll, Allan Abrahamse & Mary Vaiana, No-Fault Approaches to Compensating People Injured in Automobile Accidents 100-05 (1991).

insured on all claims for which there is even arguably coverage.[256] In effect, the duty to defend creates pre-paid legal defense insurance for the insured.[257] With liability insurance, middle-class individuals need fear neither the risk of having to incur out-of-pocket legal defense fees nor the risk of personal liability.

Nevertheless, it may be rational for some homeowners to purchase only the mandatory minimum auto insurance, and to decline personal liability coverage. Rational – but difficult to do. In the eyes of many insurance agents, an auto insurance customer who owns a home but insists on buying only the mandatory minimum exhibits an irresponsible attitude that may make the agent unwilling to write the policy. Nonetheless, a determined homeowner can doubtless find a carrier willing to write the mandatory minimum auto coverage.

Doing without personal liability insurance, by contrast, is exceedingly difficult for any homeowner-insured. Since 1955, homeowners' insurers have sold personal liability insurance as part of a bundle that also includes property and casualty – and the two components cannot be purchased separately.[258] And of course, mortgage lenders require

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[256] See Robert H. Jerry, II, Understanding Insurance Law 857 (3d ed. 2002) (duty to defend arises if there is any possibility of recovery). This rule enables plaintiff's lawyers to bring the liability insurer into many intentional tort cases by "underpleading," that is, framing the complaint in terms of negligence. In turn, the defense attorney, although paid by the insurer, must defend the client – the insured – and that frequently means cooperating with the plaintiff's attorney in shaping the case as involving negligence. See Tom Baker, Six Ways, at --. Of course, underpleading may be costly to plaintiffs as well. Consider a case in which the insured has minimum auto liability insurance, the plaintiff underpleads, and the plaintiff wins a judgment in excess of the policy limits. The excess judgment is dischargeable in bankruptcy, whereas, if the plaintiff had litigated (and won) the case as an intentional tort, the judgment would be non-dischargeable.

[257] Id. at 856 (describing liability insurance as "litigation insurance").

[258] S.S. Huebner, Kenneth Black, Jr., and Robert S. Cline, Property and Liability Insurance 433-34 (1982).

mortgagors to maintain homeowners' insurance. Persons who own their homes free and clear can elect to go bare, but few homeowners are prepared to shoulder the property and casualty risks that strategy would entail.[259] Personal liability insurance of at least $100,000-$200,000 is therefore *de facto* mandatory in the United States. As with auto insurance, additional layers of personal liability protection are inexpensive, and many affluent individuals purchase "umbrella" policies of $1,000,000 or more.

In sum, the residual threat of tort liability,[260] plus the institutional practices of lenders and liability insurers, encourage most middle-class and affluent individuals to purchase more than token amounts of liability insurance. But how much is "enough" – and how does "enough to protect myself" compare to "enough to compensate those I might wrong"? I have not yet unearthed good data on how much liability insurance the average or median consumer purchases (though it seems clear that underinsured drivers are common at all income levels). Fortunately, a remarkable, path-breaking study of personal injury lawyers by Professor Tom Baker sheds considerable light on these questions. As we will now see, Baker's study suggests that individuals should buy enough liability insurance to satisfy the professional expectations of plaintiff's lawyers as to what is "adequate," and that those expectations are largely a function of the individual's wealth and the perceived riskiness of his or her activities.

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[259] The percentage of people who own their homes without any mortgage debt declined from 38.9% to 34.6% between 1997 and 2003, according to Census figures. David Streitfeld, *Equity is Altering Spending Habits and View of Debt,* L.A. Times Aug. 28, 2005 (available online at http://www.latimes.com/business).

[260] Purchasing liability insurance may also reduce the risk of criminal prosecution, for several reasons. The victim may be less insistent on punishment if the victim is compensated. The victim want to underplead in the civil case, a strategy that would be undermined by establishing criminal liability if the relevant mens rea involves more than negligence. And the victim will have less incentive to seek criminal restitution if adequate compensation is available on the civil side. See infra at --.

Baker's "Blood Money" Study

Baker set out to study the dynamics of personal injury litigation against underinsured tortfeasors by interviewing personal injury and insurance defense lawers in Connecticut. Because so many tortfeasors lack adequate insurance, Baker began his interviews with Connecticut tort lawyers expecting that "a significant part of the personal injury universe would be financed by 'real money' from 'real people;' that is, out-of-pocket payments by uninsured or underinsured individual defendants."[261] But most of the lawyers told Baker that they pursue "blood money" – money paid out of defendants' own pockets -- infrequently, reluctantly, and only from intentional tortfeasors or grossly underinsured defendants.[262] (Baker was able, however, to identify some dissenters who refused to follow this "union rule.")[263]

According to Baker, whereas "[b]argaining for insurance money takes place very much in the shadow of law . . . bargaining for blood money turns more on common-sense morality and practicality." [264] Plaintiffs and plaintiff's lawyers are morally uncomfortable taking people's houses and other personal assets. Nevertheless, Baker finds that "plaintiffs' legal right to exact blood money retains an important role in the tort settlement process. In combination with a strong role against paying blood money in a negligence case, the

[261] *Blood Money*, at 276.

[262] Id. at 281-82.

[263] Id. at 286-89.

[264] Id. at 276.

plaintiffs' legal claim to blood money motivates all the repeat players in the litigation process to arrive at a settlement within the liability insurance limits."[265]

Baker's analysis is nuanced and perceptive, and he presents convincing evidence that moral sentiments (particularly those of plaintiffs) support the norm against seeking blood money.[266] In my view, however, Baker overestimates the role of morality – and underestimates the extent to which bargaining over blood money (like bargaining over insurance money) takes place "in the shadow of law."[267] In large part, plaintiff's lawyers are reluctant to pursue blood money because of the serious legal barriers to collecting it.[268] Ultimately, whatever their moral beliefs may be, the self-interest of plaintiff's attorneys appears sufficient to explain the professional norm to which most of them subscribe.

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[265] Id. at 277.

[266] See, e.g., id. at 284 (respondent asserted that "most often a plaintiff doesn't want to take the money out of the defendant," and will settle for the available insurance money). See also id. at 285 (respondent stated, "I've rarely seen anybody that just stands on principle and says, you know, "I think I should get so much money. I don't care how much insurance you have.'")

[267] Baker acknowledges that his "respondents also stressed the practical problems in collecting money from real people." Id. at 289. But he seems to place greater weight on moral considerations. Similarly, whereas Baker stresses that the moral aversion to blood money creates pressure on insurers to settle within the policy limits, I would emphasize that insurers know they face greater potential liability (for breach of their duty to settle) if they refuse to settle and an excess judgment results. By definition, that risk is omnipresent in the under-insurance cases on which Baker focuses.

[268] Baker also underestimates the prevalence of the judgment-proof problem. He infers from the pervasiveness of consumer credit, and from the existence of collection agencies for consumer credit, that most tort defendants are not judgment-proof. See id. at 276, 294. But the question is not whether defendants could be "forced to pay *something*." Id. at 294. It is whether they could be forced to pay *enough* to justify the considerable costs of getting a judgment and then collecting a portion of it, in the teeth of exemptions from collection and the threat of bankruptcy.

Consider these statements by some of Baker's interviewees. One attorney said he would advise a client who is intent on pursuing a defendant's personal assets "this is not about vengeance . . . in order to take someone's house, you know, the legal hurdles you'd have to jump over are very significant."[269] A second lawyer, who felt that "dipping into someone's everyday bread" contravened "the moral order,"[270] also pointed out that "[i]t is easier to collect from an insurance company than it is to go against the individual and try to garnish wages, foreclose on a home, as well as other things that most people aren't interested in doing, whereas the insurance companies, they're like a bank."[271] A third adroitly explained how, if his client pursued a large judgment against an elementary school teacher with only $100,000 in coverage, the defendant would file for bankruptcy – in which event, "he's going to keep his house, he's going to keep his car, and he's going to keep, under the statute, $15,000. You can't tap into his IRA, if he has one, his 401K if he's got one . . . So what advantage is there for he client to do that?"[272]

It appears, then, that most plaintiffs' lawyers avoid blood-money cases because they are far more expensive and difficult to litigate.[273] This creates a "niche" that can profitably be exploited by the minority of lawyers who are willing and able to pursue blood money

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[269] Id. at 282.

[270] Id. at 285.

[271] Id. at 285.

[272] Id. at 289. This lawyer also stressed that whereas insurance-money cases tend to settle, blood-money claims are much more likely to go to trial, and hence involve far greater delay in obtaining compensation for the tort victim. Id.

[273] The "union rule" against pursuing blood money also advances the reputational interests of the plaintiff's bar in not being perceived as ruthless or greedy. Indeed, one defense lawyer described the attitude of the few lawyers who pursue blood money as "the hell with the bar association, *the hell with our image*, the hell with ethics, the hell with anything." (emphasis added). Id. at 287.

recoveries in ordinary negligence cases.[274] But because most plaintiffs are uninterested in blood money, and because collecting blood money is often uneconomical, that niche is a small one.

If correct, this analysis suggests that unintentional tortfeasors have little reason to fear personal tort liability – *provided they have adequate liability insurance*. How much is "adequate"? According to Baker, "[t]he minimum is whatever it takes to claim, credibly, that you have satisfied your moral obligation to insure." [275] The first determinant of this "moral obligation" turns out to be the defendant's assets: "Wealthy people have an obligation to purchase insurance in larger amounts."[276] The second determinant appears to be the magnitude of the harm done to the plaintiff: the greater the damages, the higher the threshold for adequate insurance.[277] Morality aside, these are precisely the factors that will determine whether pursuing a blood-money recovery is rational for the plaintiff and the plaintiff's attorney. The plaintiff's attorney, in particular (and ignoring ethical constraints), is better off settling within the policy limits unless the increased costs of trial and collection are lower than the lesser of (1) the plaintiff's attorney's percentage of the

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[274] See id. at 286 (noting that some lawyers are known for being willing to go after blood money).

[275] Id. at 296-297. Interestingly, the plaintiff's lawyers who refuse to follow the customary norm of avoiding blood money in ordinary negligence cases appear to use a different measure of adequacy – enough insurance to cover the damage done. See id. at 287 (quoting a lawyer who argued that the underinsured defendant has "done two things wrong. They caused the injury, number one. And, number two, they didn't have themselves adequately insured").

[276] Id. at 297.

[277] See id. at 297-98 (discussing physicians who were grossly underinsured compared to the foreseeable risks associated with their specialty).

excess judgment or (2) the plaintiff' attorney's percentage of the defendant's collectible assets.[278]

The other exception to the professional norm against pursuing blood money involves the highly culpable tortfeasor – e.g., drunk drivers and batterers.[279] Almost all of the cases in this category are non-dischargeable tort claims – which makes collecting blood money easier because it removes the threat of bankruptcy.[280] At the same time, these are also the situations in which plaintiffs are most likely to *want* blood money. As one lawyer put it, for these plaintiffs "[t]he coverage just doesn't cut it because it is not coming out of the person's pocket."[281] Even in such cases, however, plaintiffs' lawyers may encourage their clients to settle within the policy limits because, as a defense lawyer explained, "the last thing they want to see is an uncollectable judgment."[282]

The evidence Baker presents, then, suggests that individuals with significant non-exempt assets will benefit from purchasing amounts of liability coverage that are roughly

[278] Under some contingent fee agreements, the interests of plaintiffs and their attorneys will diverge, because the attorney bears most of the costs of going to trial (and of post-judgment collection).

[279] The defendants in many of these cases are judgment-proof, and consequently only a small percentage of them are litigated. Indeed, while a recent study of California civil trials found that roughly 5% of all cases involved "unlawful force", the defendants in these cases were far more likely to be governments or businesses than individuals. See 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). This data suggests that vicarious liability is the dominant theory of recovery in unlawful force cases.

[280] Many of these cases also involve intentional harms that are technically excluded from coverage under most liability insurance policies. Nevertheless, the insurer may well offer to settle, to avoid the costs of providing a defense and the possibility that the plaintiff will "underplead" (that is, litigate the case as a negligence claim). See Ellen Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 Tex 1721 (1997).

[281] *Blood Money*, at 300.

[282] *Blood Money* , at 300.

proportionate to their non-exempt assets.[283] A tortfeasor with a good income and some non-exempt assets faces a real – though discounted -- threat of personal liability for, say, a $100,000 auto accident covered only by a $20,000 policy. The plaintiff's attorney may advise the plaintiff to settle for the policy limit. But there is also a chance that the plaintiff's attorney will treat this as a case of grossly inadequate insurance, and hence outside the "union rule." By purchasing a moderate rather than minimal policy limit, the individual can greatly reduce the risk of blood-money liability. Given that individuals are likely to be quite risk-averse when it comes to the risk of a large personal tort liability, then, it is rational for many people to purchase proportionate amounts of liability insurance.

Marketing and Information-Cost Factors

Information-cost problems also may be a factor in creating demand for liability insurance. Many people do not understand the extent to which their assets are already protected by exemptions, the bankruptcy option, and the other legal barriers to collection. Liability insurers ignore or downplay these other methods of asset protection, in order to increase the demand for their product.[284] They market liability insurance as essentially another type of *casualty* insurance: 'Even if you were not at fault, you might still be sued if an accident happens – and your home and income could be at risk. A six-figure (or

[283] Cf. Syverud, supra, 72 Tex. L. Rev. at 1638 (arguing that risk-averse potential defendants "should buy at least the average amount of liability insurance" purchased by similarly-situated persons).
[284] See Syverud, supra, 72 Tex. at 1644 ("many insurers are anxious to encourage current customers to increase their liability policy limits, thus increasing the premium income from a line of insurance and a set of insureds with which the underwriters are already most familiar").

seven-figure) personal liability policy will ensure that your assets are safe.'[285] This type of sales pitch is reinforced by the ongoing and highly publicized charges – often made by insurers – that the tort system is "out of control."[286]

Moreover, individuals are in a poor position to quantify the risks of tort liability or discount them properly in light of the legal barriers to tort recovery. Governments do not advertise those barriers to the general public. The information is readily available, but only for those who take the time to look for it. Nor do plaintiff's lawyers publicize the fact that they will not pursue blood money except from intentional tortfeasors or grossly underinsured defendants. These informational considerations make middle-class individuals an "easy sell" for liability insurance, provided its cost is not exorbitant.[287]

Disaggregating The Uninsured-or-Underinsured Problem

Now that we have examined the reasons why individuals purchase as much liability insurance as they currently do, we are in a position to draw some additional conclusions about the nature and magnitude of the judgment-proof problem. Intentional torts aside, the judgment-proof problem would be of no practical importance if every potential

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[285] See, e.g., the advertisements for personal umbrella protection at www.chaseagency.com/umbrellaFAQ.htm, and http://finance.americanexpress.com/sif/cda/page/0,1641,15030,00.asp.

[286] See generally Stephen Daniels and Joanne Martin, *The Impact that It Has Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiff's Lawyer's*, 50 Depaul L. Rev. 453 (2000).

[287] The costs and benefits of liability insurance may be different for wealthy individuals, to whom the non-pecuniary costs of litigation may matter more than legal defense costs. Some rich individuals may prefer to go bare precisely on the grounds that the combination of zero insurance and customized asset-protection planning is the best way to deter plaintiff's lawyers from suing them at all.

tortfeasor carried unlimited amounts of personal liability insurance. Thus, we can also think of the judgment-proof problem as "the uninsured-or-underinsured problem." Viewed from that perspective, the key questions are which torts are likely to be underinsured and who is likely to commit torts while underinsured. Obviously there are uninsured and underinsured tortfeasors at every level of age, income and wealth. Clearly, however, some demographic groups are more likely than others to commit unintentional torts, and to be underinsured for the whatever torts they do commit.

Consider, for example, the two-thirds of households that are homeowners. The fact that the liability insurance component of homeowners' insurance is inexpensive is strong evidence that – except when they are driving -- homeowners simply do not commit very many serious unintentional torts. Conversely, as we have already seen, homeowners are *de facto* required to buy liability insurance on the order of $100,000. The implication is that homeowners will normally have liability insurance sufficient to cover most non-driving-related unintentional torts they might commit. Thus, although there is certainly an underinsured-tortfeasor problem with regard to serious accidents of the kinds covered by homeowners liability insurance, that problem is comparatively modest in scope.

Contrast the situation of renters, who are, on average, significantly younger than homeowners and have far lower net worth. Like intentional wrongdoing, negligence is presumably negatively correlated with age and wealth in most settings. One would therefore expect renters' insurance to be more expensive. At the same time, renters face a far smaller residual threat of tort liability, because they are less likely to have significant collectible assets. Nor is there any gatekeeper to pressure renters to purchase personal liability insurance. Unsurprisingly, therefore, most renters do not purchase personal liability insurance (other than auto insurance). It seems clear, therefore, that the underinsured-tortfeasor problem is far more serious among renters: they probably commit more unintentional torts per capita, and they unquestionably have far less insurance to cover them.

When it comes to automobile liability insurance, a similar pattern appears. There is clearly some correlation between levels of income and wealth and levels of liability insurance purchased. Poor and working-class people are more likely either to be uninsured or to have purchased the statutory minimum. As income increases, voluntary purchases of liability insurance in excess of the minimum become increasingly frequent (and increasingly large).[288] At the same time, negligence rates probably diminish.

In sum, persons with few assets and modest incomes are probably responsible for a disproportionately high share of the uninsured-or-underinsured torts that occur with such regularity in our society. In turn, that suggests that the most important part of the judgment-proof problem is income-sheltering, not asset-sheltering. People who have significant assets are less likely to commit torts in the first place. When they do, as I will argue in Part IV, their personal assets should be at risk absent adequate liability insurance. But from the standpoint of deterrence, income-sheltering matters more,

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[288] See Rachel Emma Silverman, *Insurers Offer New Policies for the Wealthy,* WSJ D1 (Oct. 27, 2005) ("as individuals' net worths increase, so does their demand for excess liability coverage").

because it alone affects the incentives of persons who have income, but few collectible assets and little or no liability insurance.

IV. Reducing The Judgment-Proof Problem: Arguments and Objections

We have now seen that the judgment-proof problem pervades our tort system, and that this situation is largely attributable to legal rules that hamper the collection of judgments. To partisans of the tort system, it may seem self-evident that these barriers to enforcing tort liability should be lowered or eliminated. On reflection, however, this turns out to be a closer question than might first appear. The existing barriers unquestionably subvert the deterrence, corrective justice, and compensation functions of the tort system. But the efficacy and efficiency of the tort system is open to doubt, and pro-debtor policies supposedly advance social goals outside the purview of the tort system. It is conceivable, therefore, that the barriers to enforcing tort liability are socially beneficial despite their detrimental impact on the tort system.

Nevertheless, I will argue in this Part that a convincing case can be made for reforms designed to increase tortfeasors' exposure to personal tort liability. I will then lay out in more detail the principal ways in which barrier-lowering might proceed, and briefly evaluate their pros and cons. Then, in Part V, I will consider an alternative way to reduce the judgment-proof problem: by mandating the purchase of adequate liability insurance in as many contexts as possible.

The Deterrence Argument for Lowering the Barriers to Enforcing Personal Tort Liability

This subsection will evaluate the argument that lowering the barriers to enforcing tort liability would greatly improve the tort system's ability to deter tortious conduct. Before taking up that question, however, it is worth noting that the obstacles to judgment-collection may be unduly high for *both* tort and contract claimants. The American discharge in bankruptcy is virtually unique in the world,[289] and American exemption laws also appear to be exceptionally generous.[290] These supposedly pro-debtor policies harm most debtors – those who do not default or file for bankruptcy – by driving up the cost of borrowing.[291] On the other hand, America's liberal bankruptcy and exemption laws have long been defended as encouraging risk-taking by individuals and firms, and ensuring that the human capital of those who run into financial difficulties will be re-deployed after a "fresh start."[292] Perhaps these benefits outweigh the higher costs of borrowing caused by generous discharge and exemption provisions.

But even if the legal barriers to enforcing contract claims are justifiable, the extension of these barriers to tort claims is highly problematic. Unlike contract claimants, tort victims

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[289] See Skeel, Debt's Dominion, supra, at 238.

[290] ~~[cite?]~~ See, e.g, Paul B. Lewis, *Can't Pay Your Debts Mate? A Comparison of the Australian and American Personal Bankruptcy Systems*, 18 Bankr. Dev. J. 297, 324-25 (2002) (describing the very limited exemptions available under Australian law).

[291] Of course, the same policies benefit debtors by supplying a form of insurance against the consequences of default. But that insurance is, to put it mildly, a better bargain for some debtors than for others.

[292] See David A. Moss, When All Else Fails: Government as the Ultimate Risk Manager 138-50 (2002).

are involuntary creditors. Contract creditors can choose the parties with whom they deal, avoid dealing with persons they perceive to be bad credit risks, and adjust other terms of their contracts (such as interest rates) in response to pro-debtor legal rules. The parallel forms of protection for potential tort victims are far less robust. In many contexts, such as auto accidents, tort victims and tortfeasors are strangers, so that bargaining is impossible; and no one has control over who else is on the road at any given time and place.[293] Even in contractual settings, such as medical malpractice, potential tort victims face severe informational problems in choosing among possible contracting parties based on their reputations for safety. And potential tort victims are almost never in a position to shift the costs of pro-tortfeasor legal rules back onto tortfeasors. Thus, the powerful private-law mechanisms that limit the undesirable effects of pro-debtor policies in the contract setting are weak or nonexistent in the tort setting. As a result, there is reason to fear that pro-debtor policies, when applied to tort claims, will produce more personal injuries and less compensation than is optimal.[294]

Although we cannot measure the reduction on deterrence attributable to the barriers to enforcing tort liability, we can get a sense for its magnitude by imagining what would happen were those barriers eliminated. Consider first the situation of potential intentional

[293] Potential tort victims can take precautions to protect themselves against accidents. But by the same token contracting parties can take precautions to protect themselves from the consequences of breach. And in any event, tort victims who fail to take such precautions are already penalized by the doctrine of comparative fault, which reduces or eliminates a negligent plaintiff's recovery.

[294] Unlike tort victims, who can purchase first-party accident, health, disability, and life insurance, creditors cannot purchase insurance against the business risk of default. But the difference in insurability is attributable to the fact that tort victims' lack of control makes their losses accidental, whereas creditors' far greater control over their lending practices makes insurance unworkable. See LoPucki, *The Death of Liabilty*, 106 Yale LJ at 72-75 (describing the limits of liability insurance).

tortfeasors. Absent barriers to collection, both the probability that these individuals would suffer the loss of personal assets were they to commit an intentional tort, and the magnitude of their expected losses, would greatly increase (on average). Moreover, these individuals would not be able to avoid the increased threat of liability by purchasing insurance, because liability insurers refuse to cover intentional torts for reasons of moral hazard.[295] (Indeed, some states would treat such insurance as against public policy even if insurers offered it.)[296]

It seems axiomatic that this greater risk of uninsurable personal liability would deter some potential tortfeasors from committing intentional torts. What is harder to predict is the magnitude of this deterrent effect. Because intentional tortfeasors must affirmatively choose to harm their victims, we might expect many of them to be deterred by the prospect of losing their core assets. On the other hand, because many intentional torts also constitute crimes, one might expect the marginal deterrence attributable to this additional threat of tort liability to be relatively small. A person who is willing to risk prison time for, say, aggravated battery might not be deterred by the risk of prison time plus the loss of some personal assets. To further complicate matters, the criminal justice system has in recent years made increasing use of criminal restitution awards that require convicted criminals to compensate their victims' pecuniary losses.[297] Unlike tort

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[295] See Understanding Insurance, at 479. For reasons to be explored later, in practice an insured with liability coverage for unintentional torts may, as a practical matter, be protected against liability for some intentional torts. See infra at --.

[296] Id. at 479 ("public policy forbids contracts indemnifying a person against loss resulting from his own willful wrongdoing").

[297] See infra at --.

judgments, these criminal restitution awards trump exemptions from collection in many jurisdictions.[298] It seems even less likely that a potential intentional tortfeasor who is not deterred by the threat of prison plus the threat of criminal restitution would be deterred by an increased threat of tort liability for non-pecuniary harm and/or punitive damages.

But this analysis is incomplete. Some intentional torts do not constitute crimes, and many intentional torts that do constitute crimes are never prosecuted due to limited government resources, problems of proof, or other grounds for the exercise of prosecutorial discretion. Lowering the barriers to enforcing tort judgments would significantly increase the probability that crime-tortfeasors will face at least one substantial sanction. There is good reason to think that this increase in the probability of suffering a sanction will generate increased deterrence.[299] No doubt many individuals, deficient in self-control or foresight, would still commit intentional torts.[300] But that simply illustrates the familiar proposition that deterrence gains at the margins can coexist with subpopulations that remain undeterred.

Let's now evaluate the deterrence gains with regard to potential unintentional tortfeasors. Because uninsured and underinsured individuals would face a much greater threat of tort liability, we would expect them to commit fewer unintentional torts.[301] Again, however,

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[298] See infra at --.

[299] [insert cite to deterrence literature].

[300] Actors who are judgment-proof in fact, of course, would not be deterred by the threat of tort liability even if there were no barriers to collection.

[301] Moreover, lowering the barriers to collection is likely to weaken the professional norm against collecting blood money from unintentional tortfeasors. To the extent that this norm is attributable to the

the key question is the magnitude of this effect. For simplicity, I will ignore the smaller (but still important) overlap between the criminal justice and unintentional-tort systems, in order to focus on the important objection that tort liability is poorly suited to deterring negligence by individuals.[302] The argument is that, unlike repeat players such as product manufacturers and health-care providers,[303] most individuals are, for several reasons, not much influenced by the threat of tort liability.[304] In the biggest category of serious personal injury cases – auto accidents – individuals already face the powerful threat of death or bodily injury should they cause a collision. Many negligent accidents are caused by inadvertent behavior that individuals cannot readily modify, and about which they do not engage in cost-benefit planning. Most unintentional torts are low-probability events that may simply not be on most individuals' "radar screens." Each of these factors reduces the deterrent impact of unintentional tort liability on individuals. Taken together, they suggest that the benefits of tort litigation against individuals are decisively lower than the benefits of tort litigation against organizations and other repeat players.

Although each of these points has some validity, they do not add up to a convincing refutation of the deterrence benefits of individual tort liability. Negligent drivers

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difficulty of collecting blood money, making collection easier should lead more lawyers to pursue the personal assets of uninsured or underinsured defendants. In turn, that will reinforce the new incentives for individuals to buy adequate liability insurance. Alternatively, to the extent that the professional norm is attributable to attorneys' moral sentiments, those sentiments are likely to reflect broader societal attitudes. Were legislatures to decide that enforcing tort liability is more important than shielding tortfeasors' personal assets, the moral sentiments of many personal injury lawyers would presumably follow suit.

302 See generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L Rev 377 (1994).

303 See James A. Henderson, Jr., Richard N. Pearson, & John A. Siliciano, The Torts Process 96-97 (6th ed. 2003) (arguing that institutional actors are more likely to be affected by liability-creating rules).

304 See id. at 382-83.

frequently emerge unscathed from accidents that seriously injure others. Adding a realistic threat of tort liability, therefore, will significantly increase the probability and severity of the expected penalty for negligent driving, notwithstanding that the existing penalty structure includes a risk-of-bodily-injury component. As for inadvertent behavior, much of the time inadvertence to one thing (say, the location, speed, presence, or likely behavior of another driver) is the result of *advertence* to other things (say, a cell-phone conversation). An increase in the expected sanction for negligence raises the cost of paying attention to one's own priorities in ways that unduly risk the safety of others. That should reduce the incidence of negligent inadvertence: for example, uninsured and underinsured drivers would make fewer cell-phone calls if the threat of personal tort liability were more credible.

The same example will illustrate the fallacy inherent in the argument that marginal deterrence will be negligible because individuals frequently ignore low-probability events.[305] I agree that many people do not think about tort liability (or even about risks to themselves) before electing to engage in risky behavior such as making a cell-phone call while driving. But in order for an increased threat of liability to produce improved deterrence it is not necessary that everyone be paying attention to the risk in question. It suffices that a substantial number of people do so. In deciding how safely to behave, many people take their bearings from salient information about the consequences of risky behavior. Stories linking driving while on one's cell phone to the loss of personal assets and income would surely be both well-publicized and memorable. They are the kind of

[305] In addition, this argument fails to address the fact that many torts involve risks that happen frequently enough that most individuals do not ignore them. (E.g., the risk of a collision if one runs a red light).

news that would predictably lead many individuals to cut down on their calls while driving, or to adopt the habit of avoiding them except in emergencies.

The discussion so far has focused on the how much deterrent impact an increase in the threat of personal tort liability can be expected to have. It is now time to consider the complication introduced by the availability of liability insurance for unintentional torts. There is good reason to think that barrier-lowering would trigger a large increase in voluntary purchases of liability insurance.[306] As we saw in Part III, millions of individuals voluntarily purchase substantial amounts of liability insurance, even though many of their assets are exempt from collection and their possible unintentional torts are dischargeable in bankruptcy. This behavior suggests that most individuals are quite risk-averse with regard to personal tort liability. If personal assets were fully exposed to collection, and if ordinary negligence were non-dischargeable, many people who already purchase liability insurance voluntarily would presumably be motivated to increase their coverage limits significantly. More importantly, millions of individuals who currently lack personal liability insurance (or who buy only the mandatory minimum auto liability coverage) would have much greater incentives to purchase "voluntary" liability insurance. A few hardy souls might elect to go bare and risk losing their paychecks and retirement savings. But most people would want to purchase enough liability insurance to protect these assets.

[306] We do not know the elasticity of demand for liability insurance as a function of increases in the "price" of tort liability. If the data were available, however, one might be able to approximate it by comparing how much liability insurance individuals purchase in low-exemption and high-exemption states.

Assuming this analysis is correct, the question is what impact these purchases of liability insurance would have on the increased deterrence that would (absent liability insurance) flow from the increased threat of personal tort liability. As Shavell has shown, if insurers can perfectly monitor insureds' levels of care, insurance will not interfere with optimal deterrence because insureds who take less care will pay higher premiums. [307] If, at the other extreme, insurers cannot monitor insureds' levels of care at all, insureds will have reduced incentives to take due care.[308] Thus, "whether injurers' incentives to take care will be altered for the better by their purchase of liability insurance depends on the ability of insurers to determine levels of care and to link the premium (or other policy terms) to it."[309] Although the issue deserves fuller investigation, it seems fairly clear that in most liability insurance markets, insurers can monitor insureds' levels of care to some extent, and adjust premiums accordingly.[310] By inducing individuals to buy more liability insurance, we will therefore (on average) increase the threat of premium increases should insureds negligently cause covered losses.

Monitoring by insurers, however, is both imperfect and costly. Consequently, we cannot rule out the possibility that in some contexts voluntary liability insurance, on balance, reduces incentives to take care.[311] But it reduces them *compared to a regime in which*

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[307] See Shavell, Economic Analysis of Tort Law 195-96.

[308] Id.

[309] Id. at 241.

[310] See Gary T. Schwartz, *The Ethics and The Economics of Tort Liability Insurance*, 75 Cornell L. Rev. 313, 320 (1990) (describing the prevalence of "responsive" insurance arrangements).

[311] As Shavell has also shown, however, liability insurance is likely to be socially beneficial even in such contexts. See Economic Analysis of Accident Law at 213.

liability insurance is forbidden. Because American law uniformly permits liability insurance for unintentional torts, that comparison is irrelevant. The baseline for comparison, rather, consists of individuals who are motivated to buy little or no liability insurance (because they face little or no threat of tort liability). Existing tort law obviously has weak deterrent force as applied to these persons. Eliminating the barriers to enforcing tort liability will increase deterrence by making the threat of tort liability more credible. Even if, in some contexts, voluntary purchases of liability insurance dilute this increase in deterrence, they are unlikely to eliminate it – and they certainly will not *reverse* it.

The Argument from Corrective Justice

To many torts scholars, deterring tortious behavior is a distinctly secondary purpose of tort law (if indeed it deserves to be called a purpose at all).[312] On this view, the main point of tort law is corrective justice -- righting wrongs, not preventing them.[313] As understood by many of its adherents, corrective justice is important for practical as well as moral reasons: it is good to do justice by requiring wrongdoers to make amends to their victims for the harm they have done. A tort system that reliably and consistently achieves corrective justice is a *better* tort system than one that unreliably and inconsistently does so. From this perspective, the barriers to collecting tort judgments are

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[312] See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801, 1806-08 (1997).

[313] As Gary Schwartz has noted, however, one can believe that corrective justice is valuable, but that *preventing* injustices (including tortious injuries) is also desirable. Id. at 1832.

plainly undesirable, because they insulate millions of Americans from accountability in corrective justice.

It does not follow, of course, that increasing the tort system's ability to deliver corrective justice is a goal we must pursue regardless of other considerations and consequences. But a large increase in the quantity of corrective justice supplied by the tort system should count as a major benefit of lowering the barriers to collecting tort judgments. Similarly, the related increase in the demand for liability insurance should mean that more tort victims receive more of the compensation owed to them by wrongdoers.[314]

The deterrence and corrective-justice benefits of barrier-lowering are not mutually exclusive: one can consistently maintain both that wrongs should be minimized and that as many wrongs as possible should be righted. In addition, barrier-lowering may generate indirect benefits of both types. In recent years, scholars have paid increasing attention to the expressive function of law – its ability to authoritatively declare society's values and expectations in ways that can reinforce and shape the attitudes and mores of individuals.[315] As Richard McAdams puts it, "[t]he thesis is that the law influences

[314] See Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 Cornell L Rev at 328-29. Schwartz points out that on some understandings of corrective justice it is crucial that the wrongdoer be personally responsible for compensating the victim. See id. at 332-36. On these views, liability insurance undermines corrective justice insofar as wrongdoers do *not* face higher premiums than other insureds. Id. at 332.

[315] See, e.g., Alex Geisinger, *A Belief-Change Theory of Expressive Law,* 88 Iowa L Rev 35 (2002); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

behavior independent of the sanctions it threatens to impose, that law works by what it says in addition to what it does."[316]

In these terms, the expressive meaning of current law is at cross-purposes with itself: tort law announces that tortfeasors should pay for their wrongs (or purchase liability insurance to make payments on their behalf), but exemption and bankruptcy law subvert that message at every turn. Of course, many people are unaware that tort liability is as easy to evade as this Article has shown it to be. But the large numbers of uninsured and underinsured tortfeasors suggest that a substantial fraction of the populace does not perceive tort liability as anything to worry about. And the emergence of an organized asset-protection industry is likely to mean, over time, that an increasingly large group of more affluent individuals perceives tort law as a risk to be avoided, rather than a series of norms mandating due care for the safety of others.

Conversely, were society to eliminate the barriers to enforcing tort judgments – and to publicize that fact – it would send a powerful message reinforcing the deterrent and corrective-justice goals of tort law. Individuals would in effect be told that torts are treated as serious wrongs for which personal responsibility is the norm, not the exception. Bound up with that message would be another: that each person is expected to purchase adequate liability insurance – and that failure to do so exposes one's personal assets and income to the full force of tort liability.

[316] Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1650-51 (2000).

Having established the prima facie case for barrier-lowering, we turn now to a series of possible justifications for the status quo. First up is the contention that blood-money tort litigation should be discouraged because it is unduly harmful to the welfare of tortfeasors and their innocent spouses and dependents. As applied to intentional tortfeasors, this argument is unpersuasive. Why, for example, should an intentional tortfeasor be allowed to keep 75% of his or her disposable earnings, regardless of how high they may be? The tortfeasor has intentionally wronged the victim, and in so doing typically (and often deliberately) impaired the victim's physical and emotional health. Under these circumstances, the tortfeasor's existing lifestyle should not be privileged -- particularly when that lifestyle is an affluent one.[317] Nor is there any reason to think that dollars are, in general, more valuable to tortfeasors than to their victims.[318] Often, the opposite is true.

As for intentional tortfeasors' innocent spouses and other family members, the simple rejoinder is that the victim is also innocent.[319] Beyond that, victims are just as likely to

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[317] Exemptions to tort collection (and to debt collection generally) almost always apply regardless of the tort judgment debtor's income (or wealth). Insofar as exemptions are said to be justified by the need to avoid undue hardship to debtors, this failure to consider the debtor's ability to pay seems indefensible.

[318] I am assuming that we can make useful (even if not rigorous) comparisons of interpersonal welfare or utility. Intuitively, enforcing a tort judgment by reducing the tortfeasor to destitution or starvation would be welfare-reducing at the margins. That is why I have suggested throughout that the elimination of barriers to torts collection should be qualified by some form of hardship exception.

[319] This statement requires a modest qualification: plaintiff's negligence is not a defense to most intentional torts, and consequently it is possible that the victim was somewhat at fault, yet is still entitled to recover.

have spouses and dependents as tortfeasors are: hence any amplification of welfare losses on one side is, on average, matched on the other. So long, therefore, as tortfeasors are allowed income and assets sufficient to provide their families with a decent level of basic needs such as food, clothing, shelter, transportation, and medical care, it seems appropriate to set aside the balance for the intentional tort victim.[320]

The case of the negligent tortfeasor seems closer. We are all negligent on occasion, and most of us would shudder at the thought that an inadvertent lapse could subject us to large blood-money losses -- or that a jury might erroneously find us negligent, with equally ruinous results. But there is a simple way to avoid these risks: purchase adequate liability insurance.[321] It is predictable, of course, that some tortfeasors will fail to follow this simple strategy (or will be uninsurable). It is equally predictable, however, that some tort victims will fail to obtain adequate first-party insurance (or be uninsurable).[322] Once again, there are large welfare losses on both sides, rather than a pattern of one-sided welfare losses favoring tortfeasors. Consequently, the deterrence and corrective justice benefits of enforcing tort liability should carry the day.

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[320] The same logic applies to alimony and child support. The fact that the tortfeasor's dependents are not living with the tortfeasor doesn't give them a greater claim to support vis-à-vis a tort victim than if they were part of the tortfeasor's intact family.

[321] See Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 Cornell L. Rev. at 325 (discussing the use of liability insurance to avoid the risk of mistaken findings of negligence).

[322] Increasing personal exposure to tort liability will have a bigger (socially beneficial) effect on potential tortfeasors' purchases of liability insurance than the (socially detrimental) effect of reducing potential victims' purchases of first-party insurance. The latter effect should be small, because first-party coverage provides protection against a broad range of risks, of which tortiously caused injuries are only a small part.

The following thought experiment lends additional support to the proposition that the existing barriers to collection are too high as applied to tort claims. Imagine that tortfeasors could not obtain a discharge in bankruptcy or invoke exemptions from collection. Instead, upon entry of judgment, the trial judge would hold a hearing to determine how much of the judgment, and from what assets, the underinsured tortfeasor should be directed to pay. In so ruling, the court would take into account the goals of deterrence and corrective justice, along with the impact of the award on the well-being of each of the parties and their dependents. The court, in other words, would decide how much of each tortfeasor's income and assets should be exempt, after considering all the relevant legal policies and welfare implications.

Under this regime, it seems intuitively obvious that judges would require defendants to pay significantly more, on average, than they do under existing law. Surely, for example, judges would require many underinsured tortfeasors to turn over portions of their retirement funds, forfeit more than 25% of their disposable income, or lose all or most of their home equity. Of course, in some instances judges would award *less* than current law allows. (For example, a court might hesitate to garnish 25% of the earnings of a low-income worker supporting a large family). But on balance this system should substantially increase payments to tort victims. Imagine that tortfeasors and tort victims were permitted to choose between this hypothetical system and the real one. In most jurisdictions, it seems clear that tortfeasors would generally prefer existing law, while tort victims would prefer the new regime.[323] In the real world, of course, this hypothetical system would be plagued by high administrative costs.[324] But if indeed judges in an individualized system would exempt a substantially smaller percentage of tortfeasors' assets and income than current law protects, we may infer that social welfare would be increased by cutting back on exemptions.

The Incentive Justification for Barriers to Tort Liability

The next justification for the existing barriers to tort liability asserts that the protection of debtors' assets and income via exemptions and discharge in bankruptcy pays important social dividends as applied to tort liabilities, not just contract claims. The argument is that individuals will be more willing to engage in risky (but on average beneficial) activities if given a "safety net"; that overwhelmed debtors will, in the end, be more productive if given a fresh start; and that these effects are as large in the tort setting as the contractual one.[325]

In some contexts, such as the potential tort liability of professionals and small businesspersons, concerns about discouraging beneficial activities could be important. For the most part, however, these individuals should be able to obtain an alternative "safety net" by purchasing more liability insurance. There may also be some situations in

[323] The considerable variation across states also complicates matters: tortfeasors in Texas and Florida would pay far more under this hypothetical regime, whereas their counterparts in creditor-friendly states such as Illinois and Maryland might pay only a little more.

[324] This system is also not entirely hypothetical. In many respects, it resembles current practice in criminal restitution cases, in which courts fashion restitution orders as part of criminal sentencing. See infra at --.

[325] Skeel, Debt's Dominion, at 100.

which fear of blood-money tort liability could over-deter individuals. For example, consider bodily injury inflicted by an actor in self-defense. Some individuals might do too little to defend themselves, for fear of personal tort liability if a jury concludes they behaved unreasonably (e.g., used excessive force).[326] But such situations seem atypical: most intentional torts do not stem from mere unreasonableness.

As for the "fresh start" policy, I agree that enhancing the enforceability of tort judgments should not be taken to extremes. For example, if tort victims were entitled to collect 75% of tortfeasors' earnings, some tortfeasors might drop out of the workforce, join the underground economy, or flee the United States. Of course, even under this regime, many tort victims would find it in their interest to strike less draconian bargains with tortfeasors in settlement of their claims. To the extent that the problem persisted, however, it would be prudent to reduce it through hardship exemptions. In any event, the problem should be self-limiting: whereas debtors cannot purchase insurance against the risk that they will be unable to pay their debts, most potential tortfeasors *can* purchase liability insurance.

The Counterargument from Political Popularity

In response, it might be argued that the political popularity of legal barriers to collection is strong evidence that additional personal tort liability would be socially undesirable. On this view, the high barriers to collecting tort judgments reflect the fact that most people

[326] Most courts hold that injuries wrongfully inflicted in self-defense are excluded by the standard exclusion for intentional injuries. See Understanding Insurance Law, at 490-91.

would rather be sure of keeping their core personal assets (should they become tortfeasors) than have the right to seize a tortfeasor's core personal assets (should they become victims). If these preferences are rational, then barrier-lowering would be welfare-reducing.

This argument, however, presupposes that existing law accurately reflects the preferences of the public. The fact that the general public unquestionably underestimates the extent to which assets are sheltered from tort liability by existing law suggests that this argument is mistaken. So does the public choice analysis I will present in Part VI of this article, which argues that the political process undervalues the interests of potential tort victims as compared with the interests of potential tortfeasors, debtors, contract creditors, attorneys, and liability insurers.[327]

In addition, this objection overstates the danger an exemption-free tort law would pose to most people, and understates the benefits it would confer on them. To avoid losing one's personal assets, one need only purchase adequate liability insurance (to minimize the threat of negligence liability) and refrain from committing any uninsurable intentional torts. To be sure, even a well-insured individual would still have a small chance of being held liable for a catastrophic accident that caused damages in excess of the policy limits; and, absent barriers to collection, plaintiffs would be more likely to pursue "blood money" in such cases. But even in this low-probability, worst-case scenario, plaintiffs

[327] Psychological biases may also play a role here. For example, individuals may feel they have more control over whether they become victims than over whether they accidentally injure someone. Or they may exaggerate the risk of tort liability because tort reform is a salient political issue. Thanks to Tom Baker and Neal Feigenson for help with these points.

would have strong incentives to settle within the (by hypothesis) large policy limits, (or, failing that, to settle for the policy limits plus a non-ruinous contribution from the defendant's personal assets). Moreover, as I discuss in Part V, this risk could be eliminated by legislation limiting the personal liability of highly-insured individuals.[328] Alternatively, insurance markets might well respond by offering unlimited liability policies for the affluent individuals who are most likely to be concerned about this residual risk.[329]

As for the benefits, an exemption-free tort law would materially reduce what is currently a very significant risk of suffering uncompensated bodily injury or death at the hands of a judgment-proof tortfeasor. True, one can soften that threat by purchasing first-party health, disability, and life insurance. But these are imperfect substitutes for liability insurance, because none of them includes compensation for non-pecuniary harm (i.e., pain and suffering and emotional distress). Beyond that, even those of us with good first-party insurance have a very real stake in the deterrence benefits of barrier-lowering: as potential victims, we would all prefer to escape bodily injury (let alone death) rather than to be injured and receive full tort damages. Consequently, behind the veil of ignorance, not knowing whether we will be victims or injurers, the preferred solution should be to choose a no-exemptions regime and purchase adequate liability insurance.

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[328] See infra at --.

[329] Unlimited automobile liability policies are apparently common in some European countries.

If Tort Liability is Bad, Why Create More of It?

In defense of the status quo, it might also be argued that tort litigation – or at least, more tort litigation – is on balance undesirable. The deterrence, corrective-justice, and loss-spreading benefits of tort liability are delivered via a civil litigation system plagued by high administrative, information, and error costs. Any proposal to reduce the barriers to enforcing tort liability can be seen as yet another expansion of a tort system that some critics would abolish altogether, and that others urge should be pruned back.[330]

Although I cannot undertake a global defense of the tort system, I agree with those who contend that its benefits are worth its costs.[331] But I agree with the critics that some parts of the tort system are dysfunctional, and that the system's high costs provide strong reason for caution in expanding it. As I have already argued, however, barrier-lowering would result in substantially greater deterrence of tortious conduct, rectification of more wrongs, and substantially greater purchases of liability insurance (and therefore fewer undercompensated tort victims). The question is whether these benefits would come at too great a cost. For the reasons that follow, I am inclined to think not.

First, the controversial areas of tort law generally involve businesses and professionals, rather than the private individuals whose exposure to tort liability I am arguing should be

[330] See, e.g., Stephen Sugarman, Doing Away with Personal Injury Law (1989) (urging replacement of the tort system with safety regulation and first-party insurance); Peter Huber, Liability: The Legal Revolution and Its Consequences (1988) (arguing that the expansion of tort liability in recent decades is socially harmful).

[331] See, e.g., Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law (2001).

increased. Criticism of the tort system has typically been directed at contexts in which juries are allegedly unreliable, or in which theories of liability are pressed beyond sensible limits. These contexts – from products liability to mass torts to medical malpractice – do not involve the commission of wrongs by individuals in their everyday personal lives. On the contrary, automobile accident litigation, slip and fall cases, and other individual-versus-individual tort claims are generally thought to showcase the tort system at its best. These are settings in which the experience and common sense of jurors are likely to be most reliable, and in which the doctrine bearing on liability has generally been most stable and predictable.

It is true that proponents of no-fault automobile insurance have long argued that even this branch of the tort system delivers too little in benefits to justify its costs.[332] But the available evidence suggests that no-fault proponents have underestimated tort law's deterrent impact.[333] Moreover, unlike many expansions of tort liability, which have subjected firms to liability for risks that others are better situated to avoid, barrier-lowering does not alter the doctrinal grounds for determining whether an individual is a tortfeasor. It simply ensures that the assets of individual tortfeasors will be collectible by their victims.

A different argument – one reminiscent of some concerns about medical malpractice litigation – holds that litigation in which personal assets are at stake should be restricted because it is especially costly, in both pecuniary and emotional terms, for the parties and

[332] See Jeffrey O'Connell, The Lawsuit Lottery (1979).

[333] See Schwartz, *Does Tort Law Really Deter?* , 42 UCLA L Rev at 394-95.

their lawyers.[334] The premise seems unexceptionable: individual defendants are more likely to be angry, fearful, and intransigent when their personal assets are at stake. In the context of unintentional torts, the availability of liability insurance is likely to reduce the frequency of this problem. Making blood-money litigation easier would increase both the amount of litigation and the amount of liability insurance purchased by individuals. But because much of the new negligence litigation would involve defendants who were "adequately" (even if not always "fully") insured, the increase in blood-money negligence litigation would probably be modest.

A different analysis applies to intentional torts, as to which potential tortfeasors generally cannot insure against personal liability. Removing the barriers to collection might produce an explosion in no-holds-barred litigation against intentional tortfeasors. But if that occurs, we would expect the greatly increased threat of blood-money litigation to deter large numbers of potential tortfeasors from committing intentional torts. It seems likely – though certainly not demonstrable – that these gains in deterrence would outweigh the increase in traumatic blood-money litigation.

The Criminal Restitution Alternative

It might also be argued that there is a better way to solve the judgment-proof problem: criminal restitution. Increasingly, criminal restitution awards are functioning as a

[334] See, e.g., Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks Between Patients and Providers*, 1986 LAW & CONTEMP. PROBS. 173, 176-77 (malpractice liability "imposes some costs that are uninsurable, such as harm to reputation, disruption of the physician's practice, and emotional stress caused by litigation").

substitute for tort liability in cases of serious wrongdoing. In recent years, legislatures have greatly expanded the availability – and even the nature -- of criminal restitution.[335] Traditionally, restitution was limited to cases in which the criminal profited from the crime. But the newer restitution statutes typically authorize criminal courts to order defendants to compensate their victims for the pecuniary harm they suffered, whether or not the criminal has any gain to disgorge.[336] Awards of this kind, while not encompassing compensation for pain and suffering, obviously resemble tort damages.[337]

In general, the barriers to collection of criminal restitution awards are also much lower than those that impede collection of tort judgments. Both state and federal criminal restitution awards are nondischargeable in bankruptcy,[338] and outside the scope of the automatic stay.[339] Federal restitution awards also trump most exemptions – state and federal – pursuant to the Mandatory Victims Restitution Act of 1996 ("MVRA").[340] Remarkably, the MVRA requires federal courts to order restitution in the full amount of

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[335] See Victims Committee, Criminal Justice Section, American Bar Association, Report, *Restitution for Crime Victims: A National Strategy* 2 (2004) (hereinafter "*Restitution for Crime Victims*") 4 (describing the increased availability of restitution since the 1970s).
[336] See U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 355 (hereinafter "*New Directions*") (describing use of restitution to compensate victims of violent crime for "current and future expenses related to their physical and mental health recovery").

[337] See *United States v. Bach,* 172 F3d 520, 523 (7th Cir. 1999) (Posner, J.) (arguing that "[f]unctionally, the Mandatory Victims Restitution Act is a tort statute," because "definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs").

[338] *In re Thompson*, 418 F.3d 362 (3d Cir. 2005) (holding state criminal restitution award non-dischargeable in Chapter 7 bankruptcy).

[339] See, e.g., *In re Family Vending,* 171 B.R. 907 (Bankr.N.D.Ga.1994) (holding that a state restitution proceeding was excepted from the automatic stay); *Bilzerian v. S.E.C.,* 146 B.R. 871 (Bankr.M.D.Fla.1992) (holding that the S.E.C.'s restitution action against the debtor was excepted from the stay).

[340] 18 USC § 3663A.

each victim's loss "without consideration of the economic circumstances of the defendant."[341] 18 U.S.C. § 3664(f)(1)(A). The court must draw up a schedule of restitution payments in light of the defendant's assets, projected earnings and income, and financial obligations.[342]

The Second Circuit's recent decision in *United States v. Jaffe*[343] illustrates the extraordinary trumping power of federal restitution orders under the MVRA. The Second Circuit first held that because a restitution order merely requires that the defendant pay money, rather than restraining the use of specific funds, it is not subject to the CCPA's restrictions on garnishment orders.[344] The court next rejected the defendant's claim that the restitution order was inconsistent with Florida's homestead exemption because he would be forced to sell his house to comply with it. The MVRA provides that a restitution award may be enforced against all of the defendant's property except property that is exempt from tax levy under specified sections of the Internal Revenue Code – and the enumerated sections do not exempt residences.[345] In light of this statutory mandate, the Second Circuit held that "even if compliance with a restitution order will ultimately force a defendant to sell specific assets, such a potential or even inevitable consequence

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[341] 18 U.S.C. § 3664(f)(1)(A).

[342] 18 U.S.C. § 3664(f)(2)(A)-(C).

[343] 417 F3d 259 (2d Cir. 2005).

[344] 417 F3d at 265.

[345] 417 F3d at 265-66.

does not lessen the district court's authority--indeed, obligation--to order full restitution."[346]

The enforceability of criminal restitution awards varies considerably from state to state, but in many jurisdictions is relatively favorable to crime victims.[347] In some states, criminal restitution orders are subject to the same exemptions from collection that apply to civil judgments.[348] But several states have exemption statutes that expressly provide that they do not apply to criminal restitution awards.[349] Courts in other states have held that their exemption laws do not apply to criminal restitution awards, or that defendants may be required to waive the exemption as a condition of receiving probation.[350] Perhaps most remarkably, some state courts have held that ERISA's anti-alienation provision does

[346] 417 F3d at 266. As the Second Circuit also pointed out, if the MVRA did conflict with Florida exemption law, the latter would be preempted. Id. See also *United States v. 817 N.E. 29th Drive, Wilton Manors, Florida,* 175 F.3d 1304, 1311-12 n. 14 (11th Cir.1999) (federal forfeiture law preempts the Florida homestead exemption).

[347] See *New Directions* 361 (noting that forty-one states "provide civil remedies for victims whose offenders' sentences include restitution orders," and describing some of the variations among these laws).

[348] See, e.g., Md. Code Ann. Article 27, § 807 (a judgment of restitution constitutes a money judgment in favor of the individual and may be enforced by the individual in the same manner as a money judgment in a civil action). See *Gray v Allstate Ins.*, 769 A2d 891 (Md. 2001). Not surprisingly, Florida is among these jurisdictions. In *Downing v. State*, 593 So. 2d 607, 609 (Fla. Ct. App. 1992), the court held that Florida's constitutional homestead exemption, which "does not distinguish between the civil court and the criminal court," barred enforcement of a criminal restitution order against the defendant's homestead.

[349] See, e.g., Mass. Code ch. 235 § 34A (exemption for retirement funds does not apply "in the event of the conviction of such person of a crime, [to] an order of a court requiring such person to satisfy a monetary penalty or make restitution to the victim of such crime").

[350] See *State v. Smith*, 628 P.2d 65, 67-68 (Ariz. Ct. App. 1981); *State v. Dziuba*, 435 N.W.2d 258 (Wis. 1989).

not bar enforcement of a criminal restitution award against pension benefits held in trust.[351]

It seems apparent that these developments in criminal law advance the deterrence and corrective justice goals it shares with the tort system. As Judge Posner has pointed out, criminal restitution "enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution," and thereby achieves "a welcome streamlining of the cumbersome processes of our law."[352] The fact that the barriers to recovering criminal restitution awards tend to be much lower than those obstructing collection of tort judgments suggests that this strategy may also be an easier "sell" politically.[353]

Nevertheless, criminal restitution offers only a partial solution to the judgment-proof problem in tort law. Only a subset of torts constitute crimes. How big that subset is varies depending on which category of torts we are considering. For example, a high percentage of tortious assaults and batteries are also criminal. By contrast, negligence in private life, of the type covered by homeowner's liability insurance, is unlikely to constitute a crime. (Think of failing to shovel one's sidewalk, or colliding with a pedestrian while bicycling). Negligent operation of a motor vehicle is an intermediate case: ordinary negligence is not criminal per se, but there are many forms of aggravated

[351] See *State v. Pulasty*, 612 A.2d 952(N.J.Super.App.1992).

[352] *Bach*, 172 F.3d at 523.

[353] As discussed infra at --, however, there may be coalition-building opportunities between advocates for greater collectibility of tort judgments and the well-established crime victim's rights groups that have lobbied for greater availability of criminal restitution.

negligence that are subject to serious criminal penalties, including criminal restitution.[354] Of course, in theory all tortious conduct could be criminalized. But that strategy has grave disadvantages, ranging from enormous expansion of government power to the unnecessary subjection of risk-averse individuals to the stigma of criminal conviction.

Indeed, even if all torts were crimes, criminal restitution would still have its drawbacks. Restitution actions are not available to the victim of a crime-tort unless the prosecutor elects to bring criminal charges and obtains a conviction. In some states, victims cannot obtain restitution if the criminal charge arising from their victimization was dropped as part of a plea bargain.[355] The combination of limited prosecutorial resources and the higher criminal burden of proof means that many torts go unredressed by criminal restitution. Even if restitution is available, prosecutors may have little incentive to seek an adequate award – and crime victims may lack standing to challenge an inadequate one.[356] Even when the tort victim does receive a restitution award, that award will be limited to pecuniary damages.[357] And – despite the fact that restitution awards usually trump exemptions – the collection rate for restitution awards is dismayingly low: a 2001 GAO study estimates that only seven per cent of state and federal restitution awards is

[354] See, e.g., *State v. Wells*, 27 P3d 47, 48 (Mont. 2001) (defendant sentenced to prison and ordered to make restitution for negligent vehicular assault, defined as negligent operation of a motor vehicle while under the influence of drugs or alcohol).

[355] See, e.g., *People v. Armijo*, 989 P.2d 224, 226-27 (Colo. App. 1999).

[356] See Jennifer Gerarda Brown, *Robbing the Rich to Feed the Poor?*, 3 Buff. Crim. L. Rev. 261, 277 (1999).

[357] I am not aware of any state that allows criminal restitution awards to include pain and suffering or emotional distress. At least in theory, however, this limitation could be removed by state legislatures.

actually collected.[358] These problems suggest that, instead of expanding the substantive criminal law in order to make ancillary criminal restitution a more common substitute for tort liability, we should attack the judgment-proof problem directly by giving tort claims the same preferred status that criminal restitution claims typically receive.

The Objection that Barrier-Lowering will Harm Preferred Non-Contractual Creditors

The final objection I will consider argues that tort claims are less important than the two principal categories of non-contractual claims that trump many exemptions under current law: criminal fines and tax obligations. Were tort claims given the same preferred treatment, the argument goes, wrongdoers' assets would sometimes be diverted from these more important purposes to compensating tort victims.

Before evaluating this argument, it will be useful to take a brief look at the treatment of criminal fine and taxes. Criminal fines have traditionally been excluded from state and federal exemptions, and from discharge in bankruptcy.[359] Some states also exclude criminal forfeitures from their exemption laws.[360] Unpaid tax obligations are, if

[358] United States General Accounting Office, *Criminal Debt: Oversight and Actions Needed to Address Deficiencies in Collection Processes* 40 (July 2001).

[359] Criminal fines are typically *not* treated as ordinary contractual debts to society. State and federal laws frequently provide that exemptions from collection shall not apply to fines or taxes. See, e.g., 10 *Del.C.* § 4913(a) ("Eighty-five percent of the amount of the wages for labor or service of any person residing within the State shall be exempt from mesne attachment process and execution attachment process under the laws of this State; but such limitation shall be inapplicable to process issued for the collection of a fine or costs or taxes due and owing the State"). Internal Revenue Code Section 523 classifies most federal tax obligations as non-dischargeable. See Understanding Bankruptcy at 215.

[360] See, e.g., *In re Forfeiture of 5118 Indian Garden Road*, 654 NW 2d 646, 650 (Mich. App. 2002) (holding that forfeiture does not entail the satisfaction of a "debt or money judgment" to which Michigan's

anything, even less subject to exemption laws. For example, federal tax levies are subject only to the very narrow exemptions set forth in Section 6334 of the Internal Revenue Code.[361] The only exemption for ordinary earned income is an amount equal to the taxpayer's personal exemptions and standard deduction (based on the taxpayer's filing status), as well as any additional standard deductions due to blindness or age.[362] The taxpayer's primary residence is subject to levy if a federal judge or magistrate determines that the taxpayer's other collectible assets are insufficient to pay the amount owed.[363] Pension benefits are not exempt,[364] nor are beneficial interests in spendthrift trusts.[365] Perhaps most remarkably, property held in tenancy by the entirety may be levied upon, even if only one spouse owes federal taxes.[366]

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constitutional homestead exemption would apply); *Tellevik v. Real Property Known as 6717 100th Street S.W. Located in Pierce County***,** 921 P.2d 1088, (Wash. App. 1996) (holding that forfeiture falls outside the state constitutional homestead exemption, which protects the homestead from "forced sale"). But see, e.g., *Butterworth v. Caggiano,* 605 So.2d 56 (Fla.1992) (holding that forfeiture is a "forced sale" within the meaning of Florida's constitutional homestead exemption); *In re Property Seized from Bly,* 456 N.W.2d 195, 199 (Iowa 1990) (holding that forfeiture is a "judicial sale" within the meaning of Iowa's statutory homestead exemption).

[361] State tax liabilities are also highly collectible. Most states specifically provide that homestead and other exemptions do not apply to tax liabilities. E.g., Nevada R.S. 115.010(3). Indeed, even Florida's constitutional homestead provision applies "except for the payment of taxes and assessments thereon." Fla. Const. Art. X, §4(a)(1). The CCPA's restrictions on garnishment do not apply to "any debt due for any State or Federal tax." 15 U.S.C.A. § 1673(b)(1)(C).

[362] I.R.C. § 6334(d). For a single individual, this shelters only $x,000 per year; for a married couple, only $y,000; for a married couple with two children, only $z,000.

[363] I.R.C. § 6334(e). Indeed, the IRS may force the sale of homestead property even if state law gives the non-delinquent spouse the equivalent of an undivided life estate in the property. See United States v. Rodgers, 461 U.S. 677 (1983).

[364] There is an exemption for railroad workers' retirement benefits and for certain military pensions. See § 6334(a)(6).

[365] *Bank One Ohio Trust Co., N.A. v. United States*, 80 F3d 173, 176 (6th Cir. 1996). See also *Drye v. U.S.,* 528 US 49, 60 n.7 (1999) (reserving the question).

[366] *United States v. Craft*, 535 U.S. 274 (2002). Under Craft, in cases in which only one spouse is responsible for unpaid taxes, the United States is entitled to one-half the proceeds of the sale of property held in tenancy by the entirety. See 535 U.S. at --.

Now consider the objection that adding tort claims to the short list of exemption-trumping claims will inevitably reduce the value of *some* of the already-privileged criminal and tax obligations. Even if we assume that it would be better to preserve some difference in treatment, however, we could simply give criminal and tax obligations *priority* over tort claims with regard to tortfeasors' otherwise-exempt assets. That would allow tort victims to recover from the personal assets of tortfeasors who did not owe taxes or criminal fines, while ensuring that tort claims did not reduce the funds available to satisfy the latter obligations.

But the more fundamental point is that the existing disparity in treatment is largely unjustifiable. Preferential treatment could be justified on the grounds that the preferred obligations involve either a higher degree of culpability, a more highly needy claimant, or both. These arguments are unpersuasive in the case of taxes. Failure to pay taxes, like tort liability, can involve a wide range of degrees of culpability. The contention that failure to pay taxes is particularly serious because government depends on taxes (and society depends on government) seems like a self-serving rationalization. If exemption laws applied to taxes, more people would fail to pay their taxes – but these losses would be spread across society, rather than concentrated on individuals, as in tort law.

Compare next the treatment of criminal fines and tort judgments. Criminal fines, which are routinely imposed to sanction wrongdoers and deter wrongdoing, obviously resemble tort judgments in both respects. Proof of crime involves a higher burden of proof, which arguably implies that criminal convictions are more reliable than plaintiff's tort judgments. But while that may be true in the small percentage of criminal cases that go to trial, it seems unlikely to be true in the far larger number of cases that are settled by plea bargains.[367] On average, crimes involve greater culpability than torts. But in many cases, a criminal fine is imposed in addition to jail or prison time – whereas in the tort system, a money judgment is normally the only sanction. Yet while the *public* can reach the criminal's exempt assets, the tort victim cannot (unless the tort also constitutes a crime for which criminal restitution is available).

Let's now turn the comparison around, and ask what would happen if criminal fines (and criminal restitution) were subject to exemptions from collection and discharge in bankruptcy. In that event, far more criminals would be judgment-proof. As to them, reliance on fines would be impractical,[368] and the criminal justice system would be forced either to accept a reduction in deterrence or to rely on imprisonment even more than it currently does. But at least imprisonment is an available choice within the criminal justice system. Imprisonment for tort debts, like imprisonment for contract debts, has been virtually extinct for more than a century.[369] Given that it must rely almost exclusively on monetary penalties, the judgment-proof problem is more urgent for the tort system.

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[367] See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale LJ 1979, 1988 (1992) (arguing that the guilty plea process is inherently unreliable).

[368] See Richard Posner, *An Economic Theory of Criminal Law*, 85 Colum 1193 (1985) (entertaining the possibility of a criminal system based solely on fines, and identifying the judgment-proof problem as an impediment thereto).

[369] See Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900, 256-57 (1974).

To sum up, the tax and criminal liabilities for which American law removes the legal barriers to collection seem closely comparable to tort liability. Yet, in most states, even intentional tort claims are subject to the full panoply of exemptions from collection. Indeed, with the exception of discharge in bankruptcy, *all* of the barriers to torts-enforcement described in Part II are generally applicable to intentional torts.[370] This dramatic disparity in treatment between tort liabilities and tax and criminal liabilities should be eliminated. Because each type of liability originates in wrongdoing to an involuntary creditor, it should not be subject to exemptions from the collection of ordinary debts.

* * *

I have examined a variety of arguments, but found none that suffices to overcome the large deterrence and corrective justice gains from making tort judgments more collectible. The existing barriers to collection are far too high. Yet it does not follow that the optimal solution is across-the-board elimination of each of the barriers to collecting tort judgments. Even with hardship exemptions, total, unqualified abolition of all barriers to collection would entail a large increase in tort litigation costs, and might invite abusive litigation to extract settlements based on fear of personal liability. It is possible that some barriers to tort collection should survive. Under these circumstances, it seems appropriate to take a brief look at some of the more plausible targets for barrier-

[370] Even discharge in bankruptcy was available for some intentional torts under Chapter 13 until the enactment of BAPCPA this year. See supra at --.

lowering legislation, both to flesh out the specifics of such legislation, and to see which reforms seem especially likely to be beneficial on net.[371]

Income-Sheltering Rules

As discussed in Part III, the most pernicious barriers from the standpoint of deterrence are probably the rules that shelter earned income (because potential tortfeasors are more likely to have collectible income than to have significant collectible assets). The CCPA's limitation on garnishment of earnings is the most universal and important income-sheltering rule. Discharge in bankruptcy, particularly Chapter 7 discharge, is a close second, because it enables tortfeasors with incomes but few assets to protect their future earnings at low cost. Also important are the various rules that shelter entitlements, from welfare to Social Security.[372]

Garnishment

As it stands, the CCPA erects a bright-line rule protecting 75% of debtors' earnings, while allowing states to protect a higher percentage if they choose. In light of the high administrative costs of individualized hearings on how much tortfeasors can feasibly pay,

[371] The analysis here deals with each barrier in isolation. If some barriers are eliminated, however, individuals may respond by taking greater advantage of others. To deal with this dynamic, it may be necessary simultaneously to restrict many of the judgment-proofing strategies available to individuals.

[372] Rules that protect retirement savings can also be seen as (deferred) income-sheltering provisions. But the homeowning-class and the retirement-savings class are largely one and the same. Younger workers who do not yet own homes or have retirement savings seem more likely to commit torts for which they are uninsured or underinsured than their older counterparts.

it probably makes sense to retain a rule-based approach.[373] But instead of a flat percentage, a sliding scale would be preferable. Perhaps family size should also be taken into account. The CCPA's 75% line could be lowered to, say, 60% for low-income workers, 50% for the middle class, and 40% for the affluent. For each income bracket, the percentage recoverable could be further increased if the tort was an intentional one.

Faced with higher levels of garnishment, some tortfeasors might work less, find employment in the underground economy, or flee.[374] The new statute should not be frozen in stone: experience might suggest adjustments to garnishment rates that would maximize the recoveries for tort victims. Higher allowable levels of garnishment would also increase the attractiveness of bankruptcy. But this could be dealt with as part of the same federal legislation, by eliminating or reducing the dischargeability of tort claims in bankruptcy.[375]

Discharge in Bankruptcy

In the 1978 Code, Congress carried forward the 1898 Bankruptcy Act's policy of denying Chapter 7 discharge to intentional tortfeasors. But Congress also made plain that even

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[373] The high costs of individualized hearings might loom less large if, as seems likely, most cases would settle after judgment was entered based on expectations about what the judge would award after a hearing. Particularly in light of its similarity to individualized criminal restitution orders, this alternative deserves further study.

[374] See Lopucki, *The Death of Liability*, supra, 106 Yale LJ at 12.

[375] I am putting to one side the important (and thorny) question of federal versus state responsibility for addressing the judgment-proof problem in tort law.

intentional tortfeasors could receive a Chapter 13 discharge under some circumstances.[376] Apparently, Congress believed that even an intentional tortfeasor should not necessarily be subject to a lifelong, non-dischargeable debt. This argument is unpersuasive, not least because it would subject some innocent tort victims to lifelong, uncompensated personal injuries. In any event, BAPCPA has now closed the loophole and made all intentional torts non-dischargeable in bankruptcy. But why stop there? *Unintentional* tort claims should also be made non-dischargeable in bankruptcy, except in cases of "undue hardship" (the standard used for student loans).[377] As we have seen, the benefits of a "fresh start" policy for tortfeasors are diminished by the ready availability of liability insurance, and outweighed by discharge's detrimental impact on the tort system.

At a minimum, unintentional tort claims should be made non-dischargeable in Chapter 7, so that negligent tortfeasors would have to file under Chapter 13 to obtain a discharge.[378] There is no reason to allow unintentional tortfeasors who have a regular, disposable income -- and who have failed to purchase adequate liability insurance -- to walk away from their obligation to compensate the victim. Alternatively, BAPCPA's means-test restrictions on Chapter 7 could be extended to cases involving primarily tort debt.[379] But that would still allow some tortfeasors with significant disposable income to evade

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[376] See supra at --.

[377] 11 USC sec. 523(a)(8).

[378] Cf. Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 Ohio St. L.J. 855, 855 (2003) (arguing that Chapter 7 bankruptcy should be abolished, and all " individuals seeking debt relief should be required by statute to participate in a wage assignment plan for a limited period").

[379] See supra notes xxx and accompanying text (discussing BAPCPA's means test).

responsibility for their torts via Chapter 7. The better view is that *all* unintentional tortfeasors should be required to pursue discharge under Chapter 13.

Asset-Sheltering Rules

Within the domain of asset-sheltering rules, the homestead and retirement-savings exemptions seem especially important, given the enormous numbers of persons who have significant home equity and/or retirement savings. Spendthrift trusts and OAPTs, while they make for sensational inequities, are far less common, but may still be worth restricting (particularly on expressive grounds).[380]

Homestead Exemptions

The simplest way to remove the barrier posed by homestead exemptions would be a per se rule making them inapplicable to tort claims. Alternatively, legislatures could employ a tiered system in which exemption amounts would be lower for tort claims than for contract ones. Other than as an expedient political compromise, a two-tiered system has little to recommend it.

In today's society, homestead exemptions from tort liability are not necessary to ensure that tortfeasors are spared from destitution. In the nineteenth century, when most families were farmers, loss of a homestead could imperil the entire family's livelihood,

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[380] If one focuses solely on torts involving bodily injury, OAPTs seem less important than if one includes fraud and other economic torts.

even its survival.[381] But homestead exemptions today, insofar as they are not merely vehicles to shelter wealth from creditors, merely ensure that individuals will be able to keep their homes. Meaningful as living in one's own home may be, that privilege hardly counts for more than repairing the personal injuries of a tort victim the homeowner has wronged. Moreover, whereas in the nineteenth century home equity loans were rare, they are now ubiquitous. Consequently, even in the absence of a homestead exemption, tortfeasors may be able to tap their home equity to fund settlements that will allow them to keep their homes. For those who want to avoid this scenario, there is now an easy solution, also unavailable in the nineteenth century: buy adequate liability insurance.

Retirement-Savings Exemptions

The sweeping exemptions for retirement savings are also far broader than necessary to spare tortfeasors from undue hardship. The premise of our existing retirement system is that retirees should *ideally* be able to maintain their pre-retirement standard of living by supplementing Social Security with their own tax-preferred retirement savings. But this ideal is not an entitlement, let alone a question of subsistence. It might be too harsh, however, to treat all retirement funds other than Social Security as collectible *in toto* to satisfy a tort judgment.[382] The better course would be to treat retirement funds like ordinary earnings, whether or not the recipient was still working, by permitting

[381] See Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accomodation and Resistance to the Market Revolution, 1840-1880*, 80 J. Am. Hist. 470, 471 (1993).
[382] On the other hand, given that millions of retirees live solely on their Social Security payments, one can argue that supplemental, private-sector retirement assets should not be exempt from tort collection at all.

garnishment of a percentage keyed to the worker's income (including Social Security) and the size of the retirement account.[383]

Trusts and OAPTs

Given the substantial costs of using spendthrift trusts and OAPTs to shelter assets, the rules that permit these strategies may do relatively little harm in deterrence terms, simply because most people cannot afford to employ them. On the other hand, there is clearly a self-selection effect in which persons at greater risk of being sued are more likely to engage in aggressive asset-protection planning.

In any event, the recommendation as to spendthrift trusts is simple: adopt the rule that spendthrift trust provisions are effective against contract creditors, but not tort victims. The voluntary/involuntary creditor line should be decisive here: contract creditors can take spendthrift trust provisions into account in their dealings with beneficiaries. (A debtor whose main income derives from a spendthrift trust is not a good candidate for an unsecured loan.) Tort victims have no such protection.

Determining what to do about OAPTs is considerably harder. It is unclear whether a state can forbid its citizens from establishing such trusts. But even if the states cannot, Congress presumably has constitutional power under the Foreign Commerce Clause to

[383] Social Security benefits should also be subject to collection in at least some circumstances. If 25% of a low-income worker's wages can be garnished to pay a tort judgment, why shouldn't 25% of a retirees Social Security benefits be subject to garnishment as well? Again, hardship exceptions could ensure that no one was unduly impoverished under this approach.

declare OAPTs unlawful, and to require the prompt dissolution of existing OAPTs established by Americans.[384] Such a law, of course, would forbid citizens from setting up an OAPT to avoid possible *contractual* liabilities as well. While that might be a good idea, for present purposes a narrower remedy would suffice. For example, federal law could forbid Americans to enter into OAPTs unless the trust provides that tort claimants shall have effective remedies against the trust proceeds, and unless the foreign jurisdiction actually enforces those provisions.[385]

One objection to this proposal is that wealthy individuals would simply move their assets abroad while continuing to hold them in their own names. Tort victims would still face many obstacles to collecting under these circumstances. This objection has some force, but it is surely easier to collect from an American who owns assets abroad in his or her own name than from an American who has established an OAPT. It might also be argued that the tort system occasionally generates questionable, even outrageous results, and that high earners, wealthy entrepreneurs, and corporate executives are entitled to self-help against the risk of arbitrary deprivations at the hands of overheated juries. Agreed -- but the better remedy would seem to be to fix whatever features of the tort system lead to these aberrant outcomes.[386]

[384] There is precedent for congressional intervention in the OAPT market. In the Tax Reform Act of 1976, Congress curtailed the use of offshore trusts as a means of tax avoidance, by requiring the IRS to treat the assets of most foreign trusts settled by Americans as assets of the settlor for income tax purposes. See Sterk, supra, at 1048 (discussing *26 U.S.C. 679* (1994)).

[385] Cf. Randall J. Gingiss, *Putting A Stop to Asset Protection Trusts* , 51 Baylor 987, 992 (1999) (advocating "criminal penalties for transferring assets to a self-settled foreign trust which does not provide for enforcement by American courts to the same degree as a domestic trust").

[386] See Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 Hastings L.J. 287, 364 (2002) (making this point in the context of domestic asset protection trusts). Alternatively, Congress could

Priority in bankruptcy

When individual tortfeasors file for bankruptcy, tort claims are treated as unsecured claims (unless the tort victim has obtained a non-avoidable judgment lien).[387] As a result, tort victims typically receive little or nothing. In the context of corporate bankruptcy – where the same rule applies -- many scholars have argued, on both fairness and efficiency grounds, that tort claims should be given priority over unsecured (and perhaps even secured) creditors.[388] This prompts the question whether tort claims should receive a parallel priority in individual bankruptcy cases.

Because corporations cannot use exemptions from collection, priority would make an enormous difference in how tort claimants fare against bankrupt corporations. In the

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legalize OAPTs on the condition that the settlor purchase large, statutorily specified amounts of liability insurance. Cf. id. at 365 (suggesting that asset protection trusts could be presumed to result from fraudulent transfers if the settlor-beneficiary has inadequate liability insurance); infra at – (proposing that exemptions not apply to tort claims unless the tortfeasor complied with mandatory insurance law)..

[387] See supra note --.

[388] See David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1643-50 (1991); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 Va. L. Rev. 1887, 1908-16 (1994); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L.J. 857 (1996). *Note, Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence,* 116 Harv L Rev 2541 (2003). See also Robert Rasmussen, *Resolving Transnational Insolvencies through Private Ordering*, 98 Mich L Rev 2252 (2000) ([t]hose who view fairness as the overriding normative goal of bankruptcy . . . conclude that tort victims should receive better treatment than they currently do."). The fairness argument relies heavily on the fact that tort victims are non-consensual creditors who cannot protect themselves by varying the terms on which they deal with tortfeasors. The efficiency argument is that unless tort claims are given priority over consensual debt, actors will not internalize the full cost of their torts, thereby undermining deterrence. See *Switching Priorities*, 116 Harv L Rev at 2542 (arguing that a rule " subordinating all non-tort creditors--whether secured or unsecured, in liquidation or reorganization--minimizes the sum of social costs, namely the total costs of precaution against accidents, of unavoided harm from accidents, of credit for ongoing business enterprise, and of related market and judicial transactions.")

context of individual bankruptcy, the situation is more complicated. In Chapter 7, priority for tort claims over *unsecured* creditors would make little difference, because so many tortfeasors have little or nothing in the way of non-exempt, unsecured assets. Priority over *secured* creditors, by contrast, would often enable tort claimants to recover from tortfeasors' non-exempt secured assets – such as homes and cars. In the Chapter 13 setting, in which debtors must make payments out of their disposable income to unsecured creditors, even priority over unsecured creditors could make a big difference.[389]

Having argued at length that tort claims should receive one kind of preference over secured and unsecured contract claims – i.e., exclusion from exemptions, and status as non-dischargeable claims – I will not belabor what are essentially the same arguments for giving them priority in bankruptcy.[390] In any event, the more pressing reform seems to be making "exempt" assets available to satisfy tort claims, rather than giving tort claims priority when it comes to "non-exempt" assets.[391]

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[389] Because far more cases will be swept into Chapter 13 under BAPCPA, the issue of priority over unsecured creditors will become considerably more important in the near future.

[390] Even if unintentional tort claims were non-dischargeable, bankruptcy could remain a technique for delaying payment to tort judgment creditors. Consider, for example, a tortfeasor who files under Chapter 13. The tort judgment creditor would receive a court-approved share of payments to creditors for five years. After that time, the tort judgment creditor could still attempt to collect the unpaid balance of the judgment. But while this is better than having the unpaid balance wiped out by a Chapter 13 discharge, it still means that the tort victim must share payments with other unsecured creditors for five years. If the tort claimant also had priority, the tort judgment could be paid off more quickly.

[391] Moreover, as we will see in Part VI, it is extremely unlikely, as a predictive matter, that the interests of tort claimants will ever be given priority over the interests of better organized secured and unsecured creditors. There is a better chance that the interests of tort claimants will someday be given greater weight vis-à-vis the interests of tortfeasors.

V. The Mandatory Liability Insurance Option

Part IV argued that the judgment-proof problem should be tamed by reducing, and in some cases eliminating, the barriers to collecting tort judgments. Doing so would give individuals better incentives to avoid negligently or intentionally injuring others, as well as better incentives to purchase adequate liability insurance.

This analysis would be incomplete, however, without some consideration of an alternative method of increasing the amount of liability insurance individuals purchase: mandatory liability insurance laws.[392] Mandatory liability insurance is an important and understudied topic that deserves an article of its own. My treatment of it here will be exploratory and highly selective. As I will try to show, however, appreciating the importance of exemptions and other barriers to collecting tort claims can help point the way to more effective use of mandatory liability insurance.

Mandatory Liability Insurance for Unintentional Torts

The reason why insurance mandates might help solve the judgment-proof problem is simple: if individuals *must* purchase insurance in order to engage in a desired activity (e.g., driving, owning a home, renting an apartment), more of them will purchase that insurance than would have voluntarily done so. In turn, the threat of premium increases – or, worse yet, uninsurability – should give individuals incentives to avoid injuring others. Moreover, mandatory liability insurance, at least in theory, can induce even individuals

[392] See Shavell, Economic Analysis of Accident Law 169, 242 (discussing mandatory liability insurance as a possible response to the judgment-proof problem). Shavell also identifies minimum asset requirements and criminal sanctions as techniques that might alleviate the judgment-proof problem. Id. at 169. This Article will not consider those alternatives.

who are *de facto* judgment-proof to purchase liability insurance. These individuals would have no incentive voluntarily to purchase liability insurance even if there were no legal barriers to enforcing tort liability.

This line of reasoning might lead one to think that we should stop worrying about barriers to collecting unintentional tort judgments, and simply mandate that every adult individual carry reasonable amounts of liability insurance.[393] That would be a recipe for well-intentioned disaster. The high barriers to enforcing tort liability mean that, for many individuals, buying liability insurance yields them little or no benefit. But the less liability insurance benefits the *insured*, the harder it is for insurers to obtain the insured's cooperation or monitor the insured's behavior. Liability insurance cannot work well under those circumstances.[394] Moreover, individuals who do not benefit from buying liability insurance may refuse to purchase it. Mandatory auto liability insurance is already beset by serious enforcement problems. The best estimates are that roughly 15% of American drivers are uninsured[395] -- even though the current mandatory minimums (typically \$20,000/\$40,000 or \$25,000/\$50,000) are extremely low (and wholly inadequate to cover serious accidents).

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[393] Given that liability insurers are generally unwilling to offer coverage for intentional torts, it plainly will not be easy to design a workable program of mandatory liability insurance that covers intentional torts. I discuss this point infra at --.

[394] For fuller discussion of these issues, in the context of corporate liability insurance, see Lopucki, *The Death of Liability*, supra, 106 Yale LJ at 80-85.

[395] According to the Insurance Research Council, the uninsured rate has varied between 13% and 16% in recent years. See Gary Kelly, *Can Government Force People to Buy Insurance?*, Council for Affordable Health Insurance's Issues and Answers, No. 123 (March 2004).

Consider what would happen if American states raised their mandatory auto minimums to Western European levels, which typically run in the *millions* of dollars.[396] This would mean at least a forty-fold increase in coverage, which would surely cost several times more than the existing price. We would expect many more individuals, particularly lower-income drivers, to disobey such an expensive mandate. That would create intense political pressure to subsidize mandatory coverage for low-income drivers, which would undermine their incentives to avoid accidents. And unless states were willing to forbid uninsurable, high-risk drivers from driving (and to enforce that prohibition), those drivers would presumably be placed in some type of assigned-risk pool – which is to say, other drivers would be forced to subsidize them, and they would have little incentive to drive carefully.[397]

I am not arguing that the enforcement problems with mandatory auto insurance are inherently unmanageable (though that may turn out to be the case).[398] I want to suggest, however, that there is a better way to strengthen individuals' incentives to comply with mandatory insurance laws – even laws that demand much higher levels of coverage than

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[396] See Jorg Fedtke, *Strict Liability for Car Drivers in Accidents involving "Bicycle Guerillas"?,* 51 Am J Comparative Law 941, 953-54 & Table 3 (2003) (Germany requires personal injury coverage of £1,635,000; England requires either a deposit of £500,000, or the purchase of the minimum insurance protection offered by the market, which provides *unlimited* coverage for personal injury).

[397] See, e.g., *State Farm Mutual Automobile Ins. Co. v. New Jersey*, 590 A.2d 191, 195-98 (1991) (describing New Jersey's successive (and ever more expensive) attempts to create a workable assigned-risk system).

[398] One way to address these enforcement problems would be to spend resources on stricter enforcement of mandatory auto insurance laws. For example, Utah law now requires that if coverage lapses, the insurer must notify the Department of Motor Vehicles. This coordination rule is said to have reduced the uninsured-motorist rate in Utah from 23% to 9%. Ken Snyder, *Proposition 213 and Its Failure to Address the Uninsured Motorist Crisis in California: Suggested Alternatives for Solving the Crisis*, 4 J. Leg. Adv. & Prac. 197, 203 (2002).

existing statutes do. The idea is simple: *threaten individuals with increased personal liability as a sanction for non-compliance*. Specifically, state laws could provide that exemptions from collection apply to unintentional tort claims if, and only if, the tortfeasor is in full compliance with all applicable mandatory insurance laws.[399] This rule would give every individual with significant exempt assets – which is to say, all but the poorest Americans – a powerful new incentive to comply with liability insurance mandates.

In one incarnation, this idea would furnish a substitute for legislation that lowered the barriers to collecting tort judgments across-the-board. Legislatures would leave exemptions at their current high levels (except for intentional torts), but would substantially increase mandatory insurance coverages, and condition the availability of exemptions on compliance with the new mandates. What might such mandates include, and what levels of coverage might they require? I will venture only a rough sketch of answers to these hard questions. A good place to start is with the risks of unintentional harm to others that individuals create in their everyday lives.[400] Because the most serious risks are associated with driving, auto liability insurance of at least $250,000/$500,000 should be mandatory.[401] (That would still be far less than many European countries require).

[399] Because intentional tort claims are uninsurable, exemptions from collection would not apply to them under this scheme.

[400] Most workplace risks are picked up by vicarious employer liability or workers' compensation, so I omit them here.

[401] This proposal is similar to current Canadian law, which requires $200,000 (Canadian) in liability coverage (except in Quebec, which requires only $50,000). See George R. Keller and Frank A. Amodeo,

Most other risks are picked up by homeowners' personal liability coverage,[402] as to which insurers have imposed a *de facto* mandate on the order of $100,000 to $200,000. A statute legally requiring the higher end of that range would make a useful contribution by nudging those at the low end up to a more realistic level of coverage. That leaves renters – who are free to decide whether or not to purchase personal liability insurance, but who apparently rarely purchase it.[403] Since renters are at least as likely to injure others as homeowners, the law should mandate that renters also purchase at least $100,000 in liability coverage.

A mandatory liability insurance scheme that penalized non-compliance with loss of exemptions, and sharply increased the required coverages, would be an improvement on the status quo.[404] It is unclear, however, whether it would be better than simply

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The Canadian Insurance Market (Jan. 2001), available online at www.irmi.com/Expert/Articles/2001/Keller01.aspx.

[402] The personal liability insurance that is provided by standard homeowners' policies covers the insured for unintentional, non-auto-related torts committed *anywhere*, not only on the insured premises. Understanding Insurance Law, at 537.

[403] I surmise that secured lenders played some part in this development Although the mortgages they hold would have priority over any tort judgment, secured lenders don't want to be involved in foreclosure sales, bankruptcy, or the like. Rather, they want an uninterrupted stream of payments.

[404] The proposal in text takes for granted that mandatory insurance laws will require all affected individuals to purchase the same levels of coverage. Although that is how our existing laws are written, uniformity may be a mistake in this context. In thinking about how much insurance coverage society should mandate, it seems appropriate to imagine how much insurance individuals would buy if all their assets and income were at risk – i.e., if there were no barriers whatsoever to enforcing tort liability. The idea behind using this standard is that exemptions from collection, discharge in bankruptcy, and all the rest should not be allowed to distort each individual's own self-interested assessment of how much risk he or she poses to others, of how much in assets he or she has at risk, and (accordingly) how much liability insurance he or she needs. Although we cannot intuit the actual amounts individuals would buy, we can be confident that, on average, individuals with higher levels of assets and income would purchase higher amounts of liability insurance. Instead of a one-size-fits-all statute, therefore, minimum liability coverage should arguably vary with the individual's income and wealth. To implement this suggestion, legislatures could specify (or leave

eliminating the barriers to collection, and leaving it to individuals to buy more liability insurance to protect their newly exposed assets and income. In any event, the two strategies are not mutually exclusive. We could lower the barriers to collecting tort judgments *and* impose heightened liability insurance mandates.[405] Used in this way, mandatory insurance laws could serve to direct individuals toward choosing sufficient liability insurance to minimize the heightened risk of personal liability they would otherwise face.

Yet even a large mandatory liability policy only reduces the risk of personal liability, rather than eliminating it. Buy a mandatory $500,000 auto policy and you might still cause $1 million in personal injuries. To provide an even greater incentive to comply, mandatory liability insurance could provide a safe harbor from tort liability: so long as an individual purchased the (large) required coverage, no excess claim would be allowed for any accident covered by the policy.[406] This proposal would operate as a legally binding replacement for the informal social bargain described by Tom Baker, in which tortfeasors who purchase "adequate" amounts of liability insurance do not normally face a serious risk of blood-money litigation. Yet despite that norm, plaintiff's lawyers routinely use the threat of a verdict in excess of the policy limits to leverage a higher settlement offer

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to administrative regulation) a schedule of mandatory liability insurance indexed to household income or net worth.

[405] In addition to my proposal to mandate renters' liability insurance, another intriguing possibility would be to mandate that every tax-qualified retirement savings account be covered by personal liability insurance in an amount proportional to the account balance.

[406] Cf. Syverud, supra, 72 Tex. L. Rev. at 1650 (arguing that legislatures should consider "specifying maximum policy limits"). As noted in Part IV, supra, at --, this proposal would remove one of the strongest objections to eliminating exemptions: that even a well-insured individual would face a residual risk of being "wiped out" by personal liability for a catastrophic accident that exceeded the policy limits.

within the policy limits.[407] If mandatory liability insurance functioned as a ceiling as well as a floor, that practice would come to a screeching halt.

Of course, this proposal could be criticized as tantamount to a cap on damages, which indeed it is. But provided the mandatory coverage is set high enough, what is wrong with a cap? Under the proposed rule, seriously injured tort victims would, on average, receive substantially more compensation, because the safe-harbor carrot would induce a higher level of compliance with the liability-insurance mandate. Tort victims would receive less only in the rare cases in which the tortfeasor was a wealthy individual with abundant collectible assets, and the damages were so high that they exceeded the mandatory coverage limit. That seems like a small price to pay for the greater assurance that tortfeasors will comply with a law that requires them to purchase far more liability insurance than is required – or even customary – under current law.

Mandatory Liability Insurance for Intentional Torts

There are serious – probably insurmountable – problems with using a mandatory insurance strategy for *intentional* torts. Liability insurers have traditionally included in their policies an exclusion for "harms expected or intended from the standpoint of the insured."[408] The vast majority of intentional torts unquestionably fall within that exclusion, which is based squarely on the moral hazard of insuring against losses that are

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[407] See *Blood Money* , 35 Law & Soc. Rev. at 292.

[408] See Understanding Insurance Law 479-80.

within the control of the insured, and on the public policy against insulating intentional wrongdoers from personal liability.

Nevertheless, where insurance coverage is mandatory, courts sometimes require potential tortfeasors to purchase – and liability insurers to provide – coverage for intentional torts. Consider mandatory minimum automobile insurance. If an insured driver commits an act of "road rage," deliberately crashing into another vehicle, the policy language would bar recovery on the ground that the harm was intended by the insured. Some state courts have held, however, that this exclusion is contrary to the public policy behind the mandatory liability insurance statute.[409]

But it hardly follows that a state could feasibly mandate that everyone purchase minimum liability insurance that would cover any torts the insured might commit, including intentional ones. [410] Intentional torts constitute only a tiny percentage of automobile accidents. Forcing insurance companies to pay for them has only a small effect on auto liability insurance rates. Imagine, on the other hand, a law mandating that homeowners and renters carry personal liability insurance, and further requiring that these policies include intentional torts. These provisions would create serious problems. Insurance companies would try to screen out persons at high risk for engaging in violent behavior. The result would almost certainly be assigned-risk pools for these individuals, with other insureds bearing a substantial fraction of the costs of insuring them. It would be cheaper

[409] See Understanding Insurance Law at 1024-25.

[410] For proposals to require mandatory insurance in particular contexts, see Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 Duke Envtl. L. & Pol'y F. 293 (2002); Jennifer Wriggins, *Domestic Violence Torts*, 75 S Cal L Rev 121 (2001).

and more effective to raise the same subsidy by general taxation, and distribute it to the uncompensated victims of intentional tortfeasors.

A full exploration of this important topic is beyond the scope of this Article, and I do not claim that mandatory liability insurance cannot make any contribution to minimizing the intentional-tort half of the judgment-proof problem. My suggestion, rather, is that the more promising strategy for deterring intentional tortfeasors is to increase their *exposure* to personal liability. Even if, for whatever reasons, we fail to remove the barriers to collecting unintentional tort judgments, we should at least eliminate the barriers that enable intentional tortfeasors to keep their personal assets.

VI. The Political Economy of the Judgment-Proof Problem

Part IV proposed that we try to minimize the judgment-proof problem by lowering the barriers to collecting tort judgments: exemptions from collection should not apply to tort judgments; all tort claims should be non-dischargeable in bankruptcy; spendthrift trusts should be subject to garnishment by tort judgment creditors; and it should be illegal to create an OAPT unless the trust provides that tort judgments against the settlor will be paid by the trustee from the corpus of the trust. Part V proposed to supplement this strategy by strengthening mandatory liability insurance laws. The issue I now take up is whether proposals such as these have any realistic chance of passage by state legislatures or Congress. This issue is part of a much broader topic (the history and political economy of the barriers to enforcing tort liability) that I intend to investigate in depth in future work. Accordingly, the analysis presented here will brief, impressionistic, and tentative – but I hope sufficient to sketch the general nature of the problem.

Liability Insurers and Plaintiff's Lawyers to the Rescue?

At the outset, there is ample reason for pessimism. If tort victims were an influential interest group, we wouldn't expect our laws to insulate tortfeasors' assets from collection at every turn, as they currently do. Nor will it be easy to mobilize potential tort victims to advocate barrier-lowering legislation. "Until tort victims actually suffer, or become aware of, an injury, they do not know who they are. Unless another group, such as trial lawyers, represents their interests, tort victims often do not have a place at the bargaining table." [411] Even after being injured, tort 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.[412]

Who then might represent the interests of tort victims in reducing the judgment-proof problem in tort law? The first candidate is liability insurers. Clearly insurers would oppose a regime in which personal assets are *never* at risk, because then individuals would simply not need liability insurance. By extension, one might think that liability insurers would also support lowering barriers to tort collection. These reforms will

[411] Skeel, Debt's Dominion, at 150.

[412] As I discuss infra at --, however, the "victim's rights" movement offers an impressive example of organizing and lobbying by victims and their families.

substantially increase individuals' demand for liability insurance, and insurers should welcome that.[413]

Yet it would be awkward, to say the least, for insurers publicly to champion legislation that would greatly increase the exposure of their actual and potential insureds to personal tort liability. The appearance of a conflict of interest could do substantial reputational harm to insurers. Advocating expanded liability would also clash with their own worldview (or at least their own rhetoric), which tends to be highly critical of tort liability.[414] Moreover, the status quo is far from intolerable for liability insurers. We currently have an intermediate regime in which the threat of personal tort liability is much diminished, but still significant. Consequently, insurers can already market liability insurance as providing protection against the risk of personal tort liability, the risk of bearing legal-defense costs, and the risk of being forced into bankruptcy.

The second interest group that might spearhead a drive to lower the barriers to enforcing tort judgments is the plaintiff's bar. Nowadays, plaintiff's tort lawyers are famously well-organized and influential, through the national and local branches of the Association of Trial Lawyers of America ("ATLA").[415] But for all its success in creating theories that

[413] See Kent D. Syverud, *On the Demand for Liability Insurance* , 72 Tex L Rev 1629, 1633 (1994) ("Liability insurance, it is clear, is promoted by liability.")

[414] See Syverud, supra, 72 Tex. L. Rev. at 1648 (suggesting that most insurers "sincerely believe liability is an evil, albeit one on which they earn a profit").

[415] ATLA originated in 1946, when plaintiffs' workers' compensation attorneys organized as the National Association of Claimants' Compensation Attorneys (NACCA). The group gradually expanded to include the full range of personal injury lawyers. In 1972, NACCA was re-organized as ATLA. See *ATLA and Trial Lawyers*, available online at www.atla.org/about.

allow deep pockets to be dragged into litigation, the plaintiff's bar seems generally to have avoided battles over the barriers that exacerbate the judgment-proof problem.[416] At first blush, this seems surprising. It is obviously in the interests of the plaintiff's bar (and, to some extent, the defense bar) to increase the scope of the tort system, and plaintiff's attorneys clearly prosper when the demand for liability insurance increases.[417]

On closer examination, however, there are good reasons why the plaintiff's bar may be unwilling to make a concerted effort to lower the barriers to tort collection. In order for barrier-lowering to drive up the demand for liability insurance, the threat of blood-money litigation must be perceived as real. But most plaintiff's lawyers specialize in recovering liability insurance money, not collecting personal assets.[418] From their perspective, barrier-lowering creates opportunities they are not personally well-positioned to exploit.

[416] For example, ATLA did not lobby against the CCPA limits on garnishment, nor did it lobby for BAPCPA. Email to the author from Dan Cohen, ATLA Director of National Affairs, 4/11/05. Fuller investigation of the stances taken by ATLA over the past fifty years (a project that is part of the larger research agenda that includes this Article) may shed more (and possibly different) light on the plaintiff bar's role with regard to exemptions and other barriers to collection.

[417] See Kent D. Syverud, *On the Demand for Liability Insurance* , 72 Tex. L. Rev. 1629, 1642 (1994) (arguing that it is in the interest of attorneys to promote consumption of liability insurance). For the proposition that defense lawyers also have a stake in expanding our lawyer-intensive system of tort liability, see Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 Cardozo 2193, 2219 (1993).

[418] See Id. at 1634 ("the plaintiffs' bar finds it both easier to collect judgments from insurance companies than from uninsured defendants and easier to specialize in a field in which the real defendants (insurers) are, by and large, repeat players who routinely pay judgments").

Nevertheless, provided a critical mass of plaintiff's lawyers *is* willing to bring more blood money cases, barrier-lowering should benefit the plaintiff's bar as a whole.[419] But an upsurge in blood-money litigation might impose serious reputational costs on the plaintiff's bar. The perception that plaintiff's lawyers (and plaintiffs) are greedy is believed by many plaintiff's lawyers to have hurt their business by increasing jurors' reluctance to award plaintiff's verdicts.[420] A campaign to make it easier to take people's personal assets could be used to depict plaintiff's lawyers as sinking to new depths. A backlash attributable to blood-money litigation might also have repercussions for ongoing legislative tort-reform battles about which the plaintiff's bar is intensely concerned.

There is also a powerful *ideological* reason why the plaintiff's bar is not enthusiastic about lowering the barriers to tort collection. Within the Democratic coalition, the plaintiff's bar tends to be allied with populist, pro-consumer, pro-debtor groups.[421] It would be politically awkward for ATLA to join forces with Republican-aligned banks and credit card lenders to push for, say, more protection in bankruptcy for creditors (including tort victims).[422] It would also be rhetorically awkward: plaintiff's lawyers portray themselves as champions of the little guy against the wealthy and powerful – not against *other* little guys.

[419] There is an organized collection-lawyer's bar (the National Association of Retail Collection Attorneys), but it is unclear how influential it is, and whether collecting tort judgments is more than a minor piece of its business. For basic information about NARCA, which was founded in 1993, see www.narca.org.

[420] See Daniels and Martin, supra, 50 DePaul L. Rev. at 472-76 (describing perceived impact of tort reform campaigns on Texas juries).

[421] See Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 Tex. L. Rev. 803, 839 n.98 (1994), and sources cited therein (describing alliances between trial lawyers and consumer groups).

[422] See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 Loy. L.A. L. Rev. 1483, 1491 (2005) (trial lawyers are aligned with the Democratic party, business groups with the Republican party).

The odds are, then, that plaintiff's lawyers will not fight hard to lower tort-enforcement barriers. Yet that complacency may well be subject to change. The reputational interests of the plaintiff's bar might shift if organizations representing tort victims succeeded in increasing public awareness of the judgment-proof problem and the legal rules that exacerbate it. At some point, the failure of the plaintiff's bar to speak out on behalf of tort victims could become a serious embarrassment. Moreover, the moral or ideological commitments of some plaintiff's lawyers may make them readily persuadable on these issues. If even a fraction of the plaintiff's bar could be enlisted as advocates for lowering the barriers to collecting tort judgments, that would greatly increase the chances of political success.

The Opposition

Even if liability insurers and plaintiff's lawyers will not lead the charge for reducing the barriers to collecting tort judgments, one might reasonably wonder who would lead the charge *against* doing so? After all, individual tortfeasors are not a highly organized and effective interest group, either.[423] Yet it seems clear that *potential* tortfeasors are better organized than potential tort victims. None of us wants to be sued in tort, to have no exit option via bankruptcy, or to face the threat of onerous personal liability. Consumer groups and the consumer movement are likely to take their marching orders from these

[423] Repeat-player defendants in tort cases are mostly corporations, which do not benefit from exemptions, discharge in bankruptcy, spendthrift trusts, or OAPTs. The exception is individual professionals, particularly doctors. Given that doctors (as a group) are already hostile to tort liability, one would expect them to oppose barrier-lowering measures.

preferences – even though, as potential tort victims, we would obviously prefer lower barriers to collection. Picture, for example, how consumer groups might react to a proposal to make tort judgments non-dischargeable in bankruptcy. It's easy to imagine effective grass-roots opposition based on stories about how one mistake could lead to a tort suit that would ruin the tortfeasor's innocent family.

In addition, some barrier-lowering proposals would predictably encounter opposition from other, even better-organized groups. For example, any attempt to change the spendthrift trust doctrine will encounter fierce opposition from banks and other providers of trust-related services. This was recently confirmed when, in *Sligh v First Nat'l Bank of Holmes County*, the Mississippi Supreme Court carved out an exception to the spendthrift trust doctrine that allowed a tort victim to recover from a drunk driver's trust.[424] A mere five months later, the Mississippi legislature passed a statute overruling *Sligh*.[425] Similarly, insurance companies, banks, and other firms that provide pension- and retirement-plan related services would presumably oppose legislation that made retirement benefits collectible. And the bankruptcy bar – which has been quite influential in shaping bankruptcy legislation[426] – might well oppose making all tort claims non-dischargeable.

[424] 704 So.2d 1020, 1029 (Miss.1997).

[425] The Family Trust Preservation Act of 1998, codified at Miss. Code Ann. § 91-9-503 (2003).

[426] See Skeel, Debt's Dominion, at 86-89.

The last best hope for potential tort victims might be to form a loose coalition with better-organized secured and unsecured lenders,[427] for whom judgment-proof defendants are also a problem. The fact that lenders, particularly credit card lenders, were among the prime movers behind BAPCPA provides reason for cautious optimism on this score. To some extent, tort claimants were able to free ride on the efforts of these creditors' groups (though, as we have seen, BAPCPA's tougher abuse-of-bankruptcy provisions remain limited to cases primarily involving consumer debt).[428]

Yet solidarity with contract creditors is a strategy that has obvious costs for tort claimants. As we have seen, the general tendency of American law is to refuse to give tort claimants priority over unsecured contract creditors, let alone secured ones. In many instances, this parity puts the tort claimant at a large disadvantage. Arguably, however,

[427] Todd Zywicki points out that the creditors side often faces collective action problems because some issues involve zero-sum games for creditors, and because different groups of creditors (e.g., secured and unsecured creditors) have different interests. *The Past, Present, and Future of Bankruptcy Law in America,* 8 (reviewing David Skeel, Debt's Dominion), available online at . Zywicki suggests that BAPCPA is exceptional in that the creditor coalition held together over several years, partly because the legislation provided benefits for a wide range of creditors. Id. at 14.

[428] Ideology may also have played some role here. As Zywicki notes, many of BAPCPA's Republican sponsors invoked an ideology of personal responsibility for one's debts, id. at 2026, and that ideology helps explain provisions that help tort victims, including the expanded list of debts that are non-dischargeable in Chapter 13, and the restrictions on homestead exemptions in bankruptcy. On the other hand, although personal responsibility applies with no less force to tort judgment debt than it does to credit card debt, Congress did not fix the anomalous limitation of 707(b)'s abuse of bankruptcy provisions to cases involving primarily consumer debt. That said, BAPCPA confers significant benefits on a group (tort victims) that plays little part in Republican politics, as well as on a group (plaintiff's lawyers) that Republicans normally regard as political antagonists.

that is the best tort claimants can hope for. If tort claimants tried to secure preferential treatment, they would be likely to face resistance from better-organized lenders.

But perhaps this reasoning oversimplifies matters. Whether contract creditors would be harmed depends on what type of preferential treatment tort claimants receive. Consider two examples: a rule that exemptions do not apply to tort claims, and a rule that tort claims have priority over other unsecured debts. The exemption-trumping rule would not directly harm contract creditors, because it would not reduce the assets available to satisfy contract claims.[429] The priority rule, by contrast, would reduce the assets available to unsecured lenders in any bankruptcy in which there was also an outstanding tort claim. Clearly the latter rule would engender far greater opposition from unsecured lenders.

On the other hand, there is an opportunity cost to each item of favorable legislation. A creditors' coalition that is dominated by lenders might resist preferential treatment for tort creditors on the grounds that the coalition would have to spend political capital to obtain the legislation, while the benefits would inure only to tort victims. This suggests that unless tort victims can contribute to the coalition's political capital – for example, by serving as more appealing "poster children" than commercial lenders, or by forestalling opposition from groups like ATLA[430] – their interests will often be given short shrift.

[429] It might harm them indirectly. For example, consider a tort victim whose judgment depletes a tortfeasor/debtor's exempt assets – whereupon the tortfeasor/debtor converts non-exempt assets into exempt ones.
[430] BAPCPA may have helped tort victims in part to defuse potential opposition from ATLA.

The Politics of Mandatory Insurance Laws

The politics of mandatory insurance legislation seems to involve a different constellation of interest groups. Historically, liability insurers have often opposed mandatory liability insurance, while plaintiff's lawyers have lobbied for it.[431] Consumers who are already purchasing more than the proposed minimum are likely to favor mandatory insurance laws, because (as potential tort victims) they are better off. Consumers who would be forced to increase their expenditures on liability insurance are likely to oppose the increase.

Increasing mandatory auto liability insurance twenty- or forty-fold, as I have proposed, would at least double auto liability costs for the vast majority of Americans. It would be surprising not to encounter substantial public resistance to this idea. And my proposal to increase insurance mandates while simultaneously lowering exemptions from collection is likely to face even greater opposition.

Putting Together A Politically Attractive Package

Even if the public would not support laws that sharply curtail exemptions from collection – or provide that exemptions do not apply to tort claims – narrower reforms might have a realistic chance of passage in some states. In particular, two proposals could be presented as appropriate ways to penalize and deter wrongdoing, and increase personal

[431] See Virginia Nolan & Edmund Ursin, *Dean Leon Green and Enterprise Liability*, 47 Wayne L Rev 91, 139 (2001) (insurance industry opposition).

responsibility: (1) a law barring intentional tortfeasors from invoking exemptions from collection, on the grounds that they engaged in highly blameworthy conduct; and (2) a law imposing the same penalty on unintentional tortfeasors who fail to comply with mandatory insurance laws, on the grounds that they have committed two serious wrongs. While these proposals might encounter opposition from some quarters, they seem likely to resonate with the general public, and could lay the foundation for wider reform in the future.

At the federal level, the most politically feasible reform might be to make all torts involving personal injury non-dischargeable in bankruptcy. Congress has already broadened non-dischargeability to sweep in drunk drivers, and closed the Chapter 13 loophole for intentional tortfeasors. Better yet, secured and unsecured creditors don't appear to have any strong incentives to oppose this reform. Opposition from pro-debtor consumer groups might not be enough to derail this proposal, particularly if the plaintiff's bar were willing to support it.

Reason for Optimism? The Victim's Rights Movement and Victims' Compensation

The analysis I have presented suggests that lowering the barriers to collecting tort judgments will present formidable political challenges. Yet there is an actual counterexample that may justify guarded optimism (and certainly deserves further study): the "victim's rights" movement spearheaded in recent decades by groups such as Mothers

Against Drunk Driving ("MADD") and the National Organization for Victim Assistance ("NOVA").[432]

The victim's rights movement has been called "probably one of the most influential social movements in postwar American history." [433] Over the past forty years, that movement has addressed a wide range of issues, ranging from victim-impact statements at sentencing, to victim's rights amendments to state constitutions, to enhanced punishments for various crimes.[434] But it is the movement's original impetus – securing compensation for crime victims -- that is relevant here.[435] Victim's rights groups have lobbied successfully for state and federal legislation increasing the availability of criminal restitution awards, and establishing separate victims' compensation funds (typically funded by criminal fines) for cases in which restitution is unavailable or insufficient.[436]

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432 MADD, an organization of indirect victims (i.e., those whose family members have been killed or injured by drunk drivers), was founded in 1981, and has successfully lobbied for a variety of measures to increase criminal and civil sanctions for driving while intoxicated. For details of MADD's lobbying efforts over the twenty-five years since the organization was founded, see http://www.madd.org/aboutus. NOVA, founded in 1975, has long been active in lobbying for victims' compensation programs and criminal restitution, and also provides and coordinates services to crime victims. See http://www.trynova.org/about. Other victims' rights organizations include the Criminal Justice Legal Foundation ("CJLF") (founded in 1982), see http://www.cjlf.org/infomain.htm, and the Victims' Assistance Legal Organization ("VALOR") (founded in 1979 as the Crime Victims Legal Advocacy Institute). See http://www.valor-national.org/history.html.

433 Gary LaFree, *Too Much Democracy or Too Much Crime? Lessons from California's Three-Strikes Law,* 27 875, 893 (2002).

434 See generally Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights (2002).

435 See id. at --.

436 See *New Directions* 325 (California established the first compensation program in 1965; "[t]oday, all 50 states, the District of Columbia, and the Virgin Islands operate victim compensation programs").

The success of these efforts suggests that it might be possible for groups that advocate on behalf of tort victims to organize, attract public attention and support, and win parallel victories. But there are several differences between crime victims and tort victims that may handicap the latter. Public perception of crime victims is more favorable than of tort victims (people complain about "greedy plaintiffs," not "greedy restitution claimants"); the federal government is far more actively involved in criminal law than in tort law, which may make lobbying for legislative reform more difficult; and, at least in theory, tort victims have long enjoyed far more rights than crime victims had when the victim's rights movement began. In addition, it is generally agreed that victim's rights groups have had considerably more success in securing formal rights to restitution than in obtaining effective enforcement of those rights.[437]

Nevertheless, the existence of established crime victims' organizations should be helpful to potential tort victims' groups – not least because of the potential alliance between crime victims and tort victims. Crime-victim's rights groups recognize that tort law can be a valuable aid to victims of crime, and are actively pursuing measures to ensure that crime victims are aware of their option to sue in tort.[438] Whether or not reforms to reduce the judgment-proof problem would be a top priority for crime victims' organizations, it seems safe to say that they would at least be willing to lend their support and expertise.

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[437] See *Restitution for Crime Victims* 2 (restitution "remains one of the most under-enforced rights within the criminal and juvenile justice systems").

[438] See *New Directions* 373-78. Interestingly, this report's chapter on "Civil Remedies" makes no mention of the fact that the judgment-proof problem severely hampers the use of the tort system by crime victims.

Conclusion

As applied to individuals, tort law and the tort system are undermined at every turn by debtor-creditor, bankruptcy, and trust law. As this Article has demonstrated, tort claimants face severe legal barriers to collecting from the personal assets and incomes of tortfeasors. Our puny patchwork of mandatory liability insurance laws makes only a small dent in the enormous judgment-proof problem created by these legal barriers. Voluntary purchases of liability insurance by individuals concerned about the residual risk of tort liability improve matters considerably. But far more people would voluntarily purchase far more liability insurance were it not for the legal rules that shelter assets – and particularly income -- from tort claimants. And far fewer individuals would commit intentional (and uninsurable) torts if exemption laws excluded these torts from their protection.

There is no good justification for these tortfeasor-friendly rules. The legal barriers to tort collection could be sharply reduced without inhumanely burdening tortfeasors and their families. Although the tort system has serious shortcomings, it could do a reasonably good job of deterring tortious behavior by individuals and of requiring those who are not deterred to make amends for their wrongs. But it cannot play that role, except fitfully, inconsistently, and arbitrarily, when exemption, bankruptcy, and trust laws are indiscriminately allowed to trump tort claims. Reasonable people can disagree about how best to strike the tort creditor- tort debtor balance. Current law, however, falls outside the broad range of reasonableness, and systematically undervalues the interests of tort claimants.

In corrective justice terms, too, the *de jure* judgment-proof problem is deeply disturbing. If it is proper as a matter of corrective justice to require corporations to compensate victims of torts committed by their employees (even when the corporation's owners and managers were faultless), it would seem imperative to require individuals who *personally* commit torts to compensate their victims. Instead, American tort law typically lets even intentional tortfeasors off with little more than the proverbial slap on the wrist. Taking corrective justice seriously means fostering a legal culture that insists on personal responsibility for one's torts. In today's tort system, we may have the rhetoric of personal responsibility, but we certainly do not have the reality.[439]

For reasons described in Part VI, the political obstacles to changing all this seem daunting (although much work remains to be done in understanding the history and the political economy of exemption laws, mandatory insurance laws, and the crime victim's rights movement). Interest-group politics aside, one reason why the judgment-proof problem has gradually become so pervasive may be that torts professors have ignored the issue for decades. Where were the torts professors, for example, when the CCPA exempted 75% of every tortfeasor's earnings from collection, when the 1978 Bankruptcy Code entitled every unintentional tortfeasor, regardless of income, to a speedy and inexpensive discharge – or, most recently, when BAPCPA imposed a means test to

[439] This is not to suggest that there was ever a golden age when we did. The history of barriers to enforcing tort judgments has yet to be written.

prevent high-income debtors from abusing Chapter 7, but only if the debtor has "primarily consumer debts"?[440] I hope this Article will lead tort professors, other legal academics, and policymakers to recognize that the judgment-proof problem in tort law is largely traceable to income-sheltering and asset-sheltering legal rules, that those rules mechanically equate involuntary tort claims with voluntary contract claims, and that society would benefit from curtailing or removing these barriers to collecting tort liability. That would be a good first step toward reforming American law to induce more individuals to buy adequate liability insurance, and to enforce the rights of tort victims against the personal assets and incomes of those who persist in committing torts while underinsured.

[440] I have not yet discovered who should receive credit for the more tort-victim-friendly provisions of BAPCPA. If there are any unsung law-professor heroes reading this, my apologies – and please let me hear from you.