WHAT CAN'T BE INSURED: THE POLICYHOLDER'S OWN BAD ACTS

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ABSTRACT

From its early eighteenth-century beginnings, modern insurance law has been governed by what can be described as a "non-responsibility" requirement: the insured cannot recover for losses that it caused through its own misbehavior. Although this principle might seem intuitive—you should not be able intentionally to burn down your own home and then get paid for it—scholars continue to debate both the range of the principle's application and its underlying rationale. Current theories of the requirement tend to argue that instrumental goals, such as the minimization of moral hazard or the maximization of victim compensation, ought to determine whether an insured can get coverage for its own bad acts. Yet these approaches fail to describe insurance law as it currently exists.

This Article advances a new framework that corrects this deficiency. The framework identifies two distinct elements of the "non-responsibility" requirement: (1) the insured must have had substantial control over the act that caused the loss; and (2) the insured's act must be something that is generally regarded as inherently wrong, rather than merely prohibited. When an insurer can demonstrate both elements, coverage is almost always disallowed.

In making this argument, the Article aims to explore and articulate insurance law's internal logic, rather than study it from the perspective of an external discipline. There are multiple benefits to this approach. First, it more accurately describes insurance law as it exists today, as well as its historical evolution. Second, it provides a normatively attractive account of the "non-responsibility" requirement's central role in contemporary insurance law. Finally, the internalist theory of insurance law can help us better predict and justify extensions of private insurance-law concepts into vital policy areas such as healthcare and unemployment.

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I. INTRODUCTION

It is a settled principle of insurance law that "[t]here can be no valid insurance coverage which will protect or indemnify the insured or indemnitee against a loss . . . which may arise from his immoral . . . conduct."[1] Thus, if an insured homeowner douses her house in gasoline and then sets it aflame, she cannot expect her insurer to pay for the loss.[2] This principle applies not just to property insurance, but to insurance generally—including policies of life insurance and liability insurance. It often prevents an insured from recovering from her insurer even when the written terms of her insurance policy would appear to protect against losses for which she was responsible.[3]

But what sort of "immoral . . . conduct"[4] is sufficient to render coverage invalid? That question has been a source of controversy since the dawn of modern insurance in England at the turn of the eighteenth century. It has often been suggested that insurance cannot cover losses that the insured "intentionally" caused, or that were the result of the insured's "illegal" acts.[5] But these refinements offer little additional guidance. What if the insured intended the act, but not the harmful effect? What if the insured's agents acted illegally, but not the insured herself? And what if the act was "illegal" but not immoral—as in the case of a driver who accidentally breaks a speed limit? Disputes of this kind have persisted in nearly every corner of insurance law, often becoming the linchpin questions in coverage disputes that have real consequences for policyholders and those caught in their wake.

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[1] Fidelity-Phenix Fire Ins. Co. v. Murphy, 146 So. 387, 390 (Ala. 1933). *See e.g.*, Solo Cup Co. v. Fed. Ins. Co., 619 F.2d 1178, 1187 (7th Cir. 1980) ("It is well settled that a contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as against public policy and the courts will not construe a contract to provide such coverage." (internal citations and quotation marks omitted)).

[2] *See, e.g.*, Checkley v. Ill. Cent. R.R. Co., 100 N.E. 942, 944 (Ill. 1913) ("A fire insurance policy issued to anyone, which purported to insure his property against his own willful and intentional burning of the same would manifestly be condemned by all courts as contrary to a sound public policy . . . .").

[3] *See infra* Section I.A.

[4] *Fidelity-Phenix Fire Ins. Co.*, 146 So. at 390.

[5] *See, e.g.*, Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26, 27–29 (1941) (reviewing the history of prohibitions against insuring intentional or illegal acts).

The principle of insurance law that one cannot be insured against the results of one's own bad acts raises profound questions. Applying it requires making determinations about which acts are "bad" in the legally-relevant sense. One must also determine whether a particular bad act is legally attributable to the insured, and thus non-insurable, or whether it was the result of a causal chain for which we do not ultimately hold her legally responsible. These issues mirror canonical issues in other areas of law. Tort law, for example, frequently holds that a but-for cause is not "proximate" enough to a loss to allow for the assignment of legal responsibility.[6] Criminal law makes similar distinctions; the state of mind of the actor determines whether she may be punished for her deeds.[7] The legal frameworks that structure these areas of the law reflect, and reinforce, deeply-contestable value judgments about which kinds of risks, costs, and harms are attributable to whom. Is it, for example, the driver of a car who runs the risk of hitting a pedestrian, or is it the pedestrian who runs the risk of getting hit by an out-of-control car?[8] As Guido Calabresi famously and enigmatically put it, the law helps us structure our shared understanding of "what-is-the-cost-of-what."[9]

This Article analyzes the multiple and overlapping sources of insurance law to show that the American legal tradition provides us with an internally coherent and normatively appealing framework for determining when an insured's own bad acts ought to preclude her from getting coverage. In practice, the framework contains two legally and conceptually distinct elements: (1) the insured must have had *substantial control* over the act that caused the loss; and (2) the insured's act must be something that is generally regarded as *inherently wrong*, rather than merely prohibited. If both of these elements can be demonstrated, typically by the insurer, then coverage is

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[6] *See* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 104 (1995).

[7] 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1 (3d ed. 2017).

[8] *Cf.* Coleman & Ripstein, *supra* note 6, at 104 ("Ronald Coase and Guido Calabresi independently invented law and economics when they realized that both injurer and victim cause any injury. . . . In all but the most bizarre cases, the accident could have been prevented had the victim stayed home, taken a different route, or whatever. Thus, any injury is always a joint product, which must somehow be divided between the parties." (footnotes omitted)). *Id.* at 94 ("[B]oth tort law and the institutions of distributive justice can be understood as responses to the question: who owns which of life's misfortunes?").

[9] GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 133 (1970).

almost always disallowed on the grounds that the insured was responsible for her own loss as far as insurance law is concerned. And if either of these two elements cannot be demonstrated, then a given loss generally is deemed legally insurable so long as the policy grants coverage.

Thus, for example, insurance for damages caused by the insured's own negligence is generally allowed.[10] Mere negligence is not, today, considered to be something blameworthy enough to prevent the insured from getting coverage for its consequences.[11] But coverage for intentional torts like battery, when committed by the insured, is generally disallowed[12] on the grounds that it "would be contrary to public policy to indemnify a person for a loss incurred as a result of his own willful wrongdoing."[13] As a result, if the policy does not contain an explicit carve-out for such coverage, courts will generally imply one.[14] Note, however, that if the insured's agents—such as his employees—are the ones who commit the bad act, then insurance coverage is permitted for vicarious liability that the insured incurs.[15] So long as the insured did not himself exercise direct control over his agents' bad acts, courts generally allow him to use his insurance coverage to defray the ramifications of those acts.[16]

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[10] *See* McNeely, *supra* note 5, at 33.

[11] *See infra* Section II.B.1.

[12] *See, e.g.*, Vt. Mut. Ins. Co. v. Ben-Ami, 193 A.3d 178 (Me. 2018) (holding that intentional assault is not covered); Mut. Serv. Cas. Ins. Co. v. McGehee, 711 P.2d 826 (Mont. 1985) (holding that striking another is an intentional act within the meaning of the policy's intentional acts exclusion).

[13] Malanga v. Mfrs. Cas. Ins. Co., 146 A.2d 105, 108 (N.J. 1958). *See e.g.*, Thomas v. Benchmark Ins. Co., 179 P.3d 421, 425 (Kan. 2008) ("Kansas public policy prohibits insurance coverage for intentional acts: '[A]n individual should not be exempt from the financial consequences of his own intentional injury to another.'"); Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co., 988 N.E.2d 897, 900 (Ohio Ct. App. 2013) ("Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts. . . . 'Liability insurance does not exist to relieve wrongdoers of liability for intentional, antisocial or criminal conduct.'" (internal citations omitted)).

[14] *See infra* Section II.A.

[15] *See* RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. e (AM. L. INST. 2019) ("Courts generally permit insurance coverage of liabilities that are assessed vicariously, even in situations in which the liability of the primary actor would be uninsurable in the jurisdiction . . . .")

[16] *See, e.g.*, New Amsterdam Cas. Co. v. Jones, 135 F.2d 191, 195–96 (6th Cir. 1943).

The inner logic of this area of insurance law has generally eluded theorization by legal commentators, who have approached it through two competing frameworks. On one side are those who study insurance law from an economic standpoint. From this perspective, moral hazard concerns ought to be the primary determinant of whether a loss caused by the insured should be insurable: if allowing coverage would produce inefficient moral hazard, then coverage generally ought to be denied; if it would not, then coverage ought to be allowed so long as the parties agree to its terms.[17] On the other side are those who are concerned with protecting victims of insureds' misdeeds. From this view, coverage ought to be allowed whenever doing so would benefit innocent parties—even in the situation, for example, where the insured is sued for his own intentional torts.[18] Both of these frameworks analyze insurance coverage disputes from an instrumentalist perspective: coverage ought to be granted, or denied, according to whether doing so would achieve external goals.

The problem is that neither of these two frameworks accurately capture the insurance law on the books. Although courts often weigh such instrumental goals, the majority of them seldom allow an insured to receive coverage when he appears to be individually morally responsible for the relevant harm or loss he has caused.[19] Because the general rules of insurance law cannot be coherently explained in terms of instrumental goals,[20] coverage disputes are resolved in ways that frequently appear inefficient or frustratingly formalistic, or that leave innocent victims painfully emptyhanded.

While the predominant approach to insurance law may be puzzling from the perspectives that emphasize either moral hazard or victim compensation, this Article offers a solution to the puzzle. It suggests that the majority of jurisdictions, in the majority of insurance contexts, decide coverage disputes involving a policyholder's bad acts based on a distinct conception of legal responsibility that is analogous to conceptions of legal

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[17] *See, e.g.*, George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1026 (1989). *See infra* Section III.C.1.

[18] *See, e.g.*, Christopher C. French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65 (2012). *See infra* Section III.C.2.

[19] *See infra* Section I.A.

[20] *But see infra* notes 53–55 and accompanying text (describing some discrete types of insurance—such as mandatory medical malpractice insurance—which legislatures have explicitly reformed to prioritize victim-compensation).

responsibility applied in tort or criminal law.[21] Understanding the conceptual and normative logic of insurance law in this way can help one to rationalize, and to predict, decisions rendered in coverage disputes of this kind.[22] It can also help reformers gain a clearer picture of the legal architecture that would need to be reframed in service of alternative goals.[23]

The argument proceeds in four parts. Part I describes how insurance law addresses the insurability of losses occasioned by an insured's bad acts. It begins by noting that the various sources of insurance law demonstrate a sustained commitment to allowing insurance only to cover losses for which the insured was not morally responsible—a principle that this Article will call the "non-responsibility" requirement.[24] It then focuses on how the

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[21] Tom Baker has distinguished at least five conceptions of "responsibility" at use in the insurance context. *See* TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY: CASES AND MATERIALS 20–24 (2017) (describing the conceptions of responsibility as "trustworthiness, accountability, causality, freedom, and solidarity"). In this Article, I use the phrase "individual responsibility" in the narrow "causal" sense of the term: A is "responsible" for x because A "caused" x, in a particular legally-relevant sense. Although the conception of causation-responsibility at work in insurance law, like the concept of proximate causation at work in tort law, draws upon popular understandings of responsibility, the two are not identical. *See infra* Section II.A.

[22] Methodologically, this Article follows in the scholarly tradition that has been dubbed the "New Private Law," in the sense that it aims to understand insurance law from an "internal perspective," and "on its own terms." For a description of the features of the New Private Law tradition, see Andrew S. Gold, *Internal and External Perspectives: On the New Private Law Methodology*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 3 (Andrew S. Gold et al. eds., 2021) ("If there is a common feature that cuts across New Private Law scholarship, it is an interest in the internal point of view. Theorists want to better understand what is sometimes called private law's self-understanding, and they seek to grasp private law concepts from that perspective." (internal citations omitted)); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1651–63 (2012). *See also* William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605 (2007) (listing several critiques of the New Private Law method).

[23] *See infra* Section II.A.

[24] The goal in choosing this term is to show that this principle is of similar importance to other equally foundational principles of insurance law, particularly the "insurable interest" requirement and the "indemnity" requirement. *See* ROBERT

requirement is applied in one area of insurance law that is currently a source of heated dispute. Contemporary liability insurance policies typically carve out coverage for property loss or injuries that were "expected or intended from the standpoint of the insured."[25] This phrase has been interpreted in roughly three ways by U.S. courts, with important implications for disputants. I suggest that although the two prominent instrumentalist frameworks for thinking about this problem can explain the two minority positions, neither can explain the third, majority rule.

Part II aims to succeed where other scholarly treatments of this area have failed. It lays out a theory of the non-responsibility requirement, and fleshes out what insurance law generally means when it asks whether an insured exercised substantial control over an act, and whether the act was inherently wrong (*i.e.*, a *malum in se* rather than a *malum prohibitum*). It shows that insurance law's own conception of individual responsibility can make sense of the outcomes that usually result when courts deal with coverage disputes involving the insured's own misbehavior. It fits the law that we have on the books.

Part II also shows that the normative open-endedness of the non-responsibility analysis gives this area of insurance law a distinctive dynamism. It traces the history of three types of insurance coverage that were once disallowed but today are permitted. As social understandings of these types of acts evolved, insurance coverage was able to evolve with them in order to keep insurance law in sync with broader social understandings of the distinction between misbehavior and misfortune. Thus, for example, in the nineteenth century, suicide was considered to be such a heinous act that it necessarily voided any life insurance coverage—even if the policy did not explicitly exclude it as a cause of death. Over time, social perceptions of suicide changed, such that it gradually came to be regarded as the result of mental illness. Courts and legislatures recognized this shift and re-interpreted the non-responsibility requirement accordingly to allow for suicide coverage. With some exceptions, suicide remains insurable today.

Part III offers a normative argument in favor of the non-responsibility requirement. It suggests that deciding insurance coverage cases on the basis of a conception of individual responsibility is justifiable

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E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 3.1 (Practitioner's ed.1988); Kenneth S. Abraham, *Peril and Fortuity in Property and Liability Insurance*, 36 TORT & INS. L.J. 777, 780 (2001).

[25] *See infra* note 59 and accompanying text. *See generally infra* Section I.B.

against the backdrop of a more general commitment to a liberal-egalitarian political philosophy. It also suggests that our current institutional arrangement—with its delegation of different roles to insurers, insureds, and courts—is defensible given the various parties' competencies. The two main alternative instrumental theories, by contrast, are not well-suited to a legal process of dispute resolution centered on courts.

Finally, Part IV elaborates on the practical implications of the legal, conceptual, and normative framework described in this Article, especially as it relates to the recently-published *Restatement of the Law, Liability Insurance* ("*RLLI*").[26] It also shows how an understanding of the inner logic of this part of insurance law can be informative for those who would seek to revise insurance law—either to reduce moral hazard or to increase the likelihood that innocent third-parties will be compensated.

Before proceeding, it is worth addressing a potential objection that might be raised at the outset. It could be argued that the insurance law principle I am here calling the non-responsibility requirement ought to be understood as merely one application of a more general principle that traverses various fields of law: that a wrongdoer ought not to profit from his own wrong. This idea is stated particularly clearly in the 1889 New York Court of Appeals case of *Riggs v. Palmer*,[27] which was recently made famous by Ronald Dworkin in his discussion of legal positivism.[28]

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[26] *See generally* RESTATEMENT OF THE L. OF LIAB. INS. (AM. L. INST. 2019).

[27] Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889). The facts in Riggs are simple. Elmer Palmer murdered his grandfather in order to prevent him from changing his will in a way that would prevent Elmer from inheriting the bulk of his grandfather's estate. *Id.* at 188–89. Elmer was then convicted and imprisoned for the murder. *Id.* at 191. Elmer's aunts, Mrs. Riggs and Mrs. Preston, sued to prevent Elmer from inheriting under the will. *Id.* They argued that Elmer should be denied his inheritance for equitable reasons, even though nothing in the plain language of New York's statute of wills prevented a murderer from inheriting his victim's estate. *Id.* at 189. The New York court of appeals split, with the majority, led by Judge Earl, holding for Elmer's aunts. *Id.* at 191.

[28] In *Riggs*, the court declared it to be a "fundamental maxim[] of the common law [that no] one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Id.* at 190. The court further argued that such "maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes." *Id.*

It is certainly true that this "maxim"[29] is recognized and applied beyond the context of insurance law—*Riggs* was a dispute about wills, not insurance. But the meaning of this maxim has been particularly well-explored in the context of insurance coverage disputes, such that it is properly regarded as a principle of *insurance* law.[30] In practice, this is evidenced by the fact that disputes over insurance coverage for an insured's own bad acts almost never cite cases beyond the insurance context, whereas such insurance disputes often serve as paradigmatic cases for applications and restatements of the "maxim" beyond the field of insurance. Indeed, the *Riggs* court's declaration of the universal principle relied principally on a life

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Dworkin uses "Elmer's Case" to argue several points, "the most important" of which is that "the dispute about Elmer was not about whether judges should follow the law or adjust it in the interests of justice. . . . It was a dispute about what the law was, about what the real statute the legislators enacted really said." RONALD DWORKIN, LAW'S EMPIRE 20 (1986). *See also id.* at 15–20, 36–44 (discussing *Riggs*); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 23–45 (1977) (discussing *Riggs*); Charles Silver, *Elmer's Case: A Legal Positivist Replies to Dworkin*, 6 L. & PHIL. 381 (1987) (discussing Dworkin's treatment of *Riggs*); Rodger Beehler, *Legal Positivism, Social Rules, and Riggs v. Palmer*, 9 L. & PHIL. 285 (1990) (discussing Dworkin's treatment of *Riggs*).

[29] *Riggs*, 22 N.E. at 190–91. *Cf.* Columbia Ins. Co. of Alexandria v. Lawrence, 35 U.S. 507, 518 (1836) ("Fraudulent losses are necessarily excepted upon principles of general policy and morals; for no man can be permitted, in a court of justice, to allege his own turpitude as a ground of recovery in a suit.").

[30] Several such reasons are available. First, insurance presents one of the few legal mechanisms whereby an everyday citizen can get financial "leverage" on his misdeeds, and so it is particularly likely to produce disputes that turn on this maxim. Second, principles of insurance contract interpretation prompt courts to construe ambiguities in insurance policies in favor of coverage. *See infra* notes 36–37 and accompanying text (discussing these interpretive doctrines). This allows misbehaving insureds to slip through insurers' attempts to craft policy terms to deny them coverage. Such situations increase insurance law's tendency to decide coverage disputes on the basis of general principles, rather than specific policy provisions. Third, because the insurance business is often regarded as a "vital service labeled quasi-public in nature," Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 147 (Cal. 1979), courts are particularly prone to resolving coverage disputes on the basis of general principles rather than specific contract provisions. *See generally* Carter v. Carter, 88 So. 2d 153, 157 (Fla. 1956) (discussing the particular salience to insurance of the "axiom of the common law, supported by admirable concepts of common justice, that no person should be permitted to benefit from his own wrong.").

insurance case.[31] Insurance law's particularly rich internal development of this maxim thus enables it to illuminate other areas of the law and to help us understand the maxim's meaning more precisely. As the paradigmatic application of this principle, the non-responsibility requirement warrants, and can sustain, focused analytical study.

II. THE PUZZLE OF THE NON-RESPONSIBILITY REQUIREMENT

This Part begins, in Section A, with a brief survey of the manifestations of the non-responsibility requirement in insurance law. It shows that the principle is present in the law governing multiple different types of insurance and that it is also present across different sources of insurance law—including the common law, statutes, and standardized insurance policy forms.

Section B illustrates the types of debates to which this principle gives rise in practice, by focusing on one contemporary split in legal authority. States are divided over how to interpret standard liability insurance policy language that denies coverage for injuries or property damages that were "expected or intended from the standpoint of the insured."[32] The meaning that courts give to this language matters, because it often determines whether insureds are covered for harms they have inflicted on third parties, and thus, whether the third parties are able to receive compensation from an otherwise judgment-proof insured.[33]

Section C shows how the two prominent theoretical frameworks for thinking about the non-responsibility requirement generally fail to capture the position that the majority of courts have taken on the question discussed in Section B. This suggests that insurance law, as it exists in practice, has developed a separate analytical framework for deciding these cases.

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[31] *Riggs*, 22 N.E. at 190 (citing N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591 (1886) (holding that a person who procured a policy upon the life of another, and then murdered him, could not recover under the policy)).

[32] *See infra* note 59 and accompanying text.

[33] *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006).

A. THE NON-RESPONSIBILITY REQUIREMENT IN INSURANCE LAW

It has long been held as a matter of common law that there are certain types of wrongful conduct for which an insured cannot be indemnified—notwithstanding provisions in his written insurance policy that could be interpreted to the contrary.[34]

In practice, this doctrine arises when an insurer raises it as a defense to an insured's claim for coverage. Thus, for example, an insured might intentionally burn his own property and demand that the insurer cover the loss because their written agreement did not clearly carve-out coverage for *intentional* fires. In response, the insurer argues that common law doctrine implies such a carve-out into every insurance agreement.[35] Courts have often allowed the insurer to prevail in such disputes.[36] In doing so, they depart from the more general tendency in U.S. insurance law to resolve disagreements between insurers and insureds in the insureds' favor.[37] Thus,

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[34] *See* Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1256–62 (1994); McNeely, *supra* note 5, at 31–32; Edwin H. Abbot, Jr., *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire*, 24 HARV. L. REV. 119, 120 (1910).

[35] *Cf.* Ambassador Ins. Co. v. Montes, 388 A.2d 603 (N.J. 1978).

[36] *See, e.g.*, Checkley v. Ill. Cent. R.R. Co., 100 N.E. 942, 944 (Ill. 1913) ("A fire insurance policy issued to any one which purported to insure his property against his own willful and intentional burning of the same would manifestly be condemned by all courts as contrary to a sound public policy . . . ."). *See also* 10A STEVEN PLITT ET AL., COUCH ON INSURANCE § 149:45 (3d ed., Westlaw, database updated Nov. 2022) ("It is firmly and indisputably established that an insured under a fire policy who personally burns the property, or causes the property to be burned, may not recover under the policy." (citing cases)); 1 WARREN FREEDMAN, RICHARDS ON THE LAW OF INSURANCE § 1:13 (6th ed. 1990) ("[T]he insured who intentionally burns his own barn is not entitled to collect the insurance on it!"). *But see Montes*, 388 A.2d at 607–08.

[37] For example, courts usually put a thumb on the insureds' side of the scale by interpreting any ambiguities in an insurance contract *contra proferentem*—"against the offeror," which is almost always the insurer—and so in a manner that expands, rather than limits, coverage. On the insurance law rules that are explicitly policyholder friendly, see Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996). Such rules have been in place since at least the mid-nineteenth century. *See, e.g.*, CHARLES JOHN BUNYON, THE LAW OF FIRE INSURANCE 53 (London, Charles & Edwin Layton 1867) (discussing *contra*

although the common law generally takes steps to protect insureds against stingy insurers, when this tendency conflicts with the more specific common law doctrine against indemnifying the insureds' own wrongful conduct, the latter generally wins.[38]

The doctrine was first developed in England in disputes involving the two oldest forms of insurance: marine insurance and fire insurance.[39] If

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proferentem); Moulor v. Am. Life Ins. Co., 111 U.S. 335, 341–42 (1884) (doctrine making the transition from fire insurance to life insurance).

[38] The cases in support of this proposition are too numerous to cite but are well-referenced in the many insurance law treatises that restate this proposition. *See, e.g.*, 7 PLITT ET AL., *supra* note 36, at § 101:22 ("Public policy generally requires that the policy be read as implicitly excluding coverage for intentional acts"); Grinnell Mut. Reins. Co. v. Jungling, 654 N.W. 530, 537–38 (Iowa 2002) (quoting 7 PLITT ET AL., *supra* note 36, at § 102:22 to identify the general rule in insurance law) ("[e]ven where the insurance policy 'is silent as to intentional wrongs and merely states positive coverage in terms sufficiently broad to encompass intentional conduct, public policy general requires that the policy be read as implicitly excluding coverage for intentional acts.'"); 4 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 23.4, at 504 (2d ed., LEXIS, database updated Jan. 2010) ("Public policy will not permit an insured to benefit from his or her own intentional wrongdoing."); *id.* § 116.1 ("The general insurance rule is that harm intentionally caused by an insured is *not covered* by *any* liability insurance policy. . . . [T]he general rule is that an insured's intentionally caused harm to another would not be covered by a liability insurance policy." (emphasis in text)); 44 C.J.S. *Insurance* § 490, Westlaw (database updated March 2022) ("In general insurance to indemnify insured against his own violation of law is void as against public policy."); WILLIAM R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 90–91 (Bust M. Anderson ed., 3d ed. 1951) ("The contract does not contemplate granting indemnity for a loss which is due to the intentional act of the insured, for one of the requisites of insurance is that the risk shall not be subject in any wise to the control of the parties. Upon this principle . . . the insurer is not required to indemnify the insured for a loss that has been caused by his own wrongful act. The insured may not recover for the loss of a ship which he has scuttled, or of a building that has been burned by himself while sane . . . ." (citations omitted)). *But see Jungling*, 654 N.W.2d at 541 (finding that public policy did not require barring coverage for intentional acts by the insured and describing this as "the emerging exception" to "the general rule").

[39] *See* Mary Coate McNeely, *The Genealogy of Liability Insurance Law*, 7 U. PITT. L. REV. 169, 169–71 (1941) (on the difficulty of selecting a historical beginning point for insurance, but noting that marine insurance had existed in some form since at least the thirteenth century, that fire insurance arose following the

an owner of a marine insurance policy intentionally scuttled his ship, courts permitted the underwriter to refuse to pay.[40] Life insurance, the third-oldest form of insurance,[41] applied a similar rule: if the policyholder committed suicide while sane, his coverage would be void.[42] Newer types of insurance have also generally been held not to provide coverage for the insured's own wrongdoing. Liability insurance, for example, which arose only at the end of the nineteenth century, has long limited coverage to personal injury or property damage that was "caused by accident."[43]

In the United States, insurance law was originally governed by state law, and for historical reasons, remains relatively free from federal regulation.[44] Common law rules have had a strong influence on state statutes that govern the business of insurance. Thus, several states have codified the common law principle that precludes insurance coverage for the insured's own bad acts. California Insurance Code § 533, for example, provides that "[a]n insurer is not liable for a loss caused by the willful act of the insured . . . ."[45] Massachusetts law states that "no company may insure any

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Great Fire of London in 1666, that life insurance "was little recognized before 1750," and that liability insurance "is a phenomenon of the past few decades"). *See also* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 576 (2005); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 226–37 (1977).

[40] *See* Nw. Mut. Life Ins. Co. v. Linard, 498 F.2d 556, 561 (2d Cir. 1974) (reviewing English law decisions).

[41] *See* McNeely, *supra* note 39, at 171 (noting that life insurance "was little recognized before 1750.").

[42] *See, e.g.*, Ritter v. Mut. Life Ins. Co., 169 U.S. 139, 160 (1898); Supreme Commandery of Knights of the Golden Rule v. Ainsworth, 71 Ala. 436 (1882). *See also infra* Section II.B.2 (discussing history of insurability of suicide).

[43] *See* Sam P. Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513, 514 (1984). For a discussion of more recent language, see *infra* Section I.B. *See also* McNeely, *supra* note 5 (discussing early forms of liability insurance and their limitations of coverage for intentional harms).

Health insurance has similarly been held to not be available for self-inflicted injuries. *See, e.g.*, Hussar v. Girard Life Ins. Co., 252 So. 2d 374, 374 (Fla. Dist. Ct. App. 1971).

[44] *See* ABRAHAM, *supra* note 39, at 104–17 (discussing history of insurance regulatory structure in the United States).

[45] CAL. INS. CODE. § 533 (West 2023). *See* J.C. Penney Cas. Ins. Co. v. M.K., 804 P.2d 689, 694 (Cal. 1991) (interpreting § 533 to function as "an implied

person against legal liability for causing injury . . . by his deliberate or intentional crime or wrongdoing . . . ."[46] Many states have also passed statutes prohibiting insurance for punitive damages arising out of intentional conduct.[47] Insurance policies are interpreted in light of these statutes, in order to preclude misbehaving insureds from receiving coverage.[48]

The common law doctrine is also evidenced in the language of insurance agreements themselves. Because the private insurance relationship is based on a written contract (known, in insurance terminology, as an insurance "policy") that describes the obligations of the insurer and the

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exclusionary clause which by statute is to be read into all insurance policies."). On California's § 533 generally, see James M. Fischer, *Accidental or Willful?: The California Insurance Conundrum*, 54 SANTA CLARA L. REV. 69, 82 (2014); Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1245–51 (1969).

Several other states have adopted similar statutes. *See, e.g.*, MONT. CODE ANN. § 28-2-702 (West 2023) ("[A]ll contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law."); N.D. CENT. CODE § 26.1-32-04 (2023) ("An insurer is not liable for a loss caused by the willful act of the insured, but the insurer is not exonerated by the negligence of the insured or of the insured's agents or others."). *See also* MASS. GEN. LAWS ANN. ch. 175, § 47 (West 2022) ("[N]o company may insure any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing . . . ."). Massachusetts courts have interpreted this statute to disallow coverage for intentional acts. *See, e.g.*, Rideout v. Crum & Forster Com. Ins., 633 N.E.2d 376, 378 (Mass. 1994). It appears that the California, Montana, and North Dakota statutes originated in the Field Code. *See* Farbstein & Stillman, *supra* note 45, at 1245; Stanley v. Columbia Cas. Co., 147 P.2d 627, 630–31 (Cal. Ct. App. 1944) (noting that the 1935 codification of California law worked no significant change to the predecessor of § 22, former Civil Code § 2527).

[46] MASS. GEN. LAWS ANN. ch. 175, § 47 (West 2022). Massachusetts courts have interpreted this statute to disallow coverage for intentional acts. *See, e.g.*, *Rideout*, 633 N.E.2d at 378.

[47] *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 422–34 (2005).

[48] Insurers are commonly prevented from agreeing to cover acts that are excluded by these statutes. *See, e.g.*, Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 830–31 (Cal. Ct. App. 1993); Ohio Cas. Ins. Co. v. Clark, 583 N.W.2d 377, 385 (N.D. 1998). On the incorporation of the non-responsibility requirement into state law, see 7 PLITT ET AL., *supra* note 36, at § 101:27.

insured, courts often look to the language in such documents first to resolve disputes between the parties.[49] Such policies contain language that clearly denies coverage for certain types of losses, and they usually contain language that carves-out coverage for losses that the insured "intended" or are the result of his own fault in some other sense.[50] When such carve-outs are unambiguous, courts typically end the analysis there and find for the insurer.[51] Because insurance policies generally take the shape of fill-in-the-blank "forms" that have been standardized across insurers and locations, coverage disputes of this type often depend on the interpretation of nearly-identical language.[52] Such standardized policies thereby exercise a great deal of influence in insurance law and provide helpful evidence of its underlying principles.

Although courts, legislatures, and insurers do not have a discrete name for the doctrine, the various sources of insurance law evidently concur that insurance coverage generally must not be extended to the bad acts of the insured herself. The requirement is often described as arising out of "public policy" considerations that apply to the operation of insurance with special relevance and force.[53] This Article carves out a place in insurance law for this proposition as a standalone legal principle. The core of the argument is a concept this Article terms the "non-responsibility requirement." Although this phrase has not explicitly been used by courts, it captures the underlying logic of their decisions: it is a requisite of coverage that the insured herself was not responsible for the underlying loss. This Article argues that that this concept is at work in both the doctrine and the practice of insurance law. Insurance law is suffused with concern for the responsibility of the insured for her own otherwise-covered losses. I also claim that there are good reasons

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[49] *See infra* Section III.B.2.

[50] *See infra* Section I.B.

[51] *See, e.g.*, Freightquote.com, Inc. v. Hartford Cas. Ins. Co., 397 F.3d 888, 896 (10th Cir. 2005) (applying Kansas law) ("[I]nsurance policies are to be enforced as written so long as the terms do not conflict with pertinent statutes or public policy.") (internal quotations omitted); Farmland Mut. Ins. Co. v. Scruggs, 886 So. 2d 714 (Miss. 2004).

[52] The Insurance Services Office ("ISO") provides standardized policy language to insurance companies across jurisdictions. *See* Harford Fire Ins. Co. v. Cal., 509 U.S. 764, 772 (1993) (describing the functions of the ISO).

[53] *See, e.g.*, Thomas v. Benchmark Ins. Co., 179 P.3d 421, 425 (Kan. 2008) ("Kansas public policy prohibits insurance coverage for intentional acts: '[A]n individual should not be exempt from the financial consequences of his own intentional injury to another.'").

to think this concern, and the resultant denials of coverage, are normatively justifiable. To the extent that academic treatment of insurance law has denied those claims, it has misdescribed insurance law, mistaken the moral situation, or both.

Admittedly, the non-responsibility requirement does not apply with the same strength in all contexts. In certain areas of insurance law, state legislatures or regulators have intervened to override the general common law prohibition against coverage for willful or intentional harms. Historically, such interventions have been made when it was determined that neither private insurance nor tort were providing a legal apparatus capable of appropriately compensating a class of particularly vulnerable victims. Workers' compensation laws, mandatory automobile liability insurance laws, and medical malpractice insurance requirements[54] can all be viewed as efforts to mandate both that insurance be purchased and that it provide coverage that minimally compensates third-party sufferers.[55] In such contexts, courts often override insurance law's non-responsibility requirement, as well as policy terms that would seem to reflect it, by averting to the legislature's expressed desire to revise the common law in order to protect victims.[56] That such legislative intervention is necessary, however,

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[54] The Affordable Care Act's "individual mandate" can be understood along similar lines. *See* Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111–148, 124 Stat. 119 (2010) (as amended by the Healthcare and Education Reconciliation Act, Pub. L. No. 111–152, 124 Stat. 1029 (2010)).

[55] *See* Erik S. Knutsen, *Auto Insurance as Social Contract: Solving Automobile Insurance Coverage Disputes Through a Public Regulatory Framework*, 48 ALBERTA L. REV. 715, 720 (2011); Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

[56] *See, e.g.*, Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342, 1353 (E.D. Pa. 1983) (finding that intentional harm was covered by a medical malpractice liability policy because of Pennsylvania's "strong interest in compensating Pennsylvania victims of malpractice for injuries suffered at the hands of Pennsylvania physicians . . . ."); Nationwide Mut. Ins. Co. v. Roberts, 134 S.E.2d 654, 659 (N.C. 1964) ("The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. . . . The victim's rights against the insurer are

reveals that these areas of insurance law are exceptions that prove the rule. Moreover, as discussed below, because these types of private insurance remain rooted in principles of insurance law generally, they are constantly subjected to a gravitational pull back towards the default rule that an insured cannot be covered for his own bad acts.[57]

B. THE "EXPECTED OR INTENDED" DEBATE IN LIABILITY INSURANCE LAW

Since liability insurance became available in the late nineteenth century, insurers have inserted language into the policies that reflected the non-responsibility requirement.[58] Such language has evolved over time in response to market forces and judicial interpretations.[59] Today, the language typically states that coverage will not be allowed for "bodily injury or

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not derived through the insured as in the case of voluntary insurance."); Wheeler v. O'Connell, 9 N.E.2d 544, 546–47 (Mass. 1937). *See also* Gallagher, *supra* note 34, at 1275 n.87 (discussing the auto insurance preference for victim compensation at length); KEETON & WIDISS, *supra* note 24, at 517.

When states have declined to make malpractice insurance coverage mandatory, this has weighed against allowing victim compensation concerns to override the non-responsibility requirement. *See, e.g.*, Am. Home Assurance Co. v. Stone, 61 F.3d 1321, 1328 (7th Cir. 1995), *as modified* (Aug. 24, 1995).

[57] *See infra* Section I.C.

[58] *See* McNeely, *supra* note 5 (discussing such language in the context of different kinds of liability insurance).

[59] "Prior to the mid-1960s, liability policies typically contained an exclusion that provided that 'bodily injury or property damage caused intentionally by or at the direction of the insured' would not be covered." ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 63C at 479; Rynearson, *supra* note 43, at 518 (on the history of development of this language). The language was arguably ambiguous, however, with regard to whose viewpoint ought to be used to determine whether a loss was "caused intentionally." *Id.* at 521–23. Some courts held that the victim's viewpoint ought to be dispositive—likely in an attempt to provide financial relief for sufferers of intentional harm. *Id.* This perspective effectively eliminated the exclusion because, in almost every case, the victim neither expected nor foresaw the injury. The interpretation was criticized for unjustly allowing the insured to shift onto the insurer the punishment he ought to have received from committing an intentional tort. The current policy language was an attempt to make clear that the relevant perspective is the insured's. *See* Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 66, 68 (David M. Engel & Michael McCann, eds., 2009).

property damage which is either expected or intended from the standpoint of the insured."[60] As discussed above, this language is understood to express an "implicit" exclusion that would necessarily be implied by courts even if it were absent.[61] Courts are divided, however, about the exact content of such an exclusion and thus how this language ought to be interpreted.[62] Generally speaking, there are three interpretations of the "expected or intended" language, with some state courts following each.[63]

Under the first (minority) view, the test becomes an objective standard: the insured "expects" and "intends" the natural and probable consequences of her actions.[64] This resembles the classic tort method of

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[60] This "expected or intended" language is found in ISO's 1986, 1990, 1993, 1996, and 2006 occurrence-based and claims-made Commercial General Liability Coverage Forms. *See* Donald S. Malecki & Arthur L. Flitner, COMMERCIAL GENERAL LIABILITY INSURANCE, appx. B,C,E,F (8th ed. 2005); Fischer, *supra* note 45, at 73–74.

[61] *See supra* note 38 and accompanying text.

[62] *See* 7A PLITT ET AL., *supra* note 36, § 103:25 ("Since their beginning, these clauses have raised disputes over their meaning and breadth, a fact well illustrated by the number of commentaries they have elicited."); Gallagher, *supra* note 34, at 1271–73 (on different standards among states).

[63] *See* 16 HOLMES, *supra* note 38, § 118.2[D]; James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957 (1984); JERRY, *supra* note 59, § 63C[a] at 480–82; Erik S. Knutsen, *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 CONN. INS. L.J. 209, 219–21 (2014); Catherine A. Salton, Comment, *Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity upon Intent*, 78 CALIF. L. REV. 1027, 1032–33 (1990); Kristin Wilcox, Note, *Intentional Injury Exclusion Clauses—What is Insurance Intent*, 32 WAYNE L. REV. 1523 (1986). *See also* Thomas v. Benchmark Ins. Co., 179 P.3d 421, 427–28 (Kan. 2008) (noting the existence of three interpretations); Home Ins. Co. v. Neilsen, 332 N.E.2d 240, 242 (Ind. Ct. App. 1975) (interpreting older policy language excluding losses "caused intentionally by or at the direction of the Insured" according to same three methods). *But see* Tenn. Farmers Mut. Ins. Co. v. Evans, 814 S.W.2d 49, 54–55 (Tenn. 1991) (making particularly fine-grained distinctions and thereby identifying up to seven different possible ways that courts could interpret the expected/intended language).

[64] *See, e.g.*, Allstate Ins. Co. v. Peasley, 932 P.2d 1244, 1247 (Wash. 1997) (excluding losses from "any bodily injury which may reasonably be expected to

looking to the foreseeable consequences of an act to determine the actor's intent. At the extreme, this understanding of the non-responsibility requirement suggests that an insurer can refuse coverage for any injury or property damage—even if merely the result of an unintentional tort such as negligence—so long as the insured *should have* expected the injury or damage to occur. As one might expect, this results in a substantial narrowing of coverage, and a higher number of pro-insurer results.[65]

Under the second (also minority) view, the test becomes a subjective standard, "virtually erasing the word 'expected' from the contract, [and requiring] an intentional act whose *purpose* is to cause an injury of the kind giving rise to the insured's liability."[66] This results in broad coverage, since it is difficult to demonstrate such intent and thereby to deny claims.

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result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person."); Barmet of Ind., Inc. v. Sec. Ins. Grp., 425 N.E.2d 201 (Ind. Ct. App. 1981); Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992) (noting that, in Iowa, the term "expected . . . denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions" and that "[i]ntent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm." (internal quotations omitted)). *See generally* JERRY, *supra* note 59, § 63C[a] at 481 ("What the 'expected' prong adds to the 'intended' prong is an exclusion from coverage in circumstances where the insured's subjective state of mind with respect to desire is not clear, but the circumstances are such that the insured, even if not clearly desiring to cause harm, should surely have anticipated that harm would result."); Rigelhaupt, *supra* note 63, at § 5[d]; RESTATEMENT OF THE L. OF LIAB. INS. § 32 rep. n.*e*. (AM. L. INST. 2019).

[65] JERRY, *supra* note 59, § 63C[b]. As then-Judge Cardozo put it, "[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow." Messersmith v. Am. Fid. Co., 133 N.E. 432, 432 (N.Y. 1921). *See also* Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989) ("[T]o exclude all losses or damages which might in some way have been expected by the insured, could expand the field of exclusion until virtually no recovery could be had on insurance."); Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 735 n.6 (Minn. 1997) (rejecting an objective test as "undermin[ing] coverage for injuries caused by simple negligence, a result we sought to avoid in prior cases.").

[66] Thomas A. Gordon & Roger Westendorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 IDAHO L. REV. 567, 591 (1988) (citing A-1 Sandblasting & Steamcleaning Co. v. Baiden, 632 P.2d 1377 (Or. Ct. App. 1981), *aff'd*, 643 P.2d 1260 (Or. 1982), and Asbestos Insurance

The majority of courts takes a third, intermediate, view.[67] On this reading, an insured "intended" the injury or damage if she subjectively intended both the act and to cause some kind of injury or damage—although not necessarily the same kind that resulted.[68] Such subjective intent can be actual, as proven by objective evidence. It can also be inferred from the

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Coverage Cases, Phase III, Judicial Counsel Coordination Proceeding No. 1072 (Cal. Super. Ct. May 29, 1977)). *See also* Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1088 (Colo. 1991) ("[T]he phrase 'neither expected nor intended' should be read only to exclude those damages that the insured knew would flow directly and immediately from its intentional act."); Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989); State Farm Fire & Cas. Co. v. Muth, 207 N.W.2d 364, 366 (Neb. 1973) (equating the meaning of "expected" with "intended"); Rigelhaupt, *supra* note 63, at § 5[f].

[67] The Arizona Supreme Court provided a representative statement of this view in *Farmers Ins. Co. v. Vagnozzi*, 675 P.2d 703, 709 (Ariz. 1983) ("The presumption that a person intends the ordinary consequences of his voluntary actions, used in determining responsibility for the consequences of voluntary acts, has no application to the interpretation of terms used in insurance contracts. The intentional acts provision excludes policy coverage if the insured acts with the intent or expectation that bodily injury will result even though the result is different in character from the injury that was intended. Thus, the trier of fact must inquire into the actor's subjective intent." (internal citations omitted)). *See e.g.*, Am. Fam. Mut. Ins. Co. v. Johnson, 816 P.2d 952 (Colo. 1991); Amco Ins. Co. v. Haht, 490 N.W.2d 843 (Iowa 1992); Thomas v. Benchmark Ins. Co., 179 P.3d 421 (Kan. 2008); Rigelhaupt, *supra* note 63, at § 5[a] (citing additional cases).

Note that the *RLLI* appears to take a position somewhere between the minority "subjective intent" view and the majority intermediate view. It defines "intent" according to the insured-friendly subjective standard. RESTATEMENT OF THE L. OF LIAB. INS. § 32 cmt. d (AM. L. INST. 2019) ("[A]n insured intends harm when *such harm* is the object of the insured's action . . . ." (emphasis added)). But it defines "expected" according to the intermediate view. *Id*. ("[A]n insured expects harm when the insured foresees that harm is practically certain to occur as a result of the insured's intentional act, even if that harm was not the object of the action.").

[68] *See, e.g.*, SL Indus. Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266, 1278 (N.J. 1992) ("[If the insured] subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage."); Brooklyn L. Sch. v. Aetna Cas. & Sur. Co., 849 F.2d 788, 789 (2d Cir. 1988) (applying New York law) ("Ordinary negligence does not constitute an intention to cause damage; neither does a calculated risk amount to an expectation of damage. To deny coverage, then, the fact finder must find that the insured intended to cause damage.") (internal citations omitted). *See generally* Rigelhaupt, *supra* note 63, at § 5[c] (citing additional cases).

nature of the act, especially when the insured's conduct shocks the conscience.[69] These courts generally give the word "expected" an independent meaning that captures fewer cases than the objective, tort-like, interpretation: an injury or damage is "expected" if the insured was subjectively aware that there was a high probability that it would occur as a consequence of the insured's act.[70] As the Maine Supreme Court stated, an "expected" injury is that which the insured "in fact subjectively foresaw as practically certain"[71]—a more stringent standard than reasonable foreseeability.[72]

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[69] *See, e.g.*, Foremost Ins. Co. v. Weetman, 726 F. Supp. 618 (W.D. Pa. 1989); Mottolo v. Fireman's Fund Ins. Co., 830 F. Supp 658 (D. N.H. 1993); Farm Bureau Ins. Co. v. Witte, 594 N.W.2d 574 (Neb. 1999); State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 463 (Ala. 1993) (citing Whitt v. De Leu, 707 F. Supp 1011, 1016 (W.D. Wis. 1989) (inferring intent to injure in case of sexual abuse of children); Cont'l W. Ins. Co. v. Toal, 244 N.W.2d 121 (Minn. 1976) (inferring intent to injure in case of armed robbery resulting in shooting death); Allstate Ins. Co. v. Foster, 693 F. Supp. 886, 888 (D. Nev. 1988) ("[D]ecisions of other jurisdictions support a conclusion that intent to harm may be inferred from sexual contact with a minor as a matter of law, regardless of the insured's subjective intent."). *See generally* Rigelhaupt, *supra* note 63, at § 5[b]; ABRAHAM, *supra* note 39, at 538 ("Sometimes . . . subjective intent or expectation can be inferred from the circumstances, perhaps even as a matter of law."); 3 Martha A. Kersey, *Exclusions Under Coverage A of a Standard CGL Policy, in* NEW APPLEMAN ON INSURANCE LAW § 18.03[2][f] (Jeffrey E. Thomas & Francis J. Mootz eds., Library ed., LEXIS, database updated May 2022) ("Many jurisdictions have recognized that the intent to injure, especially when guns or sexual abuse are involved, can be inferred as a matter of law based on the egregious nature of the act involved and the accompanying foreseeability or certainty of harm.").

[70] *See* Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 836 (Cal. Ct. App. 1993) ("The appropriate test for 'expected' damage is whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage."). Courts have used different phrases to communicate this idea, including "practically certain," *Honeycomb Sys. Inc. v. Admiral Ins. Co.*, 567 F. Supp. 1400, 1404 (D. Me. 1983) (applying Maine law), "substantial probability," *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1058–59 (8th Cir. 1979) (applying Iowa law), and "substantial certainty," *Quincy Mut. Fire Ins. Co. v. Abernathy*, 469 N.E.2d 797, 800 (Mass. 1984); *United Servs. Auto. Ass'n v. Elitzky*, 517 A.2d 982, 989 (Pa. Super. Ct. 1986).

[71] Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981).

[72] *See* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE

In practice, given the difficulty of proving subjective intent, the choice among these three interpretations often determines which party prevails in disputes over coverage for losses caused by the insured.[73] For example, in "prank" cases—where a practical joke goes wrong and causes real injury—the different approaches often lead to diverging determinations of whether the expected/intended exclusion applies.[74] Such differences have real consequences because the question whether the insured is covered often determines whether the victim receives anything approaching adequate compensation.[75]

This three-way jurisdictional split over the interpretation of the expected/intended language has led courts and commentators to turn to theories of the underlying goals of insurance law to try to determine the purpose of this particular clause. Generally, two such frameworks dominate, both of which suggest that insurance law ought to be interpreted to further instrumental goals.[76]

On the one hand are those inclined to think about the law using economic frameworks. This perspective suggests that the goal of controlling moral hazard provides an adequate normative model for thinking about the types of insurance coverage disputes described above.[77] Moral hazard—the tendency of insurance coverage to reduce incentives to prevent or minimize

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ISSUES 131 (1991) (noting that, on this standard, "the harm in question may be intended but not expected, or expected but not intended, as well as being both expected and intended.").

[73] *See* St. Joe Mins. Corp. v. Zurich Ins. Co., 89 Cal Rptr. 2d 101, 108 (Cal. Ct. App. 1999) (describing the choice of a subjective or objective standard as a "vital determination" and often dispositive of recovery).

[74] *See, e.g.*, Am. Fam. Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001); Vt. Mut. Ins. Co. v. Dalzell, 218 N.W.2d 52 (Mich. Ct. App. 1974).

[75] *See* Knutsen, *supra* note 63; Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721 (2012); Gilles, *supra* note 33.

[76] *See, e.g.*, James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 96 (1990) (describing the two "leading public policy justification[s]" for the intentional act exclusion as "deterrence of socially proscribed conduct" and "compensating persons who have been injured by the insured.").

[77] *See, e.g.*, Priest *supra* note 17, at 1011, 1034.

loss[78]—has long been expressed as a public policy concern.[79] Insurance rules that create moral hazard increase the aggregate amount of loss and also shift the cost of such losses onto others. In doing so, such rules inevitably make insurance coverage more expensive, thereby rendering it unavailable to individuals who could afford it at a lower price.[80] From this perspective, it is in the public's interest to prohibit the enforcement of insurance claims that would create moral hazard.[81] Insurance policy language generally, and the expected/intended language specifically, therefore ought to be interpreted in order to retain the deterrent effect of tort liability.[82] This perspective suggests that courts ought to interpret the expected/intended language according to something like the minority-rule "objective" standard.

For those inclined to focus on the ability of insurance to protect against loss, on the other hand, it may be argued that everything possible should be done to interpret policy language to create coverage in each individual case.[83] When an insured has coverage, it not only increases the

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[78] *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1547 (1987) ("Moral hazard refers to the effect of the existence of insurance itself on the level of insurance claims made by the insured. . . . *Ex ante* moral hazard is the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance."). For the seminal treatment of the long and fascinating history of the concept of moral hazard, see Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

[79] *See, e.g.*, Ritter v. Mut. Life Ins. Co., 169 U.S. 139, 154 (1898) (discussing the concern that allowing suicide insurance would "encourage[] the assured to commit suicide in order to make provision for those dependent upon him. . . .").

[80] *See* Priest, *supra* note 17, at 1019–25.

[81] *See id.* at 1026.

[82] *See* Baker, *supra* note 59, at 72 ("Almost all tort liabilities involve harm that potential defendants can avoid to at least some degree, if only by reducing the extent to which they or people they control engage in activity that may cause harm. Indeed, in economic analysis, loss prevention is the primary justification for tort liability. Thus, to the extent that liability provides an incentive to take care, all liability insurance creates at least the potential for moral hazard." (internal citations omitted)).

[83] *See, e.g.*, Knutsen, *supra* note 63, at 229 (describing one of the two purposes of liability insurance as "victim compensation"); French, *supra* note 18, at 73; Baker, *supra* note 59, at 75 ("[*L*]*iability insurance protects victims.* If any victims deserve that protection, victims of serious crime-torts like arson and rape surely do."); Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical*

likelihood that his victims will be able to recover against him. It also often determines whether a suit is brought against him at all, and thus, whether his victims get an opportunity to "at the very least announce the wrong and . . . shame the defendant."[84] From this perspective, whenever a policy provision appears designed to remove coverage for the insured's own fault, it should be construed in favor of coverage to the extent that it contains even the slightest ambiguity.[85] And when no such policy provision is present, an exclusion ought not to be implied. As one insurance law treatise puts it:

> To look at only the insured's behavior ignores the fact that insurance is also for the benefit of the injured victims of accidents. They are the third party beneficiaries of the insurance contracts and their situation should not be ignored. The interpretation of an insured's conduct is not only a dispute between the insured and the insurance company.[86]

From this perspective, the narrowest possible reading of the expected/intended language—*i.e.*, the minority-rule subjective view—ought to prevail.[87]

The problem, however, is that the majority of courts appear to be thinking about the problem differently than the above two frameworks—and, as a result, they pick the third interpretation of the expected/intended language. Although courts and litigants often discuss moral hazard concerns and victim compensation goals, the determinative consideration frequently appears to be a different one—*i.e.*, whether finding coverage would allow

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and Empirical Review of Federal and State Courts' Declaratory Judgments—1900-1997, 47 AM. U. L. REV. 1131, 1218 (1998); Fischer, *supra* note 76.

[84] Baker, *supra* note 59, at 74. *See also* Swedloff, *supra* note 75, at 737; RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. g (AM. L. INST. 2019) ("[T]he presence of liability insurance can promote, rather than hinder, the objectives of tort law, by providing compensation for the victim as well as the means to employ the civil-justice system to name, blame, and shame the defendant.").

[85] *See* French, *supra* note 18, at 79–86 (applying the doctrine of *contra proferentem* and reasonable expectations to suggest that the "expected or intended" language in liability insurance policies is ambiguous and should be interpreted in favor of the insured).

[86] 16 HOLMES, *supra* note 38, at § 118.2[A]. *See also* Swedloff, *supra* note 75.

[87] *See, e.g.*, Knutsen, *supra* note 63, at 220–21, 248.

the insured to avoid being held individually responsible for his own wrongdoing. As the Supreme Court of Oregon put it: "[P]unishment rather than deterrence is the real basis upon which coverage should be excluded. A person should suffer the financial consequences flowing from his intentional conduct and should not be reimbursed for his loss, even though he bargains for it in the form of a contract of insurance."[88] Although not all courts state the proposition quite so strongly, an overarching concern with individual responsibility appears to motivate the position that most courts take on this question. This concern with individual moral responsibility explains why, for example, intent is often inferred when the underlying act is particularly abhorrent. Such a move is not justified from either a deterrence or victim-compensation perspective, and commentators have noted the divergence between instrumentalist goals and courts' decisions.[89] Such an inference makes sense, however, if one understands insurance law to contain within it an implicit commitment to holding individuals responsible for their own bad acts.

C. CONFLICT WITH INSTRUMENTAL GOALS

This Article suggests that the particular conception of individual responsibility at work in the majority-rule interpretation of the expected/intended language is the same conception that animates the non-responsibility requirement generally. As a preliminary step in the process of unpacking this distinctly legal understanding of what cannot be insured, it is helpful to show the ways that a concern with individual responsibility can conflict with attempts to characterize insurance law's purpose as the pursuit of instrumental goals. Such conflicts can take two forms.

First, there are situations where an instrumentalist calculus suggests that coverage for the insured's bad acts ought to be allowed, but an

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

[89] *See, e.g.*, Fischer, *supra* note 76, at 99 ("The need to reconcile the often competing goals of deterrence and [victim] compensation, both of which clearly underlie the proper application of the intentional act exclusion, are in many instances ignored by courts in favor of an *ad hoc* retributivist approach that is not in keeping with the rules and principles governing insurance contracts."); James E. Scheuermann, *Fortuity, Intent, and Causation in Liability Insurance Law*, 9 ELON L. REV. 329, 343 (2017).

It is the argument of this Article, that what Fischer calls the "retributivist approach" *is* in keeping with the rules and principles of insurance law. *Contra* Fischer, *supra* note 76, at 99.

individual-responsibility analysis suggests the opposite. For example, it has been argued that insurance for civil liability arising out of criminal acts should be permitted because criminal penalties are a sufficient deterrent to mitigate moral hazard concerns and because there is a particularly strong public interest in compensating the victims of such acts.[90] Moreover, to the extent that shielding the insured from civil penalties would undermine the deterrent effect of tort liability, such concerns could be alleviated by allowing the insurer to bring a subrogated claim against the insured in order to recoup its costs.[91] On this "pay-and-then-subrogate" model,[92] the insured would be covered for civil liabilities arising out of his intentional harms so long as the proceeds of the coverage flowed to the victims rather than to the insured. The insurer would then be able to sue the insured to recoup its costs.[93]

Proposals of this sort have been made by commentators, and early drafts of the *RLLI* suggested that coverage for the insured's intentional harms is permissible when paired with the type of subrogation regime described above.[94] The proposal has not caught on, however. Although one state

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[90] *See, e.g.*, French, *supra* note 18, at 94 ("[W]hen examined, the suggestion that the policyholder would be deterred from engaging in criminal conduct if insurance were not available is suspect . . . ."); Knutsen, *supra* note 63, at 244; Baker, *supra* note 59, at 72–75.

[91] *See* Baker, *supra* note 59, at 73 ("Under this alternative approach, the liability insurance contract would provide coverage for the tort, and the liability insurance company would manage the moral hazard by subrogation—*i.e.*, by going after the insured to recoup the money paid to the victim."). *See also* Erin E. Meyers & Joni Hersch, *Employment Practices Liability Insurance and Ex Post Moral Hazard*, 106 CORNELL L. REV. 947, 979 (2021) (discussing subrogation).

[92] Baker, *supra* note 59, at 74.

[93] To the extent that allowing victims to recover increases the likelihood that they bring a claim, this would increase, rather than diminish, the deterrent effect of tort liability because insurers would be more able to extract damages from the insureds, given the insurers' status as repeat-players. *See* Swedloff, *supra* note 75, at 764–66; Baker, *supra* note 59, at 73 ("Under this . . . approach, the liability insurance contract would provide coverage for the tort, and the liability insurance company would manage the moral hazard by subrogation—*i.e.*, by going after the insured to recoup the money paid to the victim."); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 165 (2001).

[94] RESTATEMENT OF THE L. OF LIAB. INS. § 47 cmt. j (AM. L. INST., Preliminary Draft No. 3, 2016) ("Subrogation against the insured provides an alternative to a

supreme court followed the "pay-and-then-subrogate" approach,[95] the decision has since been confined to its facts,[96] and the *RLLI's* proposal was withdrawn from the final draft. As Tom Baker, one of the reporters of the *RLLI*, has put it, concerns with individual responsibility and public morality appear to be the reason why this alternative framework has failed to get traction.[97] The instrumentalist proposal is met with the "object[ion] . . . that *liability insurance protects defendants* and that some defendants—rapists and arsonists for example—do not deserve protection."[98] The failure of instrumentalist perspectives to override such individual-responsibility concerns is stark in cases where the victim is vulnerable and the insured's act is heinous—such as when the insured is accused of child molestation.[99] Moral hazard is usually not a concern in such cases: the insured's act was not plausibly influenced by the availability of coverage, and criminal punishment serves as a deterrent. The felt need to compensate victims of such heinous acts is also particularly strong.[100] Nor is it easy for insurance companies to show that the insured subjectively intended to cause harm: it often appears, horrifyingly, that the insured thought that he was somehow benefitting his victims.[101] Courts nonetheless have generally held that liability insurance does not cover the victims' injuries resulting from sexual molestation or exploitation by an insured.[102]

Second, there are situations where an instrumentalist calculus suggests that certain types of coverage ought to be forbidden, even though individual responsibility considerations do not necessarily require that the insured be prevented from getting coverage. Life insurance coverage for suicide[103] or liability insurance coverage for losses caused by the insured's

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public-policy-based prohibition of insurance for certain liabilities."). *See* Fischer, *supra* note 76, at 112 (discussing subrogation).

[95] Ambassador Ins. Co. v. Montes, 388 A.2d 603 (N.J. 1978).

[96] Allstate Ins. Co. v. Malec, 514 A.2d 832, 838 (N.J. 1986) ("We are content to give *Ambassador* a narrow reading . . . .").

[97] *See* Baker, *supra* note 59, at 75.

[98] *Id.*

[99] *See infra* note 148 and accompanying text.

[100] Baker, *supra* note 59, at 74–75.

[101] *See* JERRY, *supra* note 59, § 63C[b] at 488.

[102] *See id. See also* Allstate Ins. Co. v. Mugavero, 561 N.Y.S.2d 35, 44–47 (N.Y. App. Div. 1990) (Balleta, J., dissenting) (citing cases), *rev'd*, 589 N.E.2d 365 (N.Y. 1992).

[103] *See infra* Section II.B.2 (describing the history of controversy regarding whether it was against public policy to insure suicide).

own negligence[104] both fall in this category. Allowing such insurance almost certainly creates moral hazard because it necessarily reduces the insureds' incentives to avoid suicide or negligence.[105] If preventing moral hazard is what matters, then these types of insurance ought to be prohibited.[106]

Arguments of this sort have also, generally, failed. As will be described in more detail below, the non-responsibility requirement has long been interpreted by courts and legislatures not to prevent insurance coverage for suicide or for the insured's own negligence—even though such insurance undoubtedly creates moral hazard.[107] This is because, as a general matter, our society does not take the position that suicide or negligence are the sorts of things for which we must hold an insured individually responsible. This suggests that such insurance is permitted not because the moral hazard concern is absent but rather because the moral hazard concern is not enough to make such insurance contrary to public policy.[108] If an insurer is willing to underwrite such a policy, then courts will not interpret background principles to render the coverage invalid—even if the net amount of losses

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[104] *See infra* Section II.B.1 (describing the history of controversy regarding whether it was against public policy to insure negligence); McNeely, *supra* note 5, at 33 ("When the validity of liability insurance was attacked as contrary to public policy, the most seriously urged contention was that indemnifying the assured against his own negligence would result in a relaxation of vigilance toward the rights of others.").

[105] *See* Priest, *supra* note 17, at 1023 ("Where expected injury costs are lower, the underlying level of activity and the underlying injury rate will increase, a phenomenon known as moral hazard.").

[106] *See* Gallagher, *supra* note 34, at 1267 ("Although courts recognize moral hazard and often prohibit those forms of insurance that promote wrongdoing, they do not invalidate all insurance it infects.").

[107] *See infra* Section II.B (describing the changing social views on these topics).

[108] *See, e.g.*, Kansas City Stock Yards Co. v. A. Reich & Sons, Inc., 250 S.W.2d 692, 698 (Mo. 1952) (noting that insurance against negligence, even if it "by having such insurance the insured might become negligent or careless in protecting the property cannot be said to make the contract void as against public policy."); *see also* Gallagher, *supra* note 34, at 1267; Fleming James Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 549 (1948) (noting that the moral hazard concern has been "tempered by a strong counter-desire not unduly to discourage enterprising affirmative activity—even when it was dangerous—because people were very much imbued with the idea that unfettered enterprise and activity in nearly all directions worked out through the laws of competition to promote the general good.").

across society is thereby increased. This suggests, again, that when the moral hazard concern and the insured non-responsibility principle conflict in the legal context, the non-responsibility principle wins.[109] The moral hazard concern appears to be determinative almost exclusively when courts also believe that the insured's loss was caused by his own bad act—such that he ought not to be able to use insurance to avoid his individual responsibility for it.

III. CONCEPTUAL ANALYSIS

This Article argues that the non-responsibility requirement is a core concept of insurance law and that the concept has its own internal logic and normative structure. Other areas of the common law have similar such concepts. The "duty of care" in tort law, "touch and concern" in property law, and "good faith" in contract law are ready examples.[110] As Shyamkrishna Balganesh and Gideon Parchomovsky have argued, core legal concepts like these "strike[] a balance between stability and change, both of which are essential to the effective operation of a legal system."[111] They perform this task by having a stable "intrinsic"[112] (or "jural"[113]) meaning, while remaining normatively open-ended.[114]

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[109] *See infra* Section IV.C. (discussing interaction between non-responsibility requirement and moral hazard concerns).

[110] *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PENN. L. REV. 1241, 1243–46 (2015) (listing such concepts and arguing that they are foundational "common law concepts" that serve as "the operational legal devices that the common law uses in doctrine to understand and compartmentalize aspects of a legal issue or dispute.").

[111] *Id.* at 1243.

[112] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 58 (1913) (quoted in Balganesh & Parchomovsky, *supra* note 110, at 1244 n.11).

[113] Balganesh & Parchomovsky, *supra* note 110, at 1244.

[114] *Id.* at 1255 ("Scholars have previously noted the idea that legal concepts can have two meanings. Some legal theorists refer to it as the distinction between the 'descriptive' and 'prescriptive' meanings of legal terms, as the distinction between the 'definitional' content of legal concepts and their 'justificatory theory,' or as the difference between the legal concept as a mere 'conceptual marker' and the foundational theory in the service of which it is employed in a particular context." (citations omitted)). *See generally*, Jules S. Coleman & Jody S. Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986); Timothy P. Terrell,

The normative flexibility of such legal concepts thus enables them to be informed by external interpretive influences, and thereby to accommodate shifts in morality and values over time, while nonetheless remaining legally identifiable and distinct.[115] This capacity to be charged with dynamic moral meaning is important because it allows for a persistent connection between law and morality.[116] As John Goldberg and Benjamin Zipursky have argued in the context of tort law, legal concepts translate deeply-rooted social norms into frameworks that structure the legal system's assignment of responsibility and liability.[117] Thomas Merrill and Henry Smith have made a similar argument in the context of property law: that any sustainable property system must be "infused with moral significance"[118] and that our property system embodies a particular moral perspective.[119]

Insurance law, like other areas of the law, has good reason to track the more general social norms that interact with it—including, in particular, notions of individual responsibility that track a distinction between misbehavior and misfortune. That we demand such a correspondence is evident in the way we talk about insurance generally.[120] Given that "[t]he very idea of insurance involves a group of individuals or entities in an indirect relationship, without any contract specifying the terms of that

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"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1981); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541 (1985).

For a particularly clear example of the interface between conceptual stability and dynamic content, see Balganesh & Parchomovsky, *supra* note 110, at 1276 (discussing "reasonable use" in nuisance law).

[115] Balganesh & Parchomovsky, *supra* note 110 at 1244.

[116] *See id.* at 1305.

[117] *See* John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 391 (2005).

[118] Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

[119] *Id.*

[120] As the Supreme Court of California put it, "The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements." Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979).

relationship,"[121] it is to be expected that conceptions of justice, particularly distributive justice, will permeate insurance law.[122] Although the normative open-endedness of legal concepts allows the law to be infused with such public norms, the choice of which norms we infuse the law with is left up to us.

Section A of this Part describes the "jural" meaning of the non-responsibility requirement: its logically-stable but normatively-open-ended conceptual structure. It then describes the distinct normative meaning that infuses that structure in our particular legal tradition. It does so by analogizing the non-responsibility requirement to the concept of proximate causation in tort law, and to the way that the latter concept allows tort law to assign legal responsibility only for certain types of acts—namely, those that were foreseeable results of the tortfeasor's breach. It argues that the non-responsibility requirement does similar work: it assigns legal responsibility to the insured only for certain types of losses—namely, those that were the results of the insured's *own bad acts*. In doing so, insurance law relies on independent and inherently-normative conceptions of what it means for an insured's act to be "bad" and what it means for the act to be attributable to the insured as his "own." Section A then shows how the non-responsibility requirement's conception of individual responsibility is reflected in, and reinforced by, the contours of the unique boundary of individual legal responsibility that insurance law draws in practice.

Section B of this Part studies the history of insurance for three particular types of loss—negligence, suicide, and arson—to show how the normative conceptions of wrongness and attributability have changed over time, thereby allowing insurance law to keep in-step with broader social changes.

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[121] Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PENN. L. REV. 653, 656 (2013).

[122] *See, e.g.*, Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369–70 (N.Y. 1992) ("We believe . . . that the ordinary person would be startled, to say the least, by the notion that Mugavero should receive insurance protection for sexually molesting these children, and thus, in effect, be permitted to transfer the responsibility for his deeds onto the shoulders of other homeowners in the form of higher premiums. . . . [T]he average person purchasing homeowner's insurance would cringe at the very suggestion that the person was paying for such coverage. And certainly the person would not want to share that type of risk with other homeowner's policyholders." (internal citations and quotation marks omitted)).

A. THE CONCEPTUAL STRUCTURE AND NORMATIVE CONTENT OF THE NON-RESPONSIBILITY REQUIREMENT

In tort law, the phrase "proximate cause" describes a judgment that a but-for cause of an event should be deemed close enough to it to be treated as legally responsible for it.[123] This judgment is based not just on facts (*i.e.*, not all but-for causes are also proximate causes) but on separate normative criteria. In the words of Justice Andrews, "[w]hat we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[124] Such core legal concepts are, as Justice Andrews notes, normatively open-ended. It is possible, for example, to argue that only efficiency-based considerations ought to determine proximate causation. One might thus argue that the proximate cause of a particular harm ought to be its most cheaply-avoidable but-for cause.[125] Of course, American tort law generally has not taken this position. It has, instead, focused on the question of *foreseeability*.[126] Did the tortfeasor's breach cause the harm in a way that was foreseeable? If so, then the tortfeasor's breach was a proximate cause.[127]

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[123] *See generally* James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

[124] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

[125] Compare, for example, William Prosser's proposal to replace existing negligence doctrine with a cost-benefit analysis that compares alternative liability regimes. *See* John C. P. Goldberg & Benjamin C. Zipursky, *Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1756–62 (1998).

[126] *See* W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 748–49 (2005); Goldberg & Zipursky, *supra* note 125, at 1742 n.38 (citing cases).

[127] Although foreseeability may also factor into negligence analysis in two places—e.g., duty and breach—I refer only to the role it plays in proximate causation analysis. *See* Cardi, *supra* note 126, at 743–66 (discussing the role of foreseeability in negligence analysis, in the context of breach, proximate cause, and duty). As Goldberg and Zipursky put it, in order for an act that causes an injury to count as a proximate cause of that injury, "the injury must be the realization of one of the risks that leads the law to deem the conduct careless in the first place." JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 107 (Dennis Patterson ed. 2010).

The non-responsibility requirement in insurance law draws a similar—and similarly "arbitrary"—boundary around a subset of an insured's but-for effects. The non-responsibility requirement structures a judgment about whether an otherwise-covered loss was caused by acts that are attributable to the insured such that the law ought to hold the insured responsible for the loss by preventing insurance from covering it. This, I suggest, is the immanent structure of the non-responsibility requirement as a legal concept.

Just as it is possible to argue that considerations of pure efficiency ought to determine proximate causation, it is similarly possible to argue that instrumental values like the minimization of moral hazard, or maximization of victim compensation, should provide the normative content for the non-responsibility requirement. As the preceding analysis has suggested, however, our legal system has not chosen to draw the default boundary of responsibility in insurance law along such lines.[128] Study of the various sources of insurance law reveals that the non-responsibility requirement derives its normative content from two questions:

(1) Did the insured exercise *substantial control* over the loss-causing act?

(2) Was the loss-causing act itself *inherently wrong*?

These two questions perform an analogous function to the foreseeability analysis in the law of proximate causation. If both questions are answered in the affirmative, then the non-responsibility requirement demands that the insured ought not to benefit from coverage.

Of course, American insurance law could have turned out differently. It is not strictly necessary that the non-responsibility requirement must turn on the insured's control or the inherent wrongness of the act. Nonetheless, this Section argues that a faithful interpretation of American insurance law reveals the above-described conceptual structure and normative content. Our legal tradition, in other words, hews to the maxim that an insured cannot be indemnified for the results of his own bad acts. In doing so, it defines an insured's act to be his "own" if he exercised substantial

[128] *See supra* Section II.A–B. For exceptions to this default, see *supra* notes 38–43 and accompanying text.

control over it.[129] And it defines the act to be "bad" if it is inherently wrong, not merely something that is "illegal" or prohibited.[130] As demonstrated below, unpacking these two prongs of the analysis shows that they trace a boundary of individual legal responsibility that is different from the boundaries traced by tort or criminal law.

1. Substantial Control

It is only when the insured has exercised "substantial" control over the loss-causing act that the non-responsibility requirement suggests coverage should be disallowed.[131]

This element of the non-responsibility analysis arises most commonly in situations involving an insured whose acts are the direct cause of the insured loss.[132] Insurance law generally holds that so long as a named insured was not at fault, it can be covered against losses caused by its agents,

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[129] *Cf.* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 90 (1986) ("[T]he notion of control is a normative conclusion about the factors for which individuals can properly be asked to bear insurance responsibility. . . . In common parlance, people are not responsible for their gender, but they are responsible for and can control their smoking and eating habits. In between these extremes lie a variety of actions that are more difficult to characterize.").

[130] *Cf.* McNeely, *supra* note 5, at 33 ("Thus it appears that before cases on liability insurance came before the courts, there was already a general recognition that an insurance contract was not necessarily against public policy because it covered . . . some criminal acts by the insured himself which were viewed as *mala prohibita*, rather than *mala in se*.").

[131] Professor Edwin Patterson identified this element as an essential feature of insurance, and through his efforts, it was incorporated into the 1939 New York Insurance Law's definition of "insurance contract." 16 HOLMES, *supra* note 38, at § 116.2[B] (2000). *See* N.Y. INS. L. § 1101(a)(2) ("[A] 'fortuitous event' is any occurrence or failure to occur which is, or is assumed by the hies to be, to a substantial extent beyond the control of either party.").

[132] *See generally* Willy E. Rice, *Destroyed Community Property, Damaged Persons, and Insurers' Duty to Indemnify Innocent Spouses and Other Co-Insured Fiduciaries: An Attempt to Harmonize Conflicting Federal and State Courts' Declaratory Judgments*, 2 EST. PLAN. & CMTY. PROP. L.J. 63 (2009); JERRY, *supra* note 59, at § 63C[b]; Gallagher, *supra* note 34, at 1276.

even if those agents caused harms intentionally,[133] and even if their actions incurred punitive damages.[134] For example, if a company has purchased insurance in its own name and then discovers that one of its employees has committed an intentional tort or intentionally destroyed company property, coverage will generally be allowed so long as the company's senior management did not approve of or participate in the act.[135] When faced with policy language that would appear to preclude coverage even for the

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[133] *See, e.g.*, Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 216 (Minn. 1984) (refusing to enforce a professional liability policy to permit an individual attorney to be indemnified for the attorney's fees that he forfeited for breaching his fiduciary duty to his client but permitting recovery by the attorney's law firm); Malanga v. Mfrs. Cas. Ins. Co., 146 A.2d 105 (N.J. 1958); Baltzar v. Williams, 254 So. 2d 470 (La. Ct. App. 1971); Nuffer v. Ins. Co. of N. Am., 45 Cal. Rptr. 918 (Cal. Ct. App. 1965) (holding coverage for intentional burning of an insured's property by his agent is not contrary to public policy and citing other cases); Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass'n, 112 N.E.2d 273 (N.Y. 1953). *See generally* Gallagher, *supra* note 34, at 1277; Fischer, *supra* note 45, at 81–84.

[134] *See* RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. e (AM. L. INST. 2019) ("Courts generally permit insurance coverage of liabilities that are assessed vicariously, even in situations in which the liability of the primary actor would be uninsurable in the jurisdiction, for example liability for punitive damages."); 7 PLITT ET AL., *supra* note 36, at § 101:23; Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R. 4th 11, § 4 (1982); French, *supra* note 18, at 79; Sharkey, *supra* note 47, at 428; Gallagher, *supra* note 34, at 1276–78. *See also* Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980) ("In almost all jurisdictions which disallow insurance coverage for punitive damages, an exception is recognized for those torts in which liability is vicariously imposed on the employer for a wrong of his servant."); Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) ("[I]f the employer did not participate in the wrong the policy of preventing the wrongdoer from escaping penalties for his wrong is inapplicable.").

[135] *See, e.g.*, Ryan Homes, Inc. v. Home Indem. Co., 647 A.2d 939, 943 (Pa. Super. Ct. 1994) (denying coverage when the insured's general contractor's subcontractors did shoddy work, potentially saving the general contractor money, because "[t]o hold otherwise . . . would permit a contractor to receive an initial payment from the property owner, allow the project to proceed in a shoddy manner, and then to receive a subsequent payment from an insured company to correct its own mistakes or the mistakes of those it had hired."); D.I. Felsenthal Co. v. N. Assurance Co., 120 N.E. 268 (Ill. 1918) (holding a corporation is not barred from recovering if its agent acted intentionally to cause loss, but if the agent owns basically all the stock and controls the corporation, then the rule does not apply).

insured's agents' intentional harms, courts will often find a way to interpret the provision to allow coverage.[136] Insurance law generally takes the position that an insured principal is *not* legally responsible for its agent's acts *unless* it exercised substantial control over the act[137] or is otherwise morally responsible.[138] As a Louisiana Court put it, "No person can insure against his own intentional acts. Public policy forbids it. But public policy does not forbid one to insure against the intentional acts of another for which he may be held vicariously liable."[139]

Insurance law thus draws a different boundary around an insured's legal responsibility for its agents' acts than does tort law, which typically

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[136] *See* KEETON & WIDISS, *supra* note 24, § 5.4(d)(5), at 430 ("In most circumstances, courts hold both (1) that the express provisions commonly used in liability insurance policies do not preclude coverage for damages awarded for an intentional tort when the insured is held to be responsible on a theory of vicarious liability, and (2) that it would not be appropriate to imply a limitation that would restrict the coverage.").

[137] *See* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) (allowing insurance where "the employer [does] not participate in the wrong"); Dart Indus. v. Liberty Mut. Ins. Co., 484 F.2d 1295, 1298 (9th Cir. 1973); Pawtucket Mut. Ins. Co. v. Lebrecht, 190 A.2d 420, 423 (N.H. 1963) ("There is no such policy against insurance to indemnify an insured against the consequences of a violation of law by others without his direction or participation, or against his own negligence, or the negligence of others."); Farris v. U.S. Fid. & Guar. Co., 542 P.2d 1031 (Or. 1975); Avis Rent A Car Sys., Inc. v. Liberty Mut. Ins. Co., 526 A.2d 522 (Conn. 1987); Capitol Indem. Corp. v. Evolution, Inc., 293 F. Supp. 2d 1067, 1073 (D.N.D. 2003) (holding that 68% majority shareholder of a corporation "was [the corporation]" for the sake of intentional act analysis, and denying coverage under the corporation's insurance policy for a fire that the majority shareholder intentionally caused); Doloughty v. Blanchard Constr. Co., 352 A.2d 613 (N.J. Super. Ct. Law Div. 1976); Com. Union Ins. Co. v. Reichard, 273 F. Supp. 952 (S.D. Fla. 1967); Hildebrand v. Holyoke Mut. Fire Ins. Co., 386 A.2d 329 (Me. 1978); Arenson v. Nat'l Auto. & Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955) (allowing coverage "where the [insured employer] *is not personally at fault*.") (emphasis added). *See generally* 10A PLITT ET AL., *supra* note 36, at § 149:51.

[138] *See, e.g.*, *Dayton Hudson Corp.*, 621 P.2d at 1161 (Okla. 1980) ("We think the ultimate answer depends in each [case] on whether prior knowledge makes the master's negligence 'ordinary' or 'gross.'"). *See also* Gallagher *supra* note 34, at 1281 (discussing judicial analysis in contexts where principal appears to be morally responsible).

[139] McBride v. Lyles, 303 So. 2d 795, 799 (La. Ct. App. 1974). *See generally* 16 HOLMES, *supra* note 38, § 116.3[D] (discussing cases).

imputes an agent's acts to its principal for the purpose of assigning liability.[140] Although an employer, for example, can defend itself against a *respondeat superior* claim by arguing that its employee acted beyond the scope of employment,[141] the employer cannot assert lack of knowledge or approval of the employee's wrongful acts as a defense to vicarious liability.[142] As Patterson put it, "the ordinary principle of the law of agency, that the agent's acts done and knowledge acquired, within the scope of his authority, are imputed to the principal, is inapplicable [in the insurance context] to willfully destructive acts done by the agent without the actual knowledge or connivance of his principal."[143] Of course, without this mismatch between the conceptions of "vicarious" responsibility contained within tort and insurance law, liability insurance for employers would be of far less value.

2. Inherent Wrongness

For an insured to be deemed responsible for an otherwise-covered loss, she must also have caused it by committing an act that is inherently wrong.

In most circumstances, this determination is made by focusing on the subjective intent of the insured.[144] If she subjectively intended to cause harm or loss, then the otherwise-covered results of her act are held to be uninsurable.[145] In other circumstances, courts appear to skip the intent

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[140] *See generally* RESTATEMENT (SECOND) OF TORTS § 317 cmt. a (AM. L. INST. 1965); RESTATEMENT (SECOND) OF AGENCY § 215 (AM. L. INST. 1958).

[141] *See, e.g.*, Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995) (Calabresi, J.); JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 502–13 (2d ed. 2008).

[142] *See* RESTATEMENT (SECOND) OF TORTS § 317 cmt. a (AM. L. INST. 1965);

[143] EDWIN W. PATTERSON, ESSENTIALS OF INSURANCE LAW: AN OUTLINE OF LEGAL DOCTRINES IN THEIR RELATIONS TO INSURANCE PRACTICES 259 (2d ed. 1957).

[144] *See, e.g.*, Nielsen v. St. Paul Cos., 583 P.2d 545, 547 (Or. 1978) ("[T]he insured's intentional, albeit unlawful, acts . . . must have been committed for the purpose of inflicting the injury and harm before either a policy provision excluding intentional harm applies or the public policy against insurability attaches."). *See generally* Farbstein & Stillman, *supra* note 45.

[145] *See generally* RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. g (AM. L. INST. 2019). Standardized liability insurance policies also seem to make this

analysis in order to cut directly to the underlying question: Was the insured's bad act sufficiently "serious" to be uninsurable?[146] If so, then coverage will be disallowed regardless of what has been shown to be the insured's subjective intent.[147] Thus, where the underlying act is particularly heinous, subjective intent to harm is often said to be "inferred" as a matter of law.[148]

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distinction. *See* Farbstein & Stillman, *supra* note 45, at 1222–28 (on the history of liability insurance policies, the distinction between intending a harmful act, and intending the harm).

[146] *See, e.g.*, Ill. Farmers Ins. Co. v. Keyser, 956 N.E.2d 575, 578–79 (Ill. App. Ct. 2011) ("Whether a particular contract of insurance violates public policy depends on the nature of the risk against which insurance is sought. Applying these public policy principles, Illinois courts have approved personal injury coverage of certain intentional torts such as retaliatory discharge and defamation. On the other hand, they have excluded coverage of intentional torts that are also serious crimes [such as murder, sexual assault, or battery]. The distinction is apparent." (internal citations omitted)). *See also* City of Muncie v. United Nat'l Ins. Co., 564 N.E.2d 979 (Ind. Ct. App. 1991) (holding that a Due Process clause violation is necessarily serious such that an intent to cause harm therefore may be inferred such that coverage is denied under a policy that contains an intentional/expected harm exclusion).

[147] Cases in which courts have allowed coverage for the insured's own "serious" harms generally involve types of insurance that legislatures have heavily regulated on the grounds that victim compensation goals ought to take precedent over general principles of insurance law. *See, e.g.*, Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342, 1353 (E.D. Pa. 1983) (applying Pennsylvania law) (holding that physician's intentional malpractice would be covered under insurance policy).

[148] *See, e.g.*, Dodge v. Legion Ins. Co., 102 F. Supp. 2d 144, 153 (S.D.N.Y. 2000) (sexual abuse by psychiatrist of adult patient); Allstate Ins. Co. v. Bailey, 723 F. Supp. 665, 669 (M.D. Fla. 1989) (sexual molestation of child); Allstate Ins. Co. v. Roelfs, 698 F. Supp. 815, 820–21 (D. Alaska 1987) (sexual molestation of child); Linebaugh v. Berdish, 376 N.W.2d 400, 406 (Mich. Ct. App. 1985) (sexual molestation of child); State Farm Fire & Cas. Co. v. Neises, 598 N.W.2d 709, 711–12 (Minn. Ct. App. 1999) (grave robbing and corpse mutilation); Farm Bureau Ins. Co. v. Witte, 594 N.W.2d 574, 586 (Neb. 1999) (shaking baby, causing shaken baby syndrome); Sanzi v. Shetty, 864 A.2d 614, 620 (R.I. 2005) (sexual abuse of child by neurologist). *See generally* Fischer, *supra* note 76, at 132.

In situations where the insured is accused of sexual molestation of a child, for example, it may appear to be the case that the insured subjectively believed that he was actually benefitting, rather than harming, the victim. *See, e.g.*, N.H. Ins. Grp. V. Strecker, 798 P.2d 130, 130 (Mont. 1990) (insured testified that he did not intend to harm the victim). Yet in nearly every jurisdiction, intent to commit harm is imputed

The standard that insurance law uses to assign responsibility to insureds appears to track general social understandings of what is inherently wrong, rather than standards that other areas of the law—like tort or criminal law—use to assign legal liability to misbehaving actors. Modern insurance law, for example, allows a tortfeasor to be indemnified against the legal ramifications of harms he negligently causes others.[149] This reveals a mismatch between the ways tort law and insurance law assign responsibility for losses. The tort of negligence is "strict" in the sense that it requires perfect compliance with the objective standard of reasonable prudence.[150] If an insured departs from this standard, he may be held legally responsible by his victims in negligence, regardless of his good intentions.

Note that despite insurance law's emphasis on intent, insurance for intentional torts is not always denied under the non-responsibility requirement.[151] Although some intentional torts are uninsurable, there are many for which liability insurance coverage is frequently allowed. Such torts include defamation, trademark infringement, false imprisonment, employment discrimination, wrongful termination, malicious prosecution, and invasion of privacy.[152] This mismatch is possible because the subjective intent standard is often stricter than that imposed for the sake of many

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to the abuser in such cases, thereby precluding insurance coverage. *See generally* State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 463 (Ala. 1993) ("The rule applied by an overwhelming majority of courts is that, in cases involving sexual abuse of children, intent to injure is inferred as a matter of law regardless of claimed intent." (internal quotations omitted)). *See generally* 17 HOLMES, *supra* note 38 § 119.6[A][1] (state by state survey).

[149] *See, e.g.*, Hartford Life Ins. Co. v. Title Guar. Co., 520 F.2d 1170 (D.C. Cir. 1975). This was not always the case, see *infra* Section II.B.1.

[150] *See* Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 288–92 (2012) (examining strict liability in negligence).

[151] *See* BAKER & LOGUE, *supra* note 21, at 416 ("[C]riminal, tort, and insurance law. . . . [a]ll use words like 'intent' and 'intentional' to draw doctrinal lines. . . . Recognizing the unique usage of the word 'intent' in each legal context is helpful in understanding both the intentional harm and criminal act exclusions.").

[152] *See generally* RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. h (AM. L. INST. 2019) (listing cases); French, *supra* note 18, at 67–70 (listing cases); Gallagher, *supra* note 35, at 1273–74 (listing cases); 7 PLITT ET AL., *supra* note 36, at § 101:24 (listing cases).

intentional torts and because courts sometimes deem the relevant intentional tort to be insufficiently serious to warrant barring coverage.[153]

Because insurance law appears to be concerned with the moral wrongness of the insured's act, one might expect there to be a correspondence between a determination that the insured's act was a crime and a determination that the non-responsibility requirement precludes insurance coverage for losses or liabilities arising out of the same act. But this is not the case either.[154] Instead, insurance law generally allows coverage for civil liability or property losses arising out of the insured's violation of criminal statutes so long as the crime was merely a *malum prohibitum*, rather than a *malum in se*.[155] Here too, this distinction is generally—although not

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[153] *See, e.g.*, Fermino v. Fedco, Inc., 872 P.2d 559, 567 (Cal. 1994) ("The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion. Thus, the intent element of false imprisonment does not entail an intent or motive to cause harm; indeed false imprisonments often appear to arise from initially legitimate motives." (internal citations omitted)); City of Newark v. Hartford Accident & Indem. Co., 342 A.2d 513 (N.J. Super. Ct. App. Div. 1975) (determining that insurance policies providing indemnity to police officers against civil consequences of their own willful or intentional acts are not contrary to public policy so long as the police officers are acting within the scope of their employment).

[154] The standard for determining intent for the purpose of insurance coverage is distinct from rules governing intent for purposes of criminal responsibility. Evidence presented during a criminal proceeding can be used, however, to show intent in a subsequent civil action regarding insurance coverage. *See, e.g.*, Merritt v. State Farm Fire & Cas. Co., 463 S.E.2d 42 (Ga. Ct. App. 1995). A criminal conviction of an intent crime may be treated as *prima facie* evidence of intent for purposes of insurance coverage. *See, e.g.*, Shelter Mut. Ins. Co. v. Bailey, 513 N.E.2d 490 (Ill. App. Ct. 1987). *See generally* Thomas D. Sawaya, *Use of Criminal Convictions in Subsequent Civil Proceedings: Statutory Collateral Estoppel Under Florida and Federal Law and the Intentional Act Exclusion Clause*, 40 U. FLA. L. REV. 479, 522 (1988); James L. Rigelhaupt, Jr., Annotation, *Criminal Conviction as Rendering Conduct for Which Insured Convicted Within Provision of Liability Insurance Policy Expressly Excluding Coverage for Damage or Injury Intended or Expected by Insured*, 35 A.L.R. 4th 1063 (1985); 7 PLITT ET AL., *supra* note 36, at § 101:25; 7A PLITT ET AL., *supra* note 36, at § 103:35.

[155] As the Supreme Court of Massachusetts put it, "If the maxim, that no man shall profit from his own wrong, be applied literally, then the slightest negligence . . . would bar recovery. Such a result would be recognized generally as impractical and unjust." Minasian v. Aetna Life Ins. Co., 3 N.E.2d 17, 18–19 (Mass. 1936).

always—made on the basis of whether the insured subjectively intended to cause loss or harm.[156] Thus, when an insured has been convicted of a crime, courts may review the relevant criminal statute to determine whether the conviction establishes the *type* of intent necessary to prevent insurance coverage.[157] Even when insurance policies contain explicit exclusions for liabilities arising out of intentional acts, courts have often read such clauses only to prevent coverage when the underlying crime is a "serious" one.[158]

There is also no clear correspondence between acts that incur punitive damages and a determination that liability arising out of such acts is uninsurable. A majority of the states have held that liability for punitive

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[156] *See* RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. d (AM. L. INST. 2019); Coop. Fire Ins. Co. v. Vondrak, 346 N.Y.S.2d 965 (N.Y. Sup. Ct. 1973) (intentional violation of the law may be insured against where the ultimate damage to the injured person was unintentional).

[157] Such a finding is not always possible, especially when the underlying crime is either a "strict liability" or "general intent" crime. *See, e.g.*, Nationwide Mut. Ins. Co. v. Machniak, 600 N.E.2d 266, 268 (Ohio Ct. App. 1991) (holding that intentional-injury exclusion did not apply to insured's conviction for felonious assault because the crime was not statutorily defined as a specific-intent crime); United States Fid. & Guar. Co. v. Perez, 384 So. 2d 904 (Fla. Dist. Ct. App. 1980); USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593 (W.D. Pa. 2000), *aff'd*, 345 F.3d 190 (3d Cir. 2003).

[158] *See, e.g.*, Allstate Ins. Co. v. Raynor, 21 P.3d 707, 712 (Wash. 2001) (holding that a criminal acts exclusion found in a homeowner's liability insurance policy did not apply to all criminal conduct, but only to "serious" criminal conduct accompanied by "a wrongful disposition" to harm or injure others); Van Riper v. Const. Gov't League, 96 P.2d 588 (Wash. 1939); Sledge v. Cont'l Cas. Co., 639 So. 2d 805, 813 (La. Ct. App. 1994) (citing *Van Riper* for the rule that "'violation of law' exclusion in life insurance policy applied only to criminal acts of a serious nature."). Courts sometimes do read criminal act exclusions literally, however, as not turning on the seriousness of the crime or the intent of the criminal. *See, e.g.*, Wilderman v. Powers, 956 A.2d 613 (Conn. App. Ct. 2008) (denying coverage for liability for neighbor's alleged psychological injuries when insured peeping tom photographed naked neighbor and was sued because his conduct was criminal in nature); SECURA Supreme Ins. Co. v. M.S.M, 755 N.W.2d 320 (Minn. Ct. App. 2008) (holding that youth's attack of neighbor was a "criminal act," regardless of intent of youth to harm neighbor); Gruninger v. Nationwide Mut. Ins. Co., 905 N.Y.S.2d 391 (N.Y. App. Div. 2010) (denying coverage when insured accidentally shot other hunter); Progressive N. Ins. Co. v. McDonough, 608 F.3d 388 (8th Cir. 2010) (interpreting plain language of criminal act exclusion as having no intent requirement such that insured's intent was irrelevant at time of accident). *See generally* Knutsen, *supra* note 63, at 238 (discussing such cases).

damages is insurable.[159] States following this majority rule generally forbid insurance for punitive damages arising out of intentional conduct, however.[160] Here again, the relevant standard of "intent" is subjective intent by the insured to cause harm, rather than an intent to perform the act.[161]

As one might expect, given the general prevalence of the subjective-intent standard, most courts have accepted the view that if an insured suffered from a lack of mental capacity when causing the relevant harm or loss, his coverage ought not to be voided—either under policy language that explicitly carves-out "intentional" acts or under general principles of insurance law.[162] "Broadly stated, if the actor does not have the mental capacity to do the act intentionally, the policy coverage remains operative."[163] Such an allowance for mental incapacity makes sense insofar as the non-responsibility requirement in insurance law aims to make a determination akin to the types of moral-culpability determinations in criminal law, which similarly allows for an insanity defense.[164] Interestingly, as Robert Jerry has noted, "Most courts reject the view that the criminal standard for determining insanity is the appropriate test for determining lack

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[159] RESTATEMENT OF THE L. OF LIAB. INS. § 45 cmt. i (AM. L. INST. 2019).

[160] Sharkey, *supra* note 47, at 432.

[161] *See id.* at 452.

[162] *See, e.g.*, Globe Am. Cas. Co. v. Lyons, 641 P.2d 251 (Ariz. Ct. App. 1981). *See generally* JERRY, *supra* note 59, at § 63B[a] (discussing insanity in the context of insurance for intentional harm); Farbstein & Stillman, *supra* note 45, at 1225–28; James. L. Rigelhaupt, Jr., Annotation, *Liability Insurance: Intoxication or Other Mental Incapacity Avoiding Application of Clause In Liability Policy Specifically Exempting Coverage of Injury or Damage Caused Intentionally by or at Direction of Insured*, 33 A.L.R. 4th 983 § 3[a] (1984); KEETON & WIDISS, *supra* note 24, at 481; VANCE, *supra* note 38, at 462 n.136 (3d ed. 1951) (discussing Karow v. Cont'l Ins. Co., 15 N.W. 27, 32 (Wis. 1883) where the court found that self-arson was covered if the insured is insane).

[163] Ruvolo v. Am. Cas. Co., 189 A.2d 204, 208 (N.J. 1963).

[164] *See* Salton, *supra* note 63, at 1037–44 (reviewing criminal law treatment of insanity). Note that this allowance for mental incapacity again differentiates insurance law's conception of responsibility from that articulated by tort law, where no insanity defense is available to tortfeasors. *See* James Goudkamp, *Insanity as a Tort Defence*, 31 OXFORD J. LEG. STUD. 727 (2011); Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 AM. J. JURIS. 179 (2003); Farbstein & Stillman, *supra* note 45, at 1226; Rajspic v. Nationwide Mut. Ins. Co., 662 P.2d 534 (Idaho 1983).

of mental capacity [for the sake of insurance coverage]."[165] Of course, there are situations where an insured is deemed to lack mental capacity under both the criminal and the insurance law standards.[166] The point, however, is that there is no clean correspondence between the insurance law and criminal law conceptions of insanity either.[167]

B. THE NON-RESPONSIBILITY REQUIREMENT OVER TIME

Because the non-responsibility requirement is structured such that it derives its legal content from inherently normative social conceptions of control and wrongness, a full presentation of it also requires a demonstration of the connection between the requirement and evolving social norms. This Section does so by showing how historical changes in public morality have corresponded to changing determinations of whether coverage for certain types of acts ought to be disallowed.[168] As Emile Durkheim put it, "Moral reality, like all reality, can be studied from two different points of view. One can set out to explore and understand it and one can set out to evaluate it. The first of these problems, which is theoretical, must necessarily precede the second . . . ."[169] The relevant moral phenomena to be described in this

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[165] JERRY, *supra* note 59, at § 63C[d]. *See also* Fischer, *supra* note 76, at 140–45; Farbstein & Stillman, *supra* note 45, at 1226–28. It is possible for an insane person's acts to be intentional for the purpose of insurance law but unintentional for the purposes of criminal law: an insane insured may be unable to get insurance coverage for his intentional acts even though he was able to avoid criminal punishment through a successful insanity defense. *See, e.g.*, Johnson v. Ins. Co. of N. Am., 350 S.E.2d 616 (Va. 1986); Transamerica Ins. Corp. of Am. v. Boughton, 440 N.W.2d 922 (Mich. Ct. App. 1989). It is also possible, contrarily, for an insane person's acts to be unintentional for the purpose of insurance law but intentional for the purposes of criminal law: an insane person's acts may be deemed unintentional, and thus insurable, even when the insanity defense to related criminal charges fails.

[166] *Boughton*, 440 N.W.2d at 925 ("We recognize that there will be cases where insanity manifests itself such that the insured cannot intend or expect to cause an injury; an actor may believe, for example, that he is peeling a banana rather than pointing a pistol."); *Ruvolo*, 189 A.2d at 208–09.

[167] For a subtle treatment of the different ways that insurance law treats insanity, see Salton, *supra* note 63.

[168] This is what Balganesh and Parchomovsky call a process of "interpretive change." Balganesh & Parchomovsky, *supra* note 110, at 1276.

[169] EMILE DURKHEIM, SOCIOLOGY AND PHILOSOPHY 35 (D. F. Pocock trans., 1953). *See also* Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L.

Section correspond to the two elements of the non-responsibility requirement described in the preceding Section: what qualifies as an inherently wrong act, and what constitutes morally-relevant control over that act by the insured.

1. Insuring Negligence

Up until the 1830s, courts and treatise-writers did not distinguish between losses that were intentionally caused by the insured and those that resulted from the insured's lack of care. Courts thus held that losses caused by negligence of the insured were uninsurable.[170] Willard Philipps, in his *Treatise on the Law of Insurance* (1823) wrote:

> [A]n agreement by one party to indemnify another against losses voluntarily incurred, seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal. And there is the same objection, in a smaller degree, against sustaining a contract to indemnify a man against the consequences of his own negligence. By such an agreement one man would consent to put himself wholly in the power of another, and it could operate only to the injury of the parties, and of the community of which they were members.[171]

In 1828, Chancellor Kent stated in his *Commentaries on America Law* that it is "the better opinion" that "the insurer is not liable for . . . damage . . . [which] may be prevented by due care, and is within the control of human prudence and sagacity."[172]

REV. 1087, 1092 (2013) (making the same point in the criminal law context and quoting Durkheim); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 5 (3d prtg. 2002) (stating that one may "stud[y] morality as a phenomenon . . . rather than in preaching.").

[170] *See* HORWITZ, *supra* note 39, at 202; Sharkey, *supra* note 47, at 420; 10A PLITT ET AL., *supra* note 36, at § 149:45.

[171] 1 WILLARD PHILLIPS, A TREATISE ON THE LAW OF INSURANCE 158 (1823).

[172] 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 334 (William M. Lacy ed., 1889).

As Kenneth Abraham has shown, the doctrinal vehicle through which this proposition was tested was the "barratry" defense[173]—barratry being injury brought about through the design of the insured's own shipmaster or crew.[174] As the Supreme Court of New York held in *Grim v. Phoenix*, which Kent discussed,[175] when an insurance policy explicitly covered barratry, the malevolent behavior of the shipmaster or crew would be covered on the grounds that even due care of the insured ship-owner could not have prevented such loss.[176] But if the loss resulted from negligence or other misconduct of the master or mariners that did not amount to barratry, then such loss was not covered, because the "act of the master must be referred to his principal, who appoints him; and, whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it."[177] Thus although insurers and courts, when delineating the coverage for barratry, made a distinction between the intentional and negligent conduct of the insured's *agents*, they declined to make a similar distinction with regard to the insured's own actions in selecting and managing his shipmaster and crew. From this perspective, the non-responsibility requirement precluded coverage for losses caused by negligence of agents both because the insured exercised sufficient control over them to be responsible for their actions, and also because responsibility

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[173] Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 576 (2005). *See also* HORWITZ, *supra* note 39, at 229–30 ("[The] defense of barratry was just another application of a more general principle that one could not insure against his own misfeasance.").

[174] HORWITZ, *supra* note 39, at 335 n.198; Grim v. Phoenix Ins. Co., 13 Johns. 451, 457 (N.Y. Sup. Ct. 1816) ("It is well settled that an act to be barratrous must be done with a fraudulent intent or *ex maleficio.* Barratry is a fraudulent breach of duty in respect to the owners.").

[175] KENT, *supra* note 172, at 494.

[176] *Grim*, 13 Johns. at 457–58.

[177] *Id.* at 459. *See also* Cleveland v. Union Ins. Co., 8 Mass (1 Tyng) 308, 321–22 (Mass. 1811) ("It is the duty of the owner [of the vessel] to see that he intrusts the property insured with a man of competent skill, prudence, and discretion. He is responsible for all losses or damage to the goods committed to his charge, which arise from his negligence, ignorance, or willful misconduct . . . . The principle of an implied warranty on the part of the assured, that every thing shall be done to prevent a loss, pervades the whole subject of marine insurance . . . ."). HORWITZ, *supra* note 39, at 202 (noting that before 1830, parties were not insured for losses arising out of their own negligence).

for losses caused by the insured's own "voluntary" acts (whether negligent or intentional) ought to lie with the insured and not on the insurer.[178]

Over the ensuing decades, however, judicial and scholarly opinions changed such that marine insurers increasingly found that the defense of barratry failed when they sought to avoid coverage by showing that mere negligence had caused the loss.[179] Fire insurers' attempts to use the policyholder's own negligence as a defense similarly failed.[180] Historians have attributed this shift to different causes. Horwitz, for example, attributes the increased acceptance of insurance for losses caused by negligence to a rise of an actuarial consciousness during the mid-nineteenth century.[181] "The courts, in short, were beginning to express what would become a more general change in nineteenth century legal consciousness: conceiving of greater numbers of business risks simply as 'costs of doing business,' largely outside the control of individual responsibility."[182] The result was that losses caused by negligence gradually became paradigmatically insurable on the belief that humans are inherently and uncontrollably prone to carelessness. Although harms proximately caused by the insured's own negligence may give rise to legal claims against him, such negligence was not the sort of

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[178] *See Grim*, 13 Johns. at 458–60. It was also a subject of controversy whether negligence was a covered cause of loss in the context of fire insurance on land. *See* KENT, *supra* note 172, at 496 ("[I]t is a vexed question, rendered the more perplexing by well balanced decisions, and in direct opposition to each other, whether a loss by fire proceeding from negligence, be covered by a policy insuring against fire.").

[179] *See, e.g.*, Patapsco Ins. Co. v. Coulter, 28 U.S. 222, 236 (1830) (finding insurance coverage for barratry because negligence that was a remote cause will not be a defense to coverage, contrary to *Grim*); Waters v. Merchs.' Louisville Ins. Co., 36 U.S. 213, 225 (1837) (holding that losses occasioned by insured perils (e.g., fire) are insured against even when caused by negligence). *See generally* Abraham, *supra* note 173, at 577; HORWITZ, *supra* note 39, at 202.

[180] *See, e.g.*, Columbia Ins. Co. v. Lawrence, 35 U.S. 507, 517–18 (1836). *See* HORWITZ, *supra* note 39, at 230–31.

[181] HORWITZ, *supra* note 39, at 226–37.

[182] *Id.* at 230. *See generally* JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA (2012); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (discussing the field of accident law and how it began to change in the nineteenth century to be more consistent with social theories).

inherently bad act that ought not to be insured.[183] This shift laid the legal groundwork for the rise of a new type of insurance: liability insurance.[184]

The first form of liability insurance arose in the 1880s as "employers' liability insurance," designed to protect employers against liability to their employees during the period before workers' compensation was enacted.[185] Soon thereafter, a "public liability" feature was added to such policies—extending coverage to third parties generally.[186] These policies eventually evolved into general commercial liability insurance.[187] The liability insurance that is sold today as part of residential insurance packages ("homeowners insurance") provides the same kind of broad protection and uses much of the same policy language as commercial liability insurance.[188]

When liability insurance first appeared, it was "considered of doubtful legality because it . . . requires the insurer *to interfere* in litigation to which he is not a party."[189] This concern—that the insurer might shield the wrongdoer from being held directly responsible by his victims—was not present in the first-party insurance context. It did not take long for courts to come to the general conclusion, however, that insofar as civil liability takes the form of "a money compensation . . . though the life or limb of a person

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[183] *See, e.g.*, Fed. Ins. Co. v. Tamiami Trail Tours Inc., 117 F.2d 794, 796 (5th Cir. 1941) ("An overwhelming percentage of all insurable losses sustained because of fire can be directly traced to some act or acts of negligence. Were it not for the errant human element, the hazards insured against would be greatly diminished. It is in full appreciation of these conditions that the property owner seeks insurance, and it is after painstaking analysis of them that the insurer fixes his premiums and issues the policies. It is in recognition of this practice that the law requires the insurer to assume the risk of the negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss.").

[184] *See* Abraham, *supra* note 173, at 580–82; McNeely, *supra* note 39; McNeely, *supra* note 5, at 27–29.

[185] *See* Abraham, *supra* note 173, at 580; McNeely, *supra* note 39, at 188.

[186] *See* Abraham, *supra* note 173, at 580.

[187] *Id*. *See also* McNeely, *supra* note 39, at 193.

[188] From the beginning, both homeowners and commercial liability insurance have been based on standard policy forms drafted by insurance trade associations. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages,* 1998 WIS. L. REV. 101, 114 n.47 (1998). Commercial liability insurance policies, as well as homeowners' policies, tend to include a promise to pay "those sums the insured becomes legally obligated to pay as damages because of bodily injury, personal injury, or property damage." *Id.* at 115.

[189] PATTERSON, *supra* note 143, at 263 (emphasis added). *See also* McNeely, *supra* note 39 (discussing history of liability insurance).

may be, and most certainly is, of greater intrinsic value than goods and chattels,"[190] there is: "no valid reason for holding that the law . . . [has not] reached a stage of allowing an [insured] . . . to purchase from a third party an indemnity fund with which to make more certain his ability to respond in damages for personal injuries caused by his carelessness and neglect."[191] Although there was some early controversy over whether it was contrary to the public's interest to allow insurance to cover liability for negligence generally, judicial and social consensus arrived fairly quickly at the determination that such coverage was permissible.[192] The question whether it was wrong in the moral sense to permit insurance for losses due to negligence—*i.e.*, because it would allow the insured to avoid responsibility for his own wrongs—had already been answered in the negative in the property insurance context.[193]

Thus, by the early twentieth century, insurance for negligence—whether in the first-party insurance context or the third-party insurance context—became fully permissible under the non-responsibility requirement. The insured was not deemed to be fully in control of "the errant human element"[194] that produced negligence nor was negligently caused loss regarded as the sort of inherently bad act that could not be diffused through

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[190] Bos. & A.R. Co. v. Mercantile Tr. & Deposit Co., 34 A. 778, 786 (Md. 1896).

[191] *Id.* at 786–87.

[192] *See, e.g.*, Messersmith v. Am. Fid. Co., 133 N.E. 432 (N.Y. 1921) (finding auto liability coverage for an accident that was directly caused by improper and negligent conduct, in accordance with public policy); *Bos. & A.R. Co.*, 34 A. at 786 ("While the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses."). *See generally* McNeely, *supra* note 5, at 33.

[193] By the early twentieth century, courts also began to cite empirical data to argue that the number of accidents due to negligence has not increased with the growth of liability insurance. McNeely, *supra* note 5, at 34 (citing Merchs.' Mut. Auto. Liab. Ins. Co. v. Smart, 267 U.S. 126 (1925); *In re* Op. of the Justs., 147 N.E. 681 (Mass. 1925)).

[194] Fed. Ins. Co. v. Tamiami Trail Tours, 117 F.2d 794, 796 (5th Cir. 1941).

insurance. Today, it remains "settled law" that a person may be insured against the results of his own negligence[195]

2. Insuring Suicide

For most of the nineteenth century, a majority of courts in the United States followed the "English rule"[196] that it was contrary to the public interest for a beneficiary to recover under a life insurance policy where the insured, while sane, committed suicide.[197] This arose out of a tradition, carried over into Colonial American law, that suicide was a morally reprehensible act for which the insured ought not to be allowed to recover.[198] This attitude was reflected in the insurance law principle—imported from the marine and fire

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[195] Hartford Life Ins. Co. v. Title Guarantee Co., 520 F.2d 1170, 1175 (D.C. Cir. 1975). *Accord* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 442 (5th Cir. 1962); St. Paul Mercury Ins. Co. v. Duke Univ., 670 F. Supp. 630, 637 (M.D.N.C. 1987), *aff'd in part, rev'd in part*, 849 F.2d 133 (4th Cir. 1988); Cent. Dauphin Sch. Dist. v. Am. Cas. Co., 412 A.2d 892, 896 (Pa. Super. Ct. 1979), *rev'd*, 426 A.2d 94 (Pa. 1981); Gordon H. Ball, Inc. v. Or. Erecting Co., 539 P.2d 1059, 1061 (Or. 1975).

[196] JERRY, *supra* note 59, at § 63B[a]. The English rule appears to originate in the criminalization of suicide. "Although suicide is no longer a criminal offense [in England] if the insured kills himself whilst not mentally disordered, the insurer can avoid liability on the ground that he cannot take advantage of his own intentional act." *Id.* at 466 n.219 (quoting 25 HALSBURY'S LAWS OF ENGLAND § 530 at 302 (4th ed. reissue 1994).

[197] *See, e.g.*, Supreme Commandery of Knights of the Golden Rule v. Ainsworth, 71 Ala. 436 (Ala. 1882); Ritter v. Mut. Life Ins. Co., 169 U.S. 139, 154 (1898) (arguing on public policy grounds that the contrary rule would "tempt[] or encourage[] the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted."). *See generally* PATTERSON, *supra* note 143, at 261 (noting that suicide by an insured, mentally sane or insane, is "not *impliedly* excepted from the insurer's risks, by the weight of authority in the United States."). When insurance was taken out in contemplation of committing suicide, the insurer could avoid the policy on the grounds of fraud even if the policy did not discuss suicide. 9A PLITT ET AL., *supra* note 36, at § 138:23; VANCE, *supra* note 38, at 518. *See, e.g.*, Lange v. Royal Highlanders, 110 N.W. 1110, 1112 (Neb. 1907).

[198] *See* Alex B. Long, *Abolishing the Suicide Rule,* 113 NW. U. L. REV. 767, 777–79 (2019).

insurance context—that an insured could not recover if his own bad act caused the otherwise-covered loss.[199]

In 1898, the Supreme Court decided *Ritter v. Mutual Life Insurance Company of New York*,[200] and it appeared to set a national standard that it was contrary to public interest for a life insurance policy to pay if the insured committed suicide while sane.[201] In *Ritter*, the insured was of sound mind and killed himself apparently with the intention of maturing his life insurance policies in order to repay his debts.[202] The Court held that his life insurer was relieved of liability, and that there was no error in the trial court's instruction to the jury that "[t]here can be no recovery by the estate of a dead man of the amount of policies of insurance upon his life, if he takes his life designedly, while of sound mind."[203] In upholding this broad statement of law, the Supreme Court gave two reasons: (1) where, as in that case, there was no express exception of sane suicide, such an exception was to be implied; and (2) an express provision for payment in the case of suicide while sane would be contrary to public policy.[204] The Court stated, "[a] contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of court of justice, or be made the foundation of its judgment."[205] In making its "sound morality" argument, the Court relied upon precedents set in jurisdictions where suicide was a crime.[206] Even though suicide by that

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[199] *See Ritter*, 169 U.S. at 160 ("[I]f a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk: a stipulation that, in either case, upon such an event the policy should give a right of action, would be void.") (quoting Moore v. Woolsey, (1854) 4 El & B. 243, 254).

[200] *Ritter*, 169 U.S. at 139–60.

[201] Following Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the decisions of state courts became binding on federal courts.

[202] *Ritter*, 169 U.S. at 142.

[203] *Id.* at 145.

[204] *Id.* at 154.

[205] *Id.*

[206] *Id*. at 157–58 (discussing Supreme Commandery of Knights of the Golden Rule v. Ainsworth, 71 Ala. 436 (Ala. 1882) (crime) and Fauntleroy's Case, 4 Bligh (N.S.) 194, 211 (felony)). The Court also relied upon cases where the relevant death had been caused by a crime. Ritter, 169 U.S. at 156–58 (citing N.Y. Mut. Ins. Co. v.

time had been decriminalized in nearly all of the states, a general moral opprobrium towards suicide was still entrenched.[207]

Although *Ritter* stood for the proposition that it was contrary to public policy for a life insurer to cover death by suicide while sane, it carved out an exception for suicide while insane.[208] The relevant definition of sanity was similar to that stated in the *M'Naghten* rule from the criminal law context: the insured must have been unable to understand the nature of his act or not know the act was wrong.[209] The requisite forfeiture of insurance coverage in the event of suicide therefore was not necessary if the insured's mental state rendered him morally blameless for his suicide.[210] Moreover, even if the insurer attempted to exclude death by suicide in the policy form,

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Armstrong, 117 U.S. 591, 600 (1886) (murder); Hatch v. Mut. Life Ins. Co., 120 Mass. 550 (Mass. 1876) (illegal abortion)).

[207] Long, *supra* note 198, at 778–79. *See, e.g.*, Commonwealth v. Mink, 123 Mass. 422, 424 (Mass. 1877) (describing suicide as "sinful and immoral"); Aetna Life Ins. Co. v. Milward, 82 S.W. 364, 365 (Ky. 1904) ("The act of suicide is not only unnatural, but is highly immoral and criminal."). *See also* Wash. v. Glucksberg, 521 U.S. 702, 774 (1997); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 67–100, 148–242 (1985).

[208] *Ritter*, 169 U.S. at 160 ("[I]f the suicide or self-destruction takes place when the assured is insane and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money.") (internal quotations omitted). Drawing upon the criminal law, some [state] courts explained that the act of taking one's own life was not truly "suicide" if the decedent was insane. Long, *supra* note 198, at 779. *See also* Phadenhauer v. Germania Life Ins. Co., 54 Tenn. (7 Heisk.) 567, 577 (Tenn. 1872).

[209] *See* Daniel Ward, *The M'Naghten Rule: A Re-evaluation*, 45 MARQ. L. REV. 506, 507 (1962). The *Ritter* court approved of the trial court's following instruction:

> If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others—in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would—then he is to be regarded by you as sane. Otherwise he is not.

Ritter, 169 U.S. at 148.

[210] *See* Long, *supra* note 198, at 780. Other courts at the time allowed insanity of an insured suicide to be demonstrated if it could be shown that the suicide acted under an irresistible "impulse." *See, e.g.*, Mut. Life Ins. Co. v. Terry, 82 U.S. 580, 582 (1872).

courts often upheld the argument that an insane person was unable to form the requisite intent to commit suicide—so the exclusion did not apply and coverage would be allowed.[211] The non-responsibility requirement was thus applied in the life insurance context in a manner that relied upon general moral disapproval of suicide that was not reflected in the criminal statutes, but it nonetheless borrowed from criminal law conceptions of blameworthiness and sanity.

Soon after *Ritter*, state legislatures and supreme courts moved to repudiate the Supreme Court's declared common-law prohibition of life insurance for suicide committed while sane.[212] The states shifted towards allowing coverage—whether the insured was sane or insane—so long as the individual did not defraud the insurer by failing to disclose an intent to commit suicide that was already present upon purchasing the policy.[213] Some states entirely prohibited the use of suicide as a defense by insurers unless fraud could be demonstrated[214] or allowed the defense only within a relatively short time-frame after the policy was purchased.[215] This appears to have been motivated by an increasing public perception that suicide was almost always the result of mental illness and not an act that was inherently

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[211] *See* Gary Schuman, *Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That Is the Question—Or Is It?*, 28 TORT & INS. L.J. 745, 756–57 (1993) (discussing *Terry*, 82 U.S. at 590–91).

[212] *E.g.*, Patterson v. Nat. Premium Mut. Life Ins. Co., 75 N.W. 980, 983 (Wis. 1898); Lange v. Royal Highlanders, 110 N.W. 1110, 1112 (Neb. 1907).

[213] *See* W. R. Vance, *Suicide as a Defense in Life Insurance*, 30 YALE L.J. 401, 401–02 (1921) (noting that at the time of the article in 1921 only Alabama followed the *Ritter* decision).

[214] *E.g.*, MO. REV. STAT. § 6945 (1909) ("In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.") (current version at MO. REV. STAT. §376.620 (West 2017); Whitfield v. Aetna Life Ins. Co., 205 U.S. 489, 494 (1907) (applying the statute). *See also* Vance, *supra* note 213, at 402 ("So deep-seated is the revolt against the [*Ritter*] doctrine that no fewer than four state statutes have been passed prohibiting, either absolutely or with qualifications, the setting up of suicide as a defense in actions on insurance policies.").

[215] *See* Schuman, *supra* note 211, at 754 n.55 (listing state statutes).

wrong.[216] "Such insanity is one of the diseases to which the insurer must have known that the insured was subject, and the unwitting act of self-destruction is as much the consequence of that disease as if some vital organ were thereby fatally affected."[217]

Eventually the Supreme Court took heed of this shift, reversing its position in *Ritter*[218] and recognizing states' power to limit an insurance company's ability to use suicide as a defense[219] as well as their power to allow life insurance that affirmatively covers suicide whether sane or insane.[220] The result was that life insurance companies were able to enforce a suicide exclusion of the following form: "If the insured dies by suicide, while sane or insane, within two years of the date of issue, our only liability will be for the amount of premiums paid."[221] So long as such exclusions were clear, they were enforceable in the majority of jurisdictions,[222] and they

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[216] *See* Morton v. Supreme Council of Royal League, 73 S.W. 259, 262 (Mo. Ct. App. 1903) ("[S]elf-destruction always indicates, if not insanity, at least an irresponsible state of mind, and may well be considered part of the risk assumed, if not specially excluded. For this reason the doctrine in question is not welcomed by all courts and seemingly not by those of this State, which hold that a company doing a life insurance business takes a risk on an insured person's life subject to all his human passions and frailties."). *See also* Campbell v. Supreme Conclave Improved Ord. of Heptasophs, 49 A. 550 (N.J. 1901) (finding coverage for suicide after felony arrest); Lange v. Royal Highlanders, 106 N.W. 224 (Neb. 1905), *aff'd*, 110 N.W. 1110 (Neb. 1907); Marcus v. Heralds of Liberty, 88 A. 678 (Pa. 1913); Jackson v. Loyal Additional Benefit Ass'n, 205 S.W. 318 (Tenn. 1917). *See generally* VANCE, *supra* note 38, at 561.

[217] VANCE, *supra* note 38, at 564.

[218] Vance, *supra* note 213, at 401 (noting the ruling of Nw. Mut. Life Ins. Co. v. Johnson, 254 U.S. 96 (1920)). William O. Cramer & Henry C. Rubin, *Public Policy in Relation to Suicide in Life Insurance*, 27 GEO. L.J. 361, 362–63 (1939).

[219] Whitfield v. Aetna Life Ins. Co., 205 U.S. 489, 501 (1907). Justice Harlan, who wrote *Whitfield*, also wrote the majority opinion in *Ritter*.

[220] *Nw. Mut. Life Ins. Co.*, 254 U.S. at 102.

[221] Schuman, *supra* note 211, at 759. The two-year period is the same as the incontestability period in most policies (*i.e.*, the period after which an insurer cannot contest coverage) which is also mandated by statute in many states. *See* VANCE, *supra* note 38, at 565.

[222] JERRY, *supra* note 59, at § 63B[a] ("Assuming the exclusion is clear, no court questions its enforceability."). Schuman, *supra* note 211, at 759–60 (discussing how the minority view "sane or insane" language does not negate any issue of the insured's state of mind).

remain prevalent today.[223] Under a typical life insurance policy today, if the insured kills himself during the first two years, then the exclusion applies regardless of his mental state;[224] if he commits suicide after the two-year period, then recovery is allowed.[225]

Comparing the contemporary rule with the *Ritter* rule reveals the degree to which the underlying structure of the non-responsibility requirement has persisted, even as public conceptions of the harms for which an individual must be held responsible have changed.[226] Over the nineteenth and twentieth centuries, suicide itself gradually ceased to be regarded by the legislatures and courts as a *malum in se* for which the insured must be held responsible.[227] Analytically and morally separate concerns about the wrongness of fraud, however, persisted.[228] The shift to allowing insurers to deny coverage to suicides, "sane or insane," committed during the first two years of coverage arose as an administratively simple way of expressing this

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[223] *See* JERRY, *supra* note 59, at § 63B[a] ("Only a few American courts have spoken approvingly of the 'English rule' that holds it against public policy for a beneficiary to recover under a policy where the insured, while sane, committed suicide. These cases are old and of dubious authority today."). *See also* PATTERSON, *supra* note 143, at 261–62 (whether suicide ought to be treated as an implicit exception to life insurance policies is "not often of practical importance, since either express exceptions in the contract or statutes expressly denying such an exception are ordinarily decisive.").

[224] JERRY, *supra* note 59, at § 63B[a]. *See* Schuman, *supra* note 211, at 759–60.

[225] *See* JERRY, *supra* note 59, at § 63B[a]; Schuman, *supra* note 211, at 755 n.59, 759–60. In order for a life insurance policy beneficiary (*e.g.*, a child or spouse) to make out a *prima facie* case for recovery, she must show the existence of the contract, the payment of premiums, and the death of the insured. Schuman, *supra* note 211, at 750. The insurer then bears the burden of proving the applicability of a suicide exclusion, which involves overcoming a presumption that the insured did not commit suicide. *Id. See also* 9A PLITT ET AL., *supra* note 36, at § 138:66.

[226] *See generally* New Amsterdam Cas. Co. v. Jones, 135 F.2d 191, 194 (6th Cir. 1943) (reviewing history of changing rules on the insurability of suicide).

[227] *See* Long, *supra* note 198, at 772.

[228] Cramer & Rubin, *supra* note 218, at 363. *See, e.g.*, Mut. Life Ins. Co. v. Durden, 72 S.E. 295 (Ga. Ct. App. 1911); Supreme Lodge Knights of Pythias v. Trebbe, 74 Ill. App. 545 (Ill. App. Ct. 1897), *rev'd*, 53 N.E. 730 (Ill. 1899); Seiler v. Econ. Life Ass'n of Clinton, 74 N.W. 941 (Iowa 1898); Supreme Conclave, Improved Ord. of Heptasophs of Balt. City v. Miles, 48 A. 845 (Md. 1901); Campbell v. Supreme Conclave Improved Ord. of Heptasophs, 49 A. 550 (N.J. 1901); Jackson v. Loyal Additional Benefit Ass'n, 205 S.W. 318 (Tenn. 1917).

distinction, in the sense that it generally avoids a costly inquiry into the mental state of the deceased insured.[229] Thus, if the insured kills himself soon after he purchased insurance, it will be presumed he purchased it fraudulently, planning on self-destruction. But if he kills himself thereafter, it can be presumed that he suffered from mental illness, a fatal disease that life insurance is supposed to cover. At bottom, the analysis has remained fundamentally the same over time: if the allegedly covered loss was the result of the insured's own inherently wrong act, then coverage should be forbidden. Otherwise, the presumption is that coverage should be allowed.

3. Insuring Innocent Co-Insureds

Applying the non-responsibility requirement becomes complicated when multiple insureds are covered under a single policy, and one of them causes a loss to both. One sadly-common fact-pattern involves co-insured spouses,[230] where one spouse (usually an abusive or suicidal husband) intentionally burns down the marital home.[231] Can the innocent spouse recover under her fire insurance policy in such a situation? For more than a

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[229] *See* Longenberger v. Prudential Ins. Co. of Am., 183 A. 422, 425 (Pa. Super. Ct. 1936) ("In fixing one year (or two years, as the case may be) as the period within which the insured's suicide, whether sane or insane, should not create a cause of action on the policy, the insurers adopted the year or two thus chosen as the extreme limit of time that a person would probably take out life insurance with the intent of killing himself in order to benefit his family or his creditors at the expense of the insurance company; and by necessary implication they agreed thereby that suicide of the insured, sane or insane, after the expiration of this period of time was not contemplated by him at the time the insurance was taken out and would not be a fraud on the company; and that they would regard suicide after that length of time as one of the hazards covered by the policy.").

[230] *See* Willy E. Rice, *Destroyed Community Property, Damaged Persons, and Insurers' Duty to Indemnify Innocent Spouses and Other Co-Insured Fiduciaries: An Attempt to Harmonize Conflicting Federal and State Courts' Declaratory Judgments*, 2 EST. PLAN. & CMTY. PROP. L.J. 63, 82 (2009) ("Generally . . . 'a fiduciary relationship exists between spouses'; and it does not terminate until the marriage dissolves.").

[231] *See id.* at 71 (describing this as the "largest category of all innocent co-insured disputes" based on an empirical survey); BAKER & LOGUE, *supra* note 21, at 204 (citing Brief of Amici Curiae California Alliance Against Domestic Violence and Ad Hoc Committee of Law Professors Working on Domestic Violence in Borman v. State Farm Fire & Cas. Co., 521 N.W.2d 266 (Mich. 1994) (No. 96266)).

hundred years,[232] courts and commentators have struggled with this question, and jurisdictions remain divided on it today.[233] This sub-section traces the historical evolution of the law in this area. Whereas the previous two sub-sections revealed the degree to which the non-responsibility requirement has tracked changing social conceptions of what is *inherently wrong*, this sub-section shows that the non-responsibility requirement also tracks changing conceptions of individual *substantial control*.

From the late nineteenth century through the middle of the twentieth century, innocent spouses, involved in the above-described situation, seldom recovered from their insurer.[234] When disputes over coverage arose, courts

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[232] *Cf.* Monaghan v. Agric. Fire Ins. Co., 18 N.W. 797 (Mich. 1884) (involving an arsonist mother and innocent co-insured children).

[233] *See, e.g.*, Trinity Universal Ins. Co. v. Kirsling, 73 P.3d 102, 105 (Idaho 2003) (listing majority and minority decisions vis-à-vis the rights of innocent co-insured spouses); Atlas Assurance Co. v. Mistic, 822 P.2d 897, 899–901 (Alaska 1991) (describing conflicts); Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727, 737–39 (Wis. 1982) (describing conflicts); Murphy v. Tex. Farmers Ins. Co., 982 S.W.2d 79, 80–82 (Tex. Ct. App. 1998), *aff'd*, 996 S.W.2d 873 (Tex. 1999) (describing history of innocent co-insured decisions in Texas courts); Cal. Cas. Ins. Co. v. Northland Ins. Co., 56 Cal. Rptr. 2d 434, 442 (Cal. Ct. App. 1996) (discussing conflicting innocent co-insured decisions); and Thoele v. Aetna Cas. & Sur., 39 F.3d 724, 727 n.1 (7th Cir. 1994) (discussing conflicting innocent co-insured decisions).

For scholarship on this problem, see Rice, *supra* note 230; Rachel R. Watkins Schoenig, *Property Insurance and the Innocent Coinsured: Was It All Pay and No Gain for the Innocent Co-Insured?,* 43 DRAKE L. REV. 893 (1995); David L. Nersessian, *Penalty by Proxy: Holding the Innocent Policyholder Liable for Fraud by Coinsureds, Claims Professionals, and Other Agents*, 38 TORT TRIAL & INS. PRAC. L.J. 907 (2003); Benjamin M. Parrott, *For Better or For Worse - The Iowa Supreme Court's Decision to Compensate the Innocent Coinsured Spouse in Sager v. Farm Bureau Mutual Insurance Company*, 54 DRAKE L. REV. 561 (2006).

[234] The traditional view was that "an innocent spouse may not recover under a fire insurance policy for damages resulting from the other spouse's fraud by deliberate burning of their jointly owned property." St. Paul Fire & Marine Ins. Co. v. Molloy, 433 A.2d 1135, 1140 (Md. 1981) (quoting Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 399 (Del. 1978)). *But see* Mercantile Tr. Co. v. N.Y. Underwriters Ins. Co., 376 F.2d 502, 506 (7th Cir. 1967) (one of few early cases where recovery was allowed); Hoyt v. N.H. Fire Ins. Co., 29 A.2d 121, 123 (N.H. 1942) (another early cases where recovery was allowed). *See generally* Parrott, *supra* note 233, at 564–65; Marvin L. Karp, *Arson and the Innocent Co-Insured - Drafting Insurance Policies to Protect against Arson and Fraud*, 22 BRIEF 9, 9 (1993); JERRY, *supra* note 59, at § 63A n.196.

relied upon the legal oneness of the couple—whether through their joint property interests or through their joint contractual obligations with the insurer[235]—to impute the wrongful act to both spouses, thereby voiding all insurance coverage.[236] As the Supreme Court of Oklahoma put it, "[t]o allow recovery . . . where the arsonist has been proven to be a joint insured would allow funds to be acquired by the entity of which the arsonist is a member and is flatly against public policy."[237]

Over time, however, the rules applied to such situations changed, with courts tending to conclude that the innocent spouse ought to recover.[238] Thus, in 1968, the Supreme Court of Wisconsin considered a situation in which an innocent co-insured husband attempted to recover under his insurance policy when his wife burned down their home.[239] The court allowed coverage, and stated:

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[235] *See, e.g.*, Rockingham Mut. Ins. Co. v. Hummel, 250 S.E.2d 774, 776 (Va. 1979) ("Furthermore, the form of the insurance contract was joint; the 'Named Insured' was 'Harold Lee and Mildred Hummel'. Thus under the policy and as the 'insured', each spouse had the joint obligation to use all reasonable means to save and preserve the property. Likewise each spouse had the joint duty to refrain from defrauding the insurer."); Klemens v. Badger Mut. Ins. Co., 99 N.W.2d 865, 866 (Wis. 1959) (finding that when a policy is written in the joint names of a husband and wife, there arises a joint obligation not to commit fraud, and thus when one insured breaches the obligation, "the breach caused by intentional destruction is chargeable to both insureds and precludes recovery by the innocent joint insured."). *See generally* Parrott, *supra* note 233, at 566.

[236] *See, e.g.*, *Steigler*, 384 A.2d at 399 (citing cases); Koisor v. Cont'l Ins. Co., 13 N.E.2d 423, 425 (Mass. 1938).

[237] Short v. Okla. Farmers Union Ins. Co., 619 P.2d 588, 590 (Okla. 1980). Courts held that property ownership in joint tenancy, tenancy by the entirety, or community property served to void the policy as to both guilty and innocent coinsureds. *See, e.g.*, Bridges v. Com. Standard Ins. Co., 252 S.W.2d 511, 512–13 (Tex. Ct. App. 1952) (holding that an innocent co-insured spouse may not recover under a property insurance contract if the deviant co-insured spouse destroys jointly owned or community property).

[238] *See* JERRY, *supra* note 59, at § 63A ("Beginning in the 1970s, a number of courts moved away from the rule barring recovery to a rule that permits recovery by an innocent coinsured of a loss intentionally caused by another coinsured." (internal citations omitted)).

[239] Shearer v. Dunn Cnty. Farmers Mut. Ins. Co., 159 N.W.2d 89, 93 (Wis. 1968).

> This court rejects the [insurer's] invitation to invent a doctrine that a spouse should be denied recovery on an insurance contract because of action of the other spouse when those actions cannot be imputed to the insured spouse. The marriage relationship should not be used as a basis for such a law. Married people are still individuals and responsible for their own acts. Vicarious liability is not an attribute of marriage.[240]

During the mid-twentieth-century, judges increasingly recognized that converting a joint property interest into a joint responsibility for arson "produces inequitable results."[241] On this view, the possibility that an arsonist "may profit through the co-mingling of funds with the innocent insured or otherwise is a factual issue properly resolved by the fact finder."[242] Courts also increasingly "tailor[ed] the recovery permitted [to] the innocent insured to guard against the possibility that the arsonist might receive financial benefit as a result of the arson."[243] So long as the arsonist was

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[240] *Id.* at 93.

[241] *See* Karp, *supra* note 234, at 11. *See, e.g.*, Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727, 740 (Wis. 1982); *Steigler*, 384 A.2d at 401 (noting that "the 'oneness' theory . . . is, to say the least, somewhat 'quaint' in this day and age."); *id.* at 402 (holding that allowing the innocent co-insured to recover "represent[s] both a more modern analysis of the problem and [] produce[s] a fairer result . . . ." insofar as it avoids holding that the innocent insured is responsible for the independent actions of her deviant spouse). *Cf.* Howell v. Ohio Cas. Ins. Co., 327 A.2d 240, 242 (N.J. Super. Ct. App. Div. 1974) ("The significant factor is that the responsibility or liability for the fraud—here, the arson—is several and separate rather than joint, and the husband's fraud cannot be attributed or imputed to the wife who is not implicated therein. Accordingly, the fraud of the co-insured husband does not void the policy as to plaintiff wife.").

[242] *Hedtke*, 326 N.W.2d at 740.

[243] *Id*. (denying the arsonist recovery while giving the innocent insured a pro-rata share). *See also* Am. Econ. Ins. Co. v. Liggett, 426 N.E.2d 136, 140 (Ind. Ct. App. 1981) ("The legal fiction of the entireties' estate in real estate is designed for the protection of the spouses and the marriage. It was initially designed to prevent the individual creditors of either spouse from taking the marital home. The courts generally, and divorce courts in particular, find no difficulty in dividing an entireties estate. I find it a perversion of this legal fiction, designed to protect the spouses' rights and marital property, to use it to destroy the property rights of an innocent spouse.").

prevented from recovering, allowing the innocent co-insureds to receive coverage was increasingly deemed unproblematic.[244]

In order to reach this holding, state courts often determined that the language in the couple's insurance policy addressing intentional harm was ambiguous[245]—which opened the door to traditional methods of insurance policy interpretation that allow ambiguities to be construed against the insurer.[246] In response, insurance companies redrafted their policy forms to unambiguously render co-insured spouses' obligation not to burn their home joint, rather than several.[247] This led to a period during which many courts found such revised policy terms unambiguous and enforced them in favor of the insurance company—against the claims of the innocent co-insured.[248]

The spread of such new policy language inaugurated the third, and most recent, phase in the evolution of this area of law wherein both courts and legislatures began to add "a second step to the contractual analysis."[249]

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[244] *See, e.g.*, Com. Union Ins. Co. v. State Farm Fire & Cas. Co., 546 F. Supp. 543, 547 (D. Colo. 1982). *See generally* JERRY, *supra* note 59, at § 63A; Karp, *supra* note 234, at 10.

[245] Often, the relevant policy language excluded from coverage are the intentional or fraudulent acts of "the insured," which courts have found to be ambiguous where only one of multiple co-insureds misbehaved. *See, e.g.*, Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 690 (Minn. 1997) (citing similar cases).

[246] *See, e.g.*, Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 401 (Del. 1978) (using the reasonable expectations doctrine to decide in favor of the innocent insured); Hoyt v. N.H. Fire Ins. Co., 29 A.2d 121, 123 (N.H. 1942) ("The ordinary person owning an undivided interest in property, not versed in the nice distinctions of insurance law, would naturally suppose that his individual interest in the property was covered by a policy which named him without qualification as one of the persons insured.").

[247] *See* Parrott, *supra* note 233, at 571 ("Insurers attempted to employ less ambiguous and more relevant language, including using the terms 'an insured' and 'any insured' in place of 'the insured.'"); JERRY, *supra* note 59, at § 63A.

[248] *See, e.g.*, Volquardson v. Hartford Ins. Co. of the Midwest, 647 N.W.2d 599, 607 (Neb. 2002) (construing an intentional loss exclusion and explicitly stating "that there is no public policy specifically articulated by Nebraska statutes or case law which would preclude application of the intentional acts exclusion . . . to negate coverage against peril of fire to an innocent coinsured . . . ."); Vance v. Pekin Ins. Co., 457 N.W.2d 589, 590 (Iowa 1990) (holding that "[a]n innocent coinsured spouse may recover depending on whether the coinsureds' interests under the policy are joint or severable."). *See generally* Parrott, *supra* note 233, at 573 (discussing how the *Vance* court found no concerns about the legitimacy of the exclusion despite there being public policy concerns); JERRY, *supra* note 59, at § 63A n.205.

[249] *Watson*, 566 N.W.2d at 689.

Courts ask whether public interest requires that policy language unambiguously denying coverage to an innocent co-insured ought nonetheless to be judicially reformed to allow for coverage. An increasing number of courts have answered this question in the affirmative. Thus, in *Osbon v. National Union Fire Insurance Co.*, the Supreme Court of Louisiana held that a widow could recover under a fire insurance policy that named both her and her husband as co-insureds, even though it unambiguously denied her coverage because her husband intentionally destroyed their home.[250] The policy language at issue differed from the Louisiana standard fire insurance policy language, however, and therefore conflicted with a state law that required all fire insurance policies made in the state to conform to the standard.[251] The Court interpreted the legislatively-mandated standard fire insurance form only to preclude recovery for an insured "who . . . is responsible for causing the loss . . . ," and reformed the widow's policy accordingly thereby granting her coverage.[252] It argued:

> This interpretation is in line with the legislative intent . . . . Specifically, we do not believe that the legislature intended to impute the incendiary actions of an insured to the innocent co-insured who has no control over the unauthorized conduct. Nor do we think that the legislature intended to penalize an innocent insured, here, a victim of arson, with the perpetrator of a wrongful act. That is, having lost the property, the innocent insured would be victimized once again by the denial of the proceeds under the insurance policy. We do not believe that the legislature intended for the statute to have such a harsh and inequitable result.[253]

Since *Osbon*, other state high courts have adopted the method deciding such cases by analyzing the insurance policy language against the backdrop of a

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[250] Osbon v. Nat'l Union Fire Ins. Co., 632 So.2d 1158, 1161 (La. 1994).
[251] *Id.* at 1160–61.
[252] *Id.* at 1160.
[253] *Id.*

legislatively-mandated standard policy form—typically in order to find coverage for innocent co-insureds.[254]

Over the last several decades, state legislatures have also enacted laws that explicitly allow a spouse to recover under an insurance policy where the intentional act of her partner is part of a pattern of domestic abuse, despite unambiguous policy exclusions to the contrary.[255] These statutes have been interpreted to promote "the public good by 'not punishing the innocent victim for the wrongs of another . . . .'"[256] Such statutes are often interpreted to require that any compensation enjoyed by an innocent spouse does not flow to the bad actor—a requirement that courts have been able to satisfy, in practice.[257] Washington and Missouri statutes, for example, allow

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[254] *See, e.g.*, Trinity Universal Ins. Co. v. Kirsling, 73 P.3d 102, 107 (Idaho 2003) (holding that the policy in question "provides less coverage than the standard policy in violation of [the state code]."); Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 691 (Minn. 1997) (holding that an "'intentional loss' provision, insofar as it excludes coverage for innocent co-insured spouses, is at odds with the rights and benefits of the Minnesota standard fire insurance policy."); Volquardson v. Hartford Ins. Co. of the Midwest, 647 N.W.2d 599, 610 (Neb. 2002) (finding the Watson's ruling determined "that insofar as the policy in question excluded coverage for an innocent coinsured, it conflicted with the standard policy and must be reformed."); Lane v. Sec. Mut. Ins. Co., 747 N.E.2d 1270, 1271 (N.Y. 2001) (holding that an intentional loss exclusion "impermissibly restricts the coverage mandated by statute and afforded the innocent insured."). *See also* Traders & Gen. Ins. Co. v. Freeman, 81 F. Supp. 2d 1070, 1074–78 (D. Or. 2000) (applying a similar statutory construction and allowing the innocent coinsured to recover). *See generally* Parrott, *supra* note 233, at 578; Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 145–46 n.297 (2007) (citing cases).

[255] *See, e.g.*, NEB. REV. STAT. ANN. § 44–7406(6) (West 1998); N.D. CENT. CODE ANN. § 26.1-32-04 (West 1995); WASH. REV. CODE ANN. § 48.18.550 (West 2020); MO. ANN. STAT. § 375.1312(5) (West 2013) ("If an innocent coinsured files a police report and completes a sworn affidavit for the insurer that indicates both the cause of the loss and a pledge to cooperate in any criminal prosecution of the person committing the act causing the loss, then no insurer shall deny payment to an innocent coinsured on a property loss claim due to any policy provision that excludes coverage for intentional acts. . . . insurers shall not be required to make any subsequent payment to any other insured for the part of any loss for which the innocent coinsured has received payment. An insurer making payment to an insured shall have all rights of subrogation to recover against the perpetrator of the loss."); 215 ILL. COMP. STAT. 5/155.22b (West 2004).

[256] Watts v. Farmers Ins. Exch., 120 Cal. Rptr. 2d 694, 702 (Cal. Ct. App. 2002).

[257] *See* Parrott, *supra* note 233, at 587–89 (listing cases performing a "case-by-case" analysis).

an innocent spouse to recover so long as she files a police report and cooperates with any law enforcement investigation relating to the act of domestic abuse.[258] Although not all states have moved in this direction, "[t]he clear trend has been in favor of allowing innocent co-insured coverage."[259]

Thus, as social understanding of the marital relationship evolved over the course of the twentieth century, courts and legislatures increasingly determined that the non-responsibility requirement ought not to preclude an innocent spouse from recovering when her husband—acting on his own and often aiming to hurt her—intentionally destroys their home. Whereas earlier decisions treated the married couple as a unit and imputed joint responsibility for intentional loss to them both as a matter of law, later decisions disaggregated the two actors and denied coverage only to spouses who exercised substantial control over the destructive act.

IV. NORMATIVE ANALYSIS

The preceding Part II presented a theory of the non-responsibility requirement as a free-standing legal concept that assigns responsibility to the insured for certain types of acts on the basis of inherently moral ideas. It then suggested that the theory fits the law that we have today, and the law that preceded it, precisely because it has tracked underlying social conceptions of morality. The above analysis aimed to show that the non-responsibility requirement is part of our moral and legal culture—as evidenced by our practice.

The preceding Part II did not, however, offer a justification for the normative content of the non-responsibility requirement. Is it morally defensible to make insurance coverage depend on individual responsibility—and, in particular, on a conception of individual responsibility that turns on social understandings of which acts are "inherently wrong" and the insured's "own"? This Part offers such a

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[258] WASH. REV. CODE ANN. § 48.18.550; MO. ANN. STAT. § 375.1312(5).

[259] Shepperson v. Metro. Prop. & Cas. Ins. Co., 312 F. Supp. 3d 183, 197 (D. Mass. 2018) (applying Massachusetts law to find coverage for the innocent co-insured, on the argument that the standard fire policy dictated by statute overrode the policy language). *See also* Century-Nat'l Ins. Co. v. Garcia, 246 P.3d 621, 627 (Cal. 2011) (finding in favor of innocent co-insured on grounds that statutorily mandated policy language overrode more restrictive language in insurer's form).

justification, in three steps. First, it argues that it is justifiable, as a matter of political theory, to use a conception of individual responsibility to place limits on insurance coverage. Second, it argues that the institutions and practices that we currently use to implement the non-responsibility requirement are well-suited to the task. Third, it argues that the two alternative instrumentalist theories—*i.e.*, those that focus on efficiency and victim compensation—are not as well-suited to the institutional framework of our current insurance law system.

A. POLITICAL THEORY

The theoretical argument in favor of the non-responsibility requirement is straightforward. It rests on the basic intuition that there is a meaningful distinction between luck and choice, and that the two forces jointly determine how well we fare in the world: someone's position can improve or decline based on her good or poor choices, and also based on her good or bad luck. Choice differs from luck in the sense that a person is responsible for the results of her choices, but she is not responsible for those things that we recognize as the result of luck.[260] Because luck impacts persons differently, liberal-egalitarian theorists have long argued that redistribution is justified if it is done in a way that is "responsibility-tracking."[261] The general proposition is that "nonsubordination requires

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[260] Note that the conception of "luck" used here is similar to Dworkin's concept of "brute luck" rather than "option luck." Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283, 293 (1981) ("Brute luck is a matter of how risks fall out that are not in that sense deliberate gambles."). *See* Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2294–95 (2003) (describing these intuitions).

[261] Markovits, *supra* note 260, at 2295. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 287 (2000) ("[I]ndividuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own bad choices."); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 916 (1989) (arguing egalitarianism's "purpose is to eliminate involuntary disadvantage, by which I (stipulatively) mean disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make."); Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 339 (2000) ("[T]he aim of justice as equality is to eliminate so far as is possible

redistribution to follow moral responsibility, specifically by eliminating luck's differential effects on persons' fortunes while leaving persons fully to bear the consequences of their (morally responsible) choices."[262] Respecting individual freedom to make choices thus requires a hands-off approach to some differences—*i.e.*, leaving people to bear the negative consequences of their bad choices and allowing them to enjoy the positive consequences of their good choices.[263]

Insurance can be interpreted straightforwardly as a redistributive practice that is justifiable from within such a liberal-egalitarian frame: it reallocates resources in a way that counteracts luck's differential effects while respecting insureds' capacity to make choices for which they are morally responsible.[264] The rules and principles of insurance law therefore can be justified by showing that they support this liberal-egalitarian interpretation of insurance practice. The non-responsibility requirement, I argue, is justifiable in precisely this way: from a liberal-egalitarian standpoint, it is proper to force an insured to bear the cost of losses that are the result of his own (bad) choices.[265] The normative framework of the non-responsibility requirement—which assigns responsibility to the insured on

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the Impact on people's lives of bad luck that falls on them through no fault or choice of their own."); Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 ETHICS 548, 548 (2001) ("As construed by the majority of its current supporters, egalitarianism accommodates choice and responsibility."); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFFS. 146 (1993). *See generally* Markovits, *supra* note 260, at 2295–97 nn.17–24 (describing this general view among egalitarian political theorists).

[262] Markovits, *supra* note 260, at 2294 (describing the responsibility-tracking egalitarian view).

[263] *Id*. at 2297–98 ("[T]aking from a person who has chosen well in order to compensate another person for the bad consequences of her bad choices involves subordinating the first person to the second. It involves requiring the first person to bear a burden for which he is not responsible—something the second person, who is after all the source of this burden, is not required to do.").

[264] That insurance is easily interpreted as such a scheme of redistribution is demonstrated by the fact that prominent political theorists like Ronald Dworkin use hypothetical insurance markets as the model for thinking about what amount and kind of egalitarian redistribution is warranted. *See* Dworkin, *supra* note 260, at 292–304.

[265] *Cf.* Nicholson v. Am. Fire & Cas. Ins. Co., 177 So. 2d 52, 54 (Fla. Dist. Ct. App. 1965) ("We believe that a person has no right to expect the law to allow him to place responsibility for his reckless and wanton actions on someone else.").

the basis of the inherent wrongness of his act and on the basis of whether he exercised control over the act—makes sense as a way of distinguishing between losses that we think of as being the results of the insured's bad luck, versus the results of his bad choices.

Of course, although a liberal-egalitarian framework can motivate an argument that the non-responsibility requirement is normatively necessary, it does not suggest that following the requirement is sufficient to justify the operations of any particular insurance practice or institution. The non-responsibility requirement determines when insurance protection for otherwise-covered losses should *not* be available; it says nothing about how much insurance protection *should be* available—a question about which political theorists also have something to say. A number of answers to this latter question—"How much insurance should there be?"—have been proposed, with varying degrees of radicalism.[266] It is possible, however, to interpret the modern liberal welfare state, with its characteristic mix of market-based and government-run methods of allocating and reallocating resources, as one practical answer to this question. On this view, government supports the operation of markets (including insurance markets), whenever markets prove to be a better method of effecting responsibility-based redistribution than vertical control.[267] Where markets (including insurance markets) fail to produce transfers that "ought" to occur, government intervenes to promote such transfers. In insurance markets specifically, such intervention usually takes the form of requirements ("mandates") to purchase insurance or requirements that insurers not discriminate on the basis of certain characteristics.[268] Where necessary, governments may also step in to create "public" forms of insurance that entirely bypass private insurance companies and the contractual form of the insurance policy. This pragmatic

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[266] *See, e.g.*, Markovits, *supra* note 260; Roemer, *supra* note 261; Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

[267] *See* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). There may also be non-instrumental reasons why government may support the operation of markets. *See* DANIEL MARKOVITS, CONTRACT LAWS AND LEGAL METHODS 1197–1203 (2012).

[268] Two key elements of the Affordable Care Act—the insurance mandate and the prohibition against discrimination on the basis of preexisting conditions—can be understood in this way. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (amending §5000A of the Internal Revenue Code of 1986).

compromise between what Guido Calabresi calls "commodification" and "commandification"[269] is our usual method of social ordering; it is not particular to insurance or to insurance law. The relevant point, for the purpose of this inquiry, is that it too is plausibly justifiable from within a liberal-egalitarian frame.

Obviously, there are other normative standpoints from which one could critique, or justify, the institutions of insurance practice and the rules and principles of insurance law. Taking such perspectives might make the non-responsibility requirement, in particular, appear to be either justifiable or not. Utilitarianism, for example, might recommend violating the non-responsibility requirement under certain circumstances.[270] Similarly, a subtler application of liberal-egalitarian political theory than the simplified sketch provided above might reveal that the non-responsibility requirement, as-applied in insurance cases, is not always straightforwardly justifiable.[271] This Article's goal is not to provide a complete political-theoretical defense of the non-responsibility requirement from a liberal-egalitarian point of view. Nor does it aim to argue that this particular political-theoretical interpretation of insurance law is the best one. Rather, this Article aims to show merely that what is generally recognized as the dominant strain of political theory today (*i.e.*, liberal egalitarianism in the Rawlsian tradition, which is explicitly designed to reach "reflective equilibrium" with our considered moral judgments[272]) appears both to reflect a generally shared set of moral intuitions[273] and to provide a method of justifying the non-responsibility requirement.

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[269] GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 24–40 (2016).

[270] *See* JOHN RAWLS, A THEORY OF JUSTICE 26–27 (1971) (discussing utilitarianism and its contrast with egalitarianism).

[271] For example, it may well be argued that the choices that individuals face are themselves the result of luck, and therefore, it does not make moral sense to hold them responsible for the results of their choices. *See, e.g.*, Victor Tadros, *Distributing Responsibility*, 48 PHIL. & PUB. AFFS. 223, 226–28 (2020).

[272] *See* Richard Arneson, *Egalitarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 24, 2013), https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/; Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 14, 2016), https://plato.stanford.edu/entries/reflective-equilibrium/.

[273] *Cf.* ABRAHAM, *supra* note 129, at 10 ("When values are shared . . . then they have as much objectivity as we have a right to ask for or ever need. Agreement on

B. INSTITUTIONAL DESIGN

In order for this normative theory of insurance law's non-responsibility requirement to be a good theory, it must also be able to justify the institutional practices of insurance law that implement the requirement. This Section argues that the theory of the non-responsibility requirement laid out above can provide normative support for the particular institutional framework that we use to apply it.

1. Courts as Deciders

When disputes arise as to the proper application of the non-responsibility requirement—understood as a legal concept that turns on normative conceptions of inherent harm and individual control—it makes sense that *courts* decide such cases. Courts are well-positioned to determine whether a particular loss is, based on the two-pronged analysis of the non-responsibility requirement, appropriately characterized as the result of "bad luck," and therefore, insurable or as the result of the insured's "choice," and therefore, uninsurable. Information about such moral phenomena[274] is available to courts. It is, of course, proper that legislatures be allowed to correct courts' distinctions between luck and choice, when necessary.[275] But as a general matter, this is a type of determination that courts are relatively well-suited to make.

2. The Priority of Policy Language

In practice, the non-responsibility requirement almost never becomes a dispositive issue unless a court first determines that the terms of the insurance policy could be interpreted to cover losses for which the insured may be held morally responsible.[276] Does this practice of giving decisional priority to the policy terms, rather than to the non-responsibility

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what is important creates objectivity in the realm of values. In discussing the purposes of insurance law, therefore, the issue is not whether the values served by this body of law are objectively grounded, but whether they are able to command agreement.").

[274] *See supra* Section II.A.2.

[275] Indeed, legislatures appear to have done so in the case of suicide and certain types of innocent co-insureds. *See* discussions *infra* Section III.B.1–2.

[276] *See supra* notes 38–39 and accompanying text. *But see infra* notes 253–259 and accompanying text.

requirement as an abstract principle, fit with the normative theory of the requirement laid out in the preceding Section?

Yes. As explained above, a private market for insurance coverage can be presumed to underwrite risks according to terms of coverage that are mutually agreeable to insurers and insureds. Assuming such terms capture an understanding that was shared by both parties,[277] they can be presumed to be socially beneficial so long as they do not contravene general principles of public policy—including the non-responsibility requirement.[278] Of course, an insurance agreement may be tailored to indemnify the insured against fewer losses than could permissibly be covered without violating the non-responsibility requirement.[279] Insurance law's starting point, therefore, is the same as contract law's starting point: the terms of the agreement determine the relative rights and obligations of the parties.[280] Once the meaning of the terms is determined, a second level of analysis asks whether background principles—including the non-responsibility requirement—suggest that the terms ought to be rendered unenforceable.[281] It therefore makes sense that the non-responsibility requirement would only become a dispositive issue when policy language would seem to extend coverage to a loss that was the result of the insured's bad choice rather than his bad luck.

3. Enforcement of the Requirement by Insurers

The non-responsibility requirement is typically enforced by the insurer seeking to deny coverage for a particular claim, rather than by a sort of "attorney general" representing the public's interest in the proper

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[277] This is not always a safe assumption. What courts often do, in practice, is determine the scope of ambiguity, which can be large, and pick the point within it that is insured-friendly, and/or meets the reasonable expectations of the insured. *See* Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 81–86 (2014) (discussing the recent trajectory of the doctrines of *contra proferentem* and "reasonable expectations").

[278] For example, it may be argued that such exchanges are beneficial because they are efficient in the sense of being Pareto-improving, or because they enact a particular type of formal relationship.

[279] For a colorful example on the types of restrictions that may be placed on insurance coverage, see WILLIAM F. MEYER, LIFE AND HEALTH INSURANCE LAW, A SUMMARY 221–22 (1976) (quoting an 1854 life insurance policy).

[280] RESTATEMENT OF THE L. OF LIAB. INS. § 44 (AM. L. INST. 2019).

[281] *Id*. at § 45.

functioning of redistributive institutions. Does this fit within the normative theory described above?

Yes. Insurers are likely to be particularly effective enforcers of the non-responsibility requirement. Insurance companies have a profit-based motive to be constantly testing the limits of what types of coverage courts will agree is impermissible under the non-responsibility requirement in order to avoid paying claims.[282] Insurers also have relatively good access to the information needed to perform this role because claims adjusters can gather facts about the circumstances of the loss to determine whether it was the result of the insured's choice or luck. Of course, it is possible that insurers' business models might be such that they lack a financial interest in vigorously enforcing the non-responsibility requirement, and, therefore, fail to do so.[283] Given the economics of the insurance business, however, such situations have proven to be both rare and correctible through regulation and legislation.[284]

This point reveals that the non-responsibility requirement is not plausibly understood as a principle of "private law" in the sense that that term is used by New Private Law theorists today.[285] Its normative force (as argued above) arises not out of a correlative relationship between private persons (*e.g.*, tortfeasor and victim, buyer and seller)[286] but rather out of general commitments to conceptions of freedom, equality, and distributive justice. The non-responsibility requirement, therefore, is not formally

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[282] *See supra* notes 55–57 and accompanying text.

[283] *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 188 (2010) (suggesting that directors and officers liability insurers "understand that, in the long run, their D&O insurance market will dry up if they press too hard on the fraud exclusion." Thus, they fail to challenge coverage for fraud-based claims even when the defense might be available.); Meyers & Hersch, *supra* note 91, at 976–77 (arguing that employment practices liability insurance coverage appears to extend to liability for wrongful acts either perpetrated or covered up by upper management, as evidenced by the recent Harvey Weinstein settlement).

[284] *See* Meyers & Hersch, *supra* note 91, at 978–83 (discussing regulatory and legislative changes meant to address moral hazard).

[285] *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW ch. 1 (1995) (defining private law); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY ch. 1–5 (2001).

[286] *See* WEINRIB, *supra* note 285, at ch. 1 (describing the correlative relationship between doer and sufferer in private law).

dependent on a "sufferer" bringing a civil suit against a "doer;"[287] there is no theoretical reason why the insurer (or any other party, for that matter) must be the one to enforce the non-responsibility requirement against the insured.[288] There are, however, practical reasons why we rely on insurers to fulfill the enforcement role under most circumstances.

C. ALTERNATIVE THEORIES

As discussed in Part I, there are at least two other normative theories that are frequently used to determine whether a loss that the insured caused ought to be insurable. On the one hand, economic analysis suggests that losses ought not to be insurable if allowing coverage will create moral hazard. On the other hand, concern with victim compensation suggests that losses ought to be deemed insurable even if they were the result of the insured's intentional act whenever doing so would increase the victim's likelihood of recovery.[289] In this Section, I suggest that although these

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[287] *Id*.

[288] This is important, because in any insurance agreement at least one of the parties—the insurance company—is a corporation. Kantian arguments that reason from the normative status of natural persons in a private-law relationship therefore are not available in the insurance context. Obligations that derive from a commitment to treat private parties as "ends in themselves" fall flat in situations involving corporations, which are properly regarded as means rather than ends. *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1464–71 (2004) (arguing that a collaborative theory of contract cannot be applied to contracts between corporations); Nathan B. Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. UNIV. L. REV. 101, 113–114 (2005) (arguing against the practice of assuming contracting parties are natural persons and not corporations).

In theory, there might be circumstances in which it would be better to create a sort of "attorney general" in charge of enforcing the insured's non-responsibility requirement. Indeed, similar moves were taken beginning in the eighteenth century when it was determined that insurance companies were failing to prevent policyholders from using insurance as a form of gambling—for example, by taking out a policy on a life or property in which they had no interest. Since then, "wager policies" have been strictly controlled by government-appointed regulators. *See* GEOFFREY CLARK, BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695–1775 (1999) (describing legislative and enforcement efforts taken to prevent insurance from serving as a form of gambling).

[289] *See infra* Section II.B–C.

frameworks might be able to justify decisions about which losses ought to be insurable, they are not well-suited to the institutional practice that we currently have for deciding coverage disputes involving the insured's misbehavior.

1. Moral Hazard Concerns

As discussed above, disputes over the insurability of a given loss are generally resolved by courts. But courts are poorly situated to determine whether granting or denying coverage in a given case will promote wider economic goals, such as decreasing the overall amount of losses, spreading risks more cheaply, or decreasing the administrative costs of the system for dealing with accident costs.[290] Judges are not in a good position to gather the sort of information necessary to make decisions on these bases. The argument that judges, when deciding cases about the insurability of intentionally caused losses, ought to consider moral hazard, therefore, is weak from an institutional-competency perspective.[291]

Insurers, by contrast, have better access to the type of information necessary to determine, for example, whether granting a particular type of coverage will create moral hazard—*i.e.*, increase the overall amount of loss.[292] They are also generally able to structure their relationships with insureds to further their own interest in promoting such goals.[293] It therefore

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[290] This draws on Guido Calabresi's distinction between primary, secondary, and tertiary costs. CALABRESI, *supra* note 9, at 26–28. *Cf.* JULES L. COLEMAN, RISKS AND WRONGS 204 (1992) (discussing Calabresi's economic goals distinction). On the third point (decreasing administrative costs), standardized policy forms may support this purpose. *See* Abraham, *supra* note 24, at 779 ("Insurance law has had little need to generate cost-reducing default rules, because the insurance industry has already done so through the development of standard-form policy provisions.").

[291] *See* Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEG. STUD. 681, 682 (1985) (discussing a ruling from the High Court of Australia that found no justification for courts to make use of policy determinants in most circumstances).

[292] *See* Meyers & Hersch, *supra* note 91, at 973 ("When insurers seek to reduce moral hazard for purposes of their bottom line, society benefits as well.").

[293] *See* Baker, *supra* note 188, at 126 ("[I]nsurance companies have a strong financial incentive to construct the insurance relationship in a manner that answers the theoretical objections to insurance for punitive damages [and moral hazard concerns]."). Insurers can, for example, impose deductibles, coinsurance, limits, and

makes sense to presume that these economic goals will be fairly well-served so long as insurance markets function smoothly. Put differently, it is reasonable to presume that market forces will contain moral hazard and related economic costs fairly well.[294] The proper role for judges vis-à-vis such economic goals is, therefore, to ensure that the rules of insurance policy interpretation support the functioning of insurance markets.

This line of thinking suggests that although the need to avoid moral hazard and to minimize other related costs of administering insurance may be an essential part of a good theory of insurance *economics*, it is probably not part of a good theory of insurance *law*. This distinction is important because it is often possible to give two overlapping justifications for a decision about whether an insured ought to receive coverage for a loss he caused.[295] A denial of coverage to someone who incinerates his own barn might be justified as necessary to the healthy operation of the insurance business. On this argument, allowing coverage would lead to a torrent of other intentional losses, thereby threatening the solvency of insurers. The same denial might also be justified by referring to insurance law's underlying commitment—rooted in a moral distinction between choice and luck—to holding individuals responsible for their own bad acts. Both justifications "concur in the judgement," as it were, that coverage should be denied to the arsonist.

To the extent that insurance companies insert language into their policy forms that clearly denies coverage to such individuals, it will often be the case that judges do not even reach the question of whether the non-responsibility requirement, on its own, requires a denial of coverage. But

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experience-rated premiums in order to control moral hazard. *See* Meyers & Hersch, *supra* note 91, at 973. *C.f.* N. Bank v. Cincinnati Ins. Cos., 125 F.3d 983, 988 (6th Cir. 1997) ("[C]ommon sense suggests that the prospect of escalating insurance costs and the trauma of litigation . . . would normally neutralize any stimulative tendency the insurance [of intentional torts] might have.") (internal quotations omitted).

[294] Of course, there may well be situations where insurance markets fail to promote such broader economic goals. Under such circumstances, legislatures are better-situated than courts—both epistemically, and normatively—to make the type of interventions necessary to steer the ship back on course.

[295] *See* ABRAHAM, *supra* note 129, at 208 (discussing "multiple justification" of insurance law, including economic, distributional, and equitable purposes). *Cf.* Alan Schwartz & Daniel Markovits, *Function and Form in Contract Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 243 (Andrew S. Gold et al. eds., 2020).

insofar as courts *are* required to determine whether the insured's self-caused losses ought to be covered under a policy that lacks a clear carve-out, it makes sense as a matter of institutional competency for them to apply modalities of analysis that suit their abilities and that are properly characterized as frameworks of insurance law. Legislatures, of course, might choose to intervene when it is determined that insurers are failing to, for whatever reason, adequately control moral hazard or promote other related economic goals. This is the type of public-policy-based decision to which legislatures are both epistemically and normatively well-suited.[296] But barring such an intervention, it makes little sense for judges to be deciding intentional harm cases on the basis of moral hazard concerns rather than on the basis of the non-responsibility requirement.

This analysis also raises a deeper point about why, to the extent that judges *do* engage in moral-hazard-based reasoning, their decisions generally do not run contrary to the non-responsibility requirement's overtly normative framework for determining the scope of the insured's responsibility for his own harms.

"Moral hazard" is generally regarded as an evil because of an insured's increased tendency to engage in risky behavior that unfairly imposes costs on others—either by forcing innocent insureds in the same risk pool to pay higher premiums or by imposing negative externalities on third parties generally.[297] Thus, for example, when auto insurance leads an insured

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[296] *See* CLARK, *supra* note 288, at 22 (arguing that the passage of the Gambling Act of 1774, which prohibited wagering policies in England, "represented the first thoroughgoing attempt to sunder activities that had previously been carried out side by side within a common domain and to consign them to different legal and moral spheres."); Baker, *supra* note 78, at 257–59 (discussing separation of gambling from insurance).

[297] *See, e.g.*, Priest, *supra* note 17, at 1026 ("The exclusion of coverage of losses intended by the insured thus benefits two classes of individuals. The first class is the broader set of insureds not intentionally engaging in acts causing harms. These insureds gain because the costs of intentional harm-causing activities will not be averaged into the premiums they pay. . . . The second set of beneficiaries is those that might suffer loss if insurance for intentional acts were available. That is, the number of intentional harm-causing actions and the extent of harm intentionally caused would be higher if insurance coverage were available than if coverage were excluded.").

to drive less carefully,[298] this has the effect of raising premiums for other insureds and also increasing the danger to all others who share the road. Put differently, moral hazard is bad because it allows an insured to make choices that affect others in a way that subordinates their interests to the individual's. This formulation reveals that the normative force of the moral hazard argument is dependent upon an antecedent conception of responsibility-tracking distributive justice. Although multiple such conceptions are available, the most acceptable framework for judges to apply is the one our legal system has developed for exactly this context—*i.e.*, the notion of individual responsibility captured in insurance law's non-responsibility requirement.[299] This explains why it is not common for judges to apply a steely-eyed economic analysis of "moral hazard"—as distinct from an overtly moralizing analysis—to explain, or to justify, decisions about what cannot be insured unless those decisions are independently acceptable according to the normative framework of the non-responsibility requirement.[300]

2. Victim Compensation

Questions about the insurability of particular losses are generally resolved through civil disputes between insurers and insureds. Third parties that are impacted by such disputes lack a formal role in the proceedings.[301]

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[298] *See, e.g.*, Herschensohn v. Weisman, 119 A. 705, 705 (N.H. 1923) (plaintiff and defendant were driving in the latter's car, and when plaintiff protested about defendant's reckless driving, defendant answered, "Don't worry, I carry insurance"; then came crash) (discussed in McNeely, *supra* note 5, at 33).

[299] The fact that the availability of insurance coverage for negligence is not understood to be problematic from a moral hazard perspective proves this point. We hold a negligent tortfeasor responsible for harms in tort law, but we do not object to him using insurance to defray his responsibility for civil liability that might arise out of such a suit. *See infra* Section III.B.1 (discussing history of insurability of negligence).

[300] *Cf. supra* notes 113–15 and accompanying text (discussing moral hazard concerns that are present in certain forms of nonetheless permissible coverage, such as insurance for negligence and suicide).

[301] *See* 7A PLITT ET AL., *supra* note 36, at § 104:2 ("As a general rule, and in the absence of a contractual provision or a statute or ordinance to the contrary, at common law, the absence of privity of contract between the claimant and the insurer

Third parties also generally have no say about whether those who might injure them purchase insurance coverage, or about the terms of the coverage that potential injurers do purchase.[302] These facts make it difficult to argue that our current institutional practice is structurally well-suited to consider the interests or deserts of such third parties—including victims of a tortfeasor-insured. The law of tort, by comparison, *does* provide an institutional mechanism whereby persons who have been wronged by an insured may seek redress directly against him or her. Tort suits are structured in a manner that is more appropriate to considering the interests of victims, who are the ones that initiate the legal process and that present evidence about the scope of the injuries they have suffered.[303]

Moreover, the legislative process provides an institutional mechanism whereby the interests of potential third parties can influence whether insurance is purchased (or provided by the government), as well as the scope of its coverage. Workers' compensation laws, mandatory automobile liability insurance laws, medical malpractice insurance,[304] and the Patient Protection and Affordable Care Act's "individual mandate" are examples of this process working.[305] When democratic representative bodies have decided to intervene in the marketplace in order to promote the goal of

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bars a direct action by the claimant against the latter under both automobile liability insurance and under other forms of liability insurance, at least where the direct action is on the basis of the insured's negligence." (internal citations omitted)).

A minority of states have enacted "direct action" statutes, which provide victims with the right to sue the insurer of their tortfeasor directly. Two states, Louisiana and Wisconsin (as well as the territories of Puerto Rico and Guam), have enacted statutes that provide for a direct cause of action by an injured party against an insurer. *See* LA. STAT. ANN. § 22:1269 (2011); WIS. STAT. ANN. §§ 803.04(2), 632.24 (West 2021); P.R. LAWS ANN. tit. 26, §§ 2001, 2003 (2007); 22 GUAM CODE ANN. § 18305 (2017). These are not to be confused with "direct action" statutes in other states that permit a suit directly against a tortfeasor's insurer only after judgment has been secured against the insured. ALA. CODE § 27-23-2 (1975); IND. CODE ANN. § 27-1-13-7 (West 2016); N.Y. INS. LAW § 3420 (McKinney 2020).

[302] *See* Knutsen, *supra* note 63, at 230–31; BAKER & LOGUE, *supra* note 21, at 407 ("Whether we think that victims are the 'real' beneficiaries of liability insurance or not, they do not get to choose the liability insurance policies that their tortfeasors purchase.").

[303] *See* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 26 (2020); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002) (discussing how tort law effects corrective justice).

[304] *See* cases cited in *supra* note 56.

[305] *Id.*

victim compensation, it makes sense for courts to allow such clearly-expressed public policies to override more general principles of insurance law—including the non-responsibility requirement. In such cases, courts may legitimately override insurance law's non-responsibility requirement by averting explicitly to the state's interest, as expressed through legislation, in protecting a particular class of victims.[306]

This institutional division of labor suggests a reason for why victim-compensation-based arguments are often hamstrung in insurance coverage disputes. Attempts to treat victim compensation as private insurance's goal are exposed to the objection that such "insurance" will force innocent premium-payers to pay for other bad actors' poor choices.[307] This objection

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[306] *See, e.g.*, Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342, 1353 (E.D. Pa. 1983) (finding that intentional harm was covered by a medical malpractice liability policy because of Pennsylvania's "strong interest in compensating Pennsylvania victims of malpractice for injuries suffered at the hands of Pennsylvania physicians . . . ."); Nationwide Mut. Ins. Co. v. Roberts, 134 S.E.2d 654, 659 (N.C. 1964) ("The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent. . . . The victim's rights against the insurer are not derived through the insured as in the case of voluntary insurance."): Wheeler v. O'Connell, 9 N.E.2d 544, 546–47 (Mass. 1937) (finding that intentional harm was covered by an auto liability policy because of a Massachusetts statute).

When states have declined to make malpractice insurance coverage mandatory, this has weighed against allowing victim compensation concerns to override the non-responsibility requirement. *See, e.g.*, Am. Home Assurance Co. v. Stone, 61 F.3d 1321, 1328 (7th Cir. 1995).

[307] *See* Swedloff, *supra* note 75, at 770 (discussing such objections); Baker, *supra* note 59, at 75 (discussing such objections); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369 (N.Y. 1992) ("We believe . . . that the ordinary person would be startled, to say the least, by the notion that Mugavero should receive insurance protection for sexually molesting these children, and thus, in effect, be permitted to transfer the responsibility for his deeds onto the shoulders of other homeowners in the form of higher premiums.") (internal citations omitted). The possibility of allowing insurers to bring a subrogated claim against the tortfeasor-insured, and thereby to recoup the costs of coverage, does not solve this problem. If tortfeasor-insureds had deep-enough pockets to make the insurer whole, then they would also

has rhetorical force because the conception of responsibility-tracking distributive justice that has been developed in the insurance context is well-established and has normative appeal.[308] Our society appears to have decided that there are certain types of losses that are the result of the insured's own bad acts; allowing the cost of these losses to be spread using insurance would be an unjust form of redistribution. The presence of the tort law regime—which reflects a logic of corrective justice rather than distributive justice[309]—makes it easier to argue that compensating victims in such situations simply is not the business of insurance law.[310] This suggests that unless and until we abandon the liberal-egalitarian logic that underpins the non-responsibility requirement, and adopt a more solidaristic political philosophy that collapses all corrective justice regimes into distributive justice regimes, the logic of victim-compensation will continuously fail to have real normative force in the arena of private insurance law. Such shifts are definitely possible, as illustrated by New Zealand's comprehensive no-fault accident compensation scheme[311] and by the "individual mandate" in the Patient Protection and Affordable Care Act.[312] But they are, at least in the American legal and

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have deep-enough pockets to pay damages to their victims. It is only because such tortfeasor-insureds are frequently so poor as to be "judgement-proof" that arguments are made for recasting liability insurance as primarily a vehicle for victim compensation. *See* Gilles, *supra* note 33.

[308] *See* discussion *infra* Section IV.A–B.

[309] On the distinction between corrective and distributive justice, see Weinrib, *supra* note 303.

[310] *See* Baker, *supra* note 59, at 75 (on the conception of insurance as "defendant protection" rather than victim compensation); Weinrib, *supra* note 291, at 682 ("The task of the courts remains that of loss fixing rather than loss spreading and if this is to be altered it is, in my view, a matter for direct legislative action rather than for the courts." (quoting *Caltrex Oil (Austl.) Pty. Ltd. v The Dredge "Willemstad"* (1976) 136 CLR. 529, 581 (Austl.)).

[311] *See* Simon Connell, *Community Insurance Versus Compulsory Insurance: Competing Paradigms of No-Fault Accident Compensation in New Zealand*, 39 LEGAL STUD. 499, 499–500 (2019) (discussing New Zealand's comprehensive no-fault accident compensation scheme where "victims of personal injury by accident receive 'entitlements' under the scheme and cannot recover compensation from wrongdoers through the civil law. New Zealand still has a law of torts, but tort cases are rarely concerned with personal injuries.").

[312] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (amending §5000A of the Internal

political tradition, localized exceptions to a general rule. Moreover, the steady gravitational pull back from solidarism towards individualism is, today more than ever in the United States, difficult to ignore.[313] So long as that pull has force, victim-compensation arguments will generally fall flat in the insurance-law arena.[314]

V. IMPLICATIONS FOR INSURANCE LAW

A successful theory of the non-responsibility requirement must also provide a useful framework for analyzing insurance law problems that appear to fall within its ambit. Kenneth Abraham has argued that such a project is unlikely to succeed.[315] Although he agrees that background principles of insurance law generally prevent indemnification of the insured's own intentional losses, he argues that such principles are not helpful when attempting to determine the scope of coverage in particular cases.[316] Theorizing the "essence of what insurance is designed to protect against, is a poor and misleading substitute for doing the hard work of interpreting policy language"[317] which, he argues, is the "actual source of

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Revenue Code of 1986) (requiring all citizens to purchase health insurance or pay a fee).

Note that the penalty for failure to purchase "minimum coverage" under the Affordable Care Act was called a "shared responsibility payment," revealing its solidaristic logic. *See No Health Insurance? See If You'll Owe A Fee*, HEALTHCARE.GOV, https://www.healthcare.gov/fees/fee-for-not-being-covered/ (last visited Oct. 22, 2021) ("A payment ('penalty,' 'fine,' 'individual mandate') you made when you filed federal taxes if you didn't have health insurance that counted as qualifying health coverage for plan years 2018 and earlier. The fee for not having health insurance no longer applies. This means you no longer pay a tax penalty for not having health coverage.").

[313] *See, e.g.*, Timothy Jost, *The Tax Bill and the Individual Mandate: What Happened, and What Does It Mean?* HEALTH AFFS. (Dec. 20, 2017), https://www.healthaffairs.org/do/10.1377/hblog20171220.323429/full/ (describing the repeal of the individual mandate).

[314] *See* Swedloff, *supra* note 75, at 768 ("Even to the extent that crime victims elicit compassion or have a lobby, the redistributive nature of [a] compulsory insurance regime will likely meet fierce opposition, and moral arguments about indemnifying bad actors will likely color the debate.").

[315] *See* Abraham, *supra* note 24.

[316] *Id*. at 791–92.

[317] *Id*. at 797.

these limitations on coverage . . . ."[318] Deciding cases on the basis of theories of insurance law, rather than on the basis of specific policy exclusions, can also have material downsides, Abraham suggests:

> To the extent that policy language already satisfactorily reflects . . . [background principles], making reference to [such principles] . . . as if [they] were not entirely subsumed within applicable policy language could only risk implying incorrectly to decision makers that they had two decisions to make, one applying policy language and the other applying the separate and additional requirements of a legal rule . . . . In its least harmful form, such an approach would lead to needless duplication of effort. In a more harmful form, the approach could generate incorrect decisions.[319]

This Article has argued that although it is proper for courts, as a first step, to focus on policy language in coverage disputes involving the insured's own bad acts, such an analysis is not always sufficient. If the requisite policy language is absent or ambiguous, and if the insurer raises a defense that sounds in the non-responsibility requirement, judges do indeed have a second decision to make. Although there are good reasons why judges ought not *to begin* their analysis with the consideration of background principles, it is suggested here that the possibility of such a second-level analysis does not undermine the practice of insurance law generally.[320]

This Part proposes several other practical implications of the preceding theorization of the non-responsibility requirement. Sections A and B point to two places that the *RLLI* departed from the non-responsibility requirement. Section C shows how a deeper understanding of the requirement can be tactically useful to those who might want to reform the insurance law we have today.

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[318] *Id*. at 791.

[319] *Id*. at 781–82.

[320] Some courts have explicitly adopted this two-step process in the insurance context. *See, e.g.*, Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 211 (Minn. 1984) ("There are, as we see it, two main issues: (1) Does the insurance policy, by its terms, cover forfeited attorney fees? (2) If so, is such a policy provision unenforceable as a matter of public policy?").

A. INSURANCE OF LIABILITIES INVOLVING "AGGRAVATED FAULT"

The *RLLI* includes a section addressing insurance of liabilities involving "aggravated fault,"[321] which refers to insurance policies that provide coverage for civil liability for "criminal acts, expected or intentionally caused harm, fraud, or other conduct involving aggravated fault."[322] Early drafts of the *RLLI* stated that "[i]t is not against public policy for a liability insurer to pay damages to a third-party claimant for the civil liability of the insured for intentionally caused harm, punitive damages, fraud, criminal acts, or other conduct involving aggravated fault."[323] After receiving comments on the draft,[324] the *RLLI*'s reporters revised the section to add that "[e]xcept as barred by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for civil liability arising out of aggravated fault is enforceable."[325]

This Article suggests that the general common law of insurance—embodied in the non-responsibility requirement—is that the insured ought not to be able to use insurance to avoid responsibility for his own bad acts, and that this is reflected not only in judicial opinions, but also in legislation, regulations and the policy forms themselves. A more correct restatement of this area of the law, therefore, would be the inverse of the *RLLI*'s formulation: except as *allowed* by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for civil liability arising out of aggravated fault is *un*enforceable.

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[321] RESTATEMENT OF THE L. OF LIAB. INS. § 45 (AM. L. INST. 2019).

[322] *Id*. at § 45(2).

[323] RESTATEMENT OF THE L. OF LIAB. INS. § 34(2) (AM. L. INST., Council Draft No. 2, 2015).

[324] *See, e.g.*, Letter from Kim V. Marrkand to Reporters regarding §§ 34–35 (Jan. 20, 2016), at 2–3 (cited in Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PENN. J. BUS. L. 718, 741 n.120 (2020)) (quoting Marrkand's letter, which stated that the proposed rule "runs squarely against established law in numerous jurisdictions" and "does away with the public policy determination of state legislatures and courts that have concluded that insurance coverage for punitive damages is against public policy") (internal quotations omitted).

[325] RESTATEMENT OF THE L. OF LIAB. INS. § 45(2) (AM. L. INST. 2019).

As described above, this encompasses the contexts where legislatures have determined that victim compensation concerns are paramount. Where such interventions have not been made, however, general principles of insurance law suggest that the insured ought not to receive coverage for his own bad acts. This suggests, further, that the majority-rule interpretation of the carve-out for "expected or intended" language is the correct one, insofar as it denies coverage to an insured who was morally responsible for an otherwise-covered loss.[326] States that have departed from this standard as their general rule of interpretation can be understood to have departed from general principles of insurance law—which are, as argued above, normatively justifiable and well-suited to our current institutional setup.

Earlier drafts of the *RLLI* also suggested that the pay-and-then-subrogate approach[327] would be consistent with current insurance law doctrine.[328] The theory of the non-responsibility requirement articulated in this Article suggests otherwise. To replace the general prohibition against allowing the insured to receive coverage for his own bad acts with a pay-and-then-subrogate approach is certainly normatively defensible. It does not, however, conform to the immanent normative logic of the non-responsibility requirement, the doctrine of insurance law, or to the division that our legal system has made between tort and insurance law. Of course, should victim-compensation concerns be deemed paramount in certain situations, it would be proper for a legislature to impose the pay-and-then-subrogate approach. But until that time, it makes more sense to view the cases that have gone down that path as exceptional.

B. BURDENS OF PROOF

In addition to the sustained judicial disagreement over the meaning of the expected/intended language in liability insurance policies,[329] courts are also divided over which party has the burden of proving whether bodily

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[326] *See supra* note 67 (describing the *RLLI*'s standpoint on the expected and intended language).

[327] *See supra* notes 91–98 and accompanying text (discussing the pay-and-then-subrogate approach).

[328] RESTATEMENT OF THE L. OF LIAB. INS. § 47 cmt. j (AM. L. INST., Preliminary Draft No. 3, 2016) ("Subrogation against the insured provides an alternative to a public-policy-based prohibition of insurance for certain liabilities.").

[329] *See* discussion *infra* Section II.B.

injury or property damage was expected or intended from the standpoint of the insured.[330] The dispute arises out of differing understandings of the effect of the language—specifically, whether it defines the scope of the initial grant of coverage or whether it carves out an exception from that initial grant.[331]

Some argue, on the one hand, that the language is meant to describe the initial grant of coverage and that "[i]t is hornbook law" that the insured bears the burden of proving that its claim falls within the policy's insuring agreement.[332] Because such expected/intended language often is included in the definition of an "occurrence" in the insuring agreement, rather than (or in addition to) the language under the heading, "Exclusions," it may be understood as a description of the initial scope of coverage rather than a carve-out from it.[333]

On the other hand, some authorities hold that the expected/intended language is an "exclusion" from the already-defined scope of coverage, regardless of where it is stated in the insurance policy itself.[334] The burden

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[330] *See* 3 DAVID LEITNER ET AL., LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 35:20 (2005) ("Inconsistency in opinions which address the burden of proof issue appears to arise from a situation which, in the eyes of some, presents a fundamental conflict."); Fischer, *supra* note 76, at 105–10 (discussing the differing rulings of courts).

[331] *See* Fischer, *supra* note 76, at 107–08 (discussing the debates on whether the intentional act language is an "exception" or an "exclusion").

[332] *See, e.g.*, New Castle Cnty. v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1181 (3d Cir. 1991) ("It is hornbook law that the insured must demonstrate that the claimed loss is comprehended by the policy's general coverage provisions."); *id.* at 1191 ("Thus, to establish coverage, the [insured] must show that . . . it 'neither expected nor intended' environmental damage to result from its operation . . . ."); Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 817 F. Supp. 1136, 1148 (D.N.J. 1993), *aff'd in part and remanded*, 89 F.3d 976 (3d Cir. 1996); Royal Globe Ins. Co. v. Whitaker, 226 Cal. Rptr. 435, 437 (Cal. Ct. App. 1986) ("[H]ere, the insurer only promises to indemnify or defend actions involving bodily injury caused by an accident resulting in bodily injury neither expected nor intended by the insured. It was therefore the appellants' burden to show they came within this definition."). *See generally* LEITNER ET AL., *supra* note 330, at § 35:20 (discussing this debate).

[333] *See* Fischer, *supra* note 76, at 108.

[334] *See, e.g.*, Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1205 (2d Cir. 1995) ("[U]nder New York law, the exclusionary effect of policy

typically rests on the insurer to prove that claims are barred by a valid exclusion to coverage, and exclusions are typically construed by courts narrowly with all ambiguities resolved in favor of the insured.[335] The *RLLI* takes this position—*i.e.*, that the expected/intended language is an exclusion regardless of its location in the policy form, and that the "insurer bears the burden of proving that a claim falls within the scope of an exclusion in the policy."[336]

If the non-responsibility requirement is a basic feature of insurance law that describes the types of coverage that are available, then it makes more sense to conceive of it as a description of the initial grant of coverage, rather than as a carve out from that grant. This is true, moreover, regardless of where relevant policy terms reside in the insurance agreement.[337] This position reflects the proposition that insurance policy language that explicitly carves out coverage for the insured's own bad acts mostly serves to codify the underlying and implicit common law rule that defines what insurance is, and also reflects the reasonable expectations of both the insurer and the insured: neither insurer nor insured can reasonably expect insurance to cover the insured's own bad acts.[338]

If this is correct, then it is more proper to place the initial burden upon the insured, rather than the insurer, to show that the policy language

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language, not its placement, controls allocation of the burden of proof*")*, *op. modified on other grounds*, 85 F.3d 49 (2d Cir. 1996). *See generally* RESTATEMENT OF THE L. OF LIAB. INS. § 32 cmt. a (AM. L. INST. 2019) ("[E]xclusions can appear in almost any part of an insurance policy: the insuring agreement, the definitions section, endorsements, and even in the conditions section.").

[335] *See, e.g.*, Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365, 370 (5th Cir. 2008) (applying Texas law) ("Exclusions are narrowly construed, and all reasonable inferences must be drawn in the insured's favor."). *See generally* French, *supra* note 18, at 75.

[336] RESTATEMENT OF THE L. OF LIAB. INS. § 32 cmt. e (AM. L. INST. 2019).

[337] *Cf.* PATTERSON, *supra* note 143, at 257–67 (describing "impliedly excepted causes").

[338] *Cf.* Bruce Chapman, *Allocating the Risk of Subjectivity: Intention, Consent, and Insurance*, 57 U. TORONTO L.J. 315, 315 (2007) ("[I]nsurance for [intentional] wrongs is not consistent with the reasonable expectations of the two contracting parties, the insurer and the insured.").

that closely tracks the non-responsibility requirement does not preclude coverage.[339]

C. FUTURE LEGAL CHANGE

Given the non-responsibility requirement's status as a long-established and stable principle of the common law that governs insurance, as well as its justifiability from both a political-theoretical and an institutional-competency perspective, normative proposals to reform insurance law would be wise to work within its conceptual architecture.[340] Attempts to remove or replace insurance law's conception of individual responsibility outright are likely to face significant obstacles, given its strong legal and normative foundations.

This recognition can be tactically useful for potential reformers. For those who would prefer liability insurance companies to be forced to cover the harms inflicted by insured murderers, rapists, or child molesters, for example, it may make strategic sense to recast the insured's acts in the courtroom as the result of mental health deficiencies—rather than as especially heinous crimes.[341] Such a radical re-orientation might seem difficult to imagine, but the history of the evolution of suicide coverage provides a helpful model for such a strategy. Harmful acts that are understood to be the result of mental incapacity, or "irresistible impulses," are less likely to be deemed uninsurable under the non-responsibility

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[339] It may still be appropriate to allow this initial burden to be carried easily, thereby still giving the insurer the burden of producing evidence that overcomes a higher standard, in order to show that the non-responsibility requirement bars coverage. *Cf.* Brown v. Snohomish Cnty. Physicians Corp., 845 P.2d 334, 340 (Wash. 1993) (en banc) (once insured has made a prima facie case that there is coverage, burden shifts to insurer to prove that an exclusionary provision applies); Schuman, *supra* note 211, at 750 ("Generally, in life insurance contract cases, the beneficiary makes out a *prima facie* case for recovery merely by showing the existence of the contract, the payment of premiums, and the death of the insured. The insurer then bears the burden of pleading and proving the applicability of the suicide exclusion." (internal citations omitted)).

[340] *Cf.* Balganesh & Parchomovsky, *supra* note 110, at 1304–09 (making a similar point).

[341] *Cf.* Dahlia Lithwick, *Is Pedophilia a Crime or an Illness?*, SLATE (Mar. 3, 2019, 7:30 PM), https://slate.com/news-and-politics/2019/03/leaving-neverland-michael-jackson-pedophelia-punishment.html.

requirement.[342] The same inner logic of the non-responsibility requirement may also explain why proposals to create mandatory insurance regimes for domestic intentional torts—which are generally not covered under homeowners insurance policies—have failed.[343] Insofar as such proposals have been unable to recast domestic violence as something for which the insured tortfeasor is *not* morally responsible, they have faced predictable resistance to "the thought of helping bad actors with liability insurance."[344]

Those who are interested in controlling moral hazard may also find it tactically useful to understand the inner logic of the non-responsibility requirement. Recently, the Weinstein Company received a payout under its employment practices liability insurance policy for its liability in a class action settlement for Harvey Weinstein's pervasive sexual harassment.[345] Although Mr. Weinstein's behavior was apparently "widely known" within the company, [346] the insurer did not attempt to use the non-responsibility requirement as a defense to coverage—even though such a defense might well have been successful.[347] Erin Meyers and Joni Hersch have argued that the availability of such coverage "is troubling from the standpoint of ex post moral hazard."[348] Allowing insurance coverage for "this type of behavior incentivizes a business's decision makers to attempt to cover up instances of

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[342] *See supra* notes 200–05 and accompanying text.

[343] *See* Wriggins, *supra* note 93, at 165 (making such a proposal); Swedloff, *supra* note 75, at 768–71 (discussing the likelihood of enactment of Wriggins's proposal).

[344] Swedloff, *supra* note 75, at 770–71. *See also id.* at 771 n.168 ("Indeed, I am struck by the general aversion to this proposal (this is by no means an empirical claim), even among colleagues and peers who are especially sympathetic toward the plight of crime victims.").

[345] *See* Alisha Haridasani Gupta, *Weinstein's Accusers Near a $25 Million Settlement. He Pays the Victims Zero.*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/2019/12/13/us/weinstein-sexual-misconduct-settlement.html; Meyers & Hersch, *supra* note 91, at 974.

[346] Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories.

[347] Meyers & Hersch, *supra* note 91, at 974.

[348] *Id*. at 947. *See also* Joan T. A. Gabel et al., *The Peculiar Moral Hazard of Employment Practices Liability Insurance: Realignment of the Incentive to Transfer Risk with the Incentive to Prevent Discrimination*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 639, 641 (2006) ("[W]hen the injured third party is an employee, EPLI creates a peculiar and particularly troubling moral hazard").

discrimination, harassment, retaliation, and wrongful termination, rather than addressing them head on."[349] Meyers and Hersh propose that these moral hazard concerns could be addressed by imposing federal regulations on insurers in the form of mandatory minimum coinsurance for employer-facilitated wrongs, as well as regulations allowing insurers a right of subrogation against their insured in such cases.[350]

The analysis in Part III of this Article suggests that these regulatory proposals are not likely to be successful. The institutional design of our current insurance regime suggests that moral hazard concerns are adequately and appropriately addressed by the insurer, on its own.[351] There is, moreover, little to prevent insurers from refusing to recover from the insured through subrogation, even if they are given the right to do so.[352] Meyers and Hersh suggest an alternative tack that may be more successful: the imposition of uninsurable fines by the EEOC against employers who facilitate wrongful employment acts.[353] Such a remedy relies on the logic of punishment for inherently bad acts,[354] and so cannot be undercut by the argument that moral hazard is not the concern of insurance law as such.

VI. CONCLUSION

Commentators often argue that "[i]t is a mistake to focus on the indemnification of the 'bad actor' to the exclusion of the compensation to the innocent victim."[355] Such arguments are generally rooted in a sociological analysis of the tort and insurance system, understood as a whole, which reveals that "[l]iability insurance protects not just the well being of

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[349] Meyers & Hersch, *supra* note 91, at 947. *See id*. at 975 ("[I]f an insurer does not hold a business any more or less accountable based on upper management's actions, they will be incentivized to cover up any misbehavior.").

[350] *Id.* at 977–81 ("Because many employment suits are brought under federal law, such as Title VII, the ADA, or the ADEA, Congress could feasibly amend these statutes to place restrictions on the EPLI market.").

[351] *See* discussion *supra* Section IV.C.1.

[352] *See* Meyers & Hersch, *supra* note 91, at 981 (conceding this point).

[353] *Id*. at 984.

[354] Currently, any damages resulting from EEOC lawsuits against employers are insurable. Under this proposal, Congress would need to characterize the punishment as a regulatory fine, which is generally excludable under insurance contracts. *See id.*

[355] Swedloff, *supra* note 75, at 766. *See also* Knutsen, *supra* note 63, at 230; Wriggins, *supra* note 93, at 151.

the insured, but also the well being of the victim."[356] As demonstrated above, even in first-party insurance contexts—such as property insurance or life insurance—there are frequently innocent third parties who would benefit from the insured receiving coverage for their own misbehavior.[357]

It is also often argued that moral hazard concerns recommend that coverage for intentional harm should be allowed when it is not likely to incentivize misbehavior,[358] and disallowed when it is likely to increase the net amount of losses.[359] Allowing incentive effects to determine the scope of permissible coverage will, in the long run, allow insurers to "provide the broadest level of insurance" to the largest possible population.[360]

This Article suggests that although there are merits to these perspectives, they are not the *law's* perspective. The majority rules of private insurance law doctrine present it as a method of protecting insureds, rather than as a way of protecting third parties, or as a method of maximizing the efficient spreading of losses.[361] This distinctly legal understanding of insurance has ideological force, because it can be justified straightforwardly using mainstream political-theoretical frameworks, as well as arguments based on relative institutional competencies and rule of law. Thus, although the sociological and economic perspectives can motivate calls for legal and institutional reform, they struggle to provide an accurate description of the law we have today.

Gaining an understanding of this matters, for two reasons.

First, "insurance" is often used by scholars, lawyers, and judges as a stand-in term for a legal arrangement that pursues purely instrumental goals, such as loss-spreading, maximization of welfare, minimization of loss, or

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[356] Swedloff, *supra* note 75, at 766. *See also* Baker, *supra* note 59, at 75 ("[*L*]*iability insurance protects victims*."); French, *supra* note 18, at 100 ("[P]ublic policies such as compensating victims and enforcing contracts outweigh the notion that it would be unseemly to allow insurance recoveries for such conduct.").

[357] *See* discussion *infra* Section II.B.

[358] *See, e.g.*, Scheuermann, *supra* note 89, at 343 ("In brief, if the insured-actor intentionally causes the insurance-activating event to occur, he violates the fortuity requirement, but he does not necessarily realize moral hazard. He realizes moral hazard only if he violates the fortuity requirement with the intent to exploit his insurance coverage.").

[359] *See, e.g.*, Priest, *supra* note 17, at 1026.

[360] *Id*.

[361] *Cf.* Knutsen, *supra* note 63, at 211 (describing a conception of liability insurance as "wealth protection").

progressive redistribution.[362] From this perspective, "insurance" is juxtaposed to a more traditional view of private law that "treats the two litigants as connected through an immediate personal interaction as doer and sufferer of the same harm."[363] Justice Traynor's famous opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*, a products liability case, has this character: "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[364] Such a conception of insurance as merely a mechanism of risk-spreading is often leveraged to reform areas of the private law (most often, tort law) along instrumentalist lines.[365]

This Article suggests that, at least from the law's perspective, "insurance" is not what proponents of these arguments think it is. Rather, insurance law, like tort law and criminal law, contains its own logic for assigning responsibility. Our existing legal practices and institutions of insurance reflect certain concepts and normative commitments which are *immanent* in them. This is why everyday lawyers may feel some resistance, in their gut, to the proposition that legal liability for an injury caused by the insured's own misbehavior ought to be assigned among insurer, insured, and victim not according to a conception of individual responsibility but rather, for example, according to what is the most efficient way to spread the loss.[366] In situations where the non-responsibility requirement suggests that the

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[362] *See* Weinrib, *supra* note 291, at 684 (discussing instrumentalist use of "insurance").

[363] *Id.* at 683. *See also*, *id*. ("Now the invoking of insurance undermines this conception of [private] law by draining the parties' relationship of its immediacy. Attention is no longer confined to the interaction of doer and sufferer.").

[364] Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

[365] Private law theorists in the "formalist" tradition argue against this move. *See, e.g.*, COLEMAN, *supra* note 290, at 208 ("We need to be careful not to confuse the fact that liability decisions have insurance implications with the very different claim that insurance implications should dictate liability decisions."); Weinrib, *supra* note 291, at 687 ("The rise of insurance as a factor in tort litigation is a harbinger of the attenuation of the hold of private law as a ruling component of the American legal experience.").

[366] *See* COLEMAN, *supra* note 290, at 207 ("[S]preading costs in general is alien to institutions that impose liability in ways that reflect judgment of individual responsibility.").

insured *ought not to be allowed to offset responsibility for his own bad acts*, an instrumentalized conception of insurance will conflict with the immanent logic of the law. This suggests that attempts to recast other areas of the law as types of "insurance" often misunderstand what insurance actually is, at least from a legal perspective.

Second, it is important to understand insurance law's immanent logic because our government often leverages insurance concepts to justify broader social policies to the general public. Programs like unemployment insurance, Social Security, Medicare, and Medicaid, are all represented as types of "insurance"—even though they often work quite differently from private insurance.

As shown above, insurance law concepts both rely upon, and inform, public conceptions of what insurance *is*. This means that attempts to characterize public health programs, or progressive redistribution, as types of "insurance" may backfire when they run up against insurance concepts like the non-responsibility requirement. Such concepts can motivate arguments, for example, for reducing government benefits to those who "are too lazy to get a job," or whose illness is due to their own poor health choices, on the grounds that "insurance" properly-understood simply does not indemnify people against the effects of their own bad (in)actions. So long as we represent government programs as types of insurance, the immanent logic of insurance law will have an outsize influence on public policy debates.

This Article suggests that it is both possible and useful to study insurance law's immanent structure and logic, because such internal architecture exists and is discoverable in the doctrine. Further work can be done—insurance law does not turn on the non-responsibility requirement alone. But insofar as gaining a better understanding of the non-responsibility requirement can help us to rationalize and justify the law that we have, and also to understand how to talk about "insurance" generally, it suggests that further study of the other internal structures of insurance law is an enterprise worth pursuing. This is true both for those who would aim to preserve insurance as it operates today, and those who would seek to reform it.