1992

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Recommended Citation

Tracy E. Silverman, *Voluntary Intoxication: A Defense to Intentional Injury Exclusion Clauses in Homeowner's Policies?*, 90 MICH. L. REV. 2113 (1992).

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Voluntary Intoxication: A Defense to Intentional Injury Exclusion Clauses in Homeowner's Policies?

Tracy E. Silverman

Insurance affects the life of every person living in the United States today.¹ What would America be like without insurance? People would not only be reluctant to buy homes² or automobiles,³ but they might refuse to work in dangerous yet vital industries such as chemical research and construction.⁴ Moreover, the insurance industry is a major source of employment⁵ and one of the country's largest investors.⁶ Insurance has also played an important role in the courts, not only "contribut[ing] to the development of fundamental legal doctrines,"⁷ but also providing courts with a forum in which to address public policies such as providing compensation for accident victims and assuring equal treatment regardless of gender or race.⁸

Judicial concern with public policy has been particularly apparent in litigation involving homeowner's policies. A typical multiple-line homeowner's policy insures the "named insured," who owns and occupies a private residence, and the named insured's relatives against fire, theft, and comprehensive personal liability.⁹ Such homeowner's

1. See generally KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 1 (1990); ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* § 11 (1987); ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 1.1(a) (1988).

2. See DAVID L. BICKELHAUPT, *GENERAL INSURANCE* 85 (11th ed. 1983). Without fire or casualty insurance, a fire, earthquake, or tornado could destroy a house and its contents in a matter of minutes, leaving the owners with nothing. Similarly, banks would be unwilling to accept homes or businesses as collateral for loans. *Id.*

3. In the absence of automobile insurance, finance companies would avoid approving automobile installment loans, and owners would constantly worry that causing an accident could result in large monetary liability for losses suffered by other drivers. *Id.*

4. See *id.*

5. Two million persons, or one in every fifty employed, hold insurance-related jobs. With over 5900 insurance companies and thousands of related businesses, the American insurance industry provides work in areas ranging from sales to accounting to research to management. Insurance employment exceeds that found in major industries such as banking, mining, and chemical production. *Id.* at 90.

6. Insurance companies receive insurance payments from policyholders or premiums in excess of \$500 billion per year. ABRAHAM, *supra* note 1, at 1; see also *infra* note 34 (discussing the role of premiums in the insurance industry). As of 1985, the insurance industry's total assets exceeded \$1.3 trillion. JERRY, *supra* note 1, § 11. As a result, insurers invest several hundred billion dollars in areas of the American economy as diverse as hospitals, education, and space travel. BICKELHAUPT, *supra* note 2, at 87, 90.

7. KEETON & WIDISS, *supra* note 1, § 1.1(a). For example, resolution of insurance disputes established many common law contract rules and foundational principles of consumer law. *Id.*

8. *Id.*

9. BICKELHAUPT, *supra* note 2, at 704-12; see also JERRY, *supra* note 1, § 60B[b] (explaining the multiple coverage provided by homeowner's policies); EMMET J. VAUGHAN, *FUNDAMEN-*

policies provide coverage not only for accidental personal and property damage occurring on the insured's premises, but also for accidents occurring away from the insured's home for which the insured is held responsible.¹⁰ To illustrate, assume Ms. A is insured under a homeowner's policy. While at a park, Ms. A accidentally pushes innocent third-party Mr. B causing him to hit his head. Ms. A's insurer will be obligated to pay Mr. B any damages for which Ms. A is found liable.

Homeowner's insurance policies generally exclude coverage for injury or damage intentionally caused by an insured.¹¹ This exclusion is premised on the principle that insurance protects solely against fortuitous events.¹² Allowing coverage for intentional acts not only frustrates insurance companies' efforts to calculate premiums accurately, but also contravenes the public policy goal of deterrence that underlies tort law.¹³ However, concerns over coverage also implicate the public interest in compensating injured victims. When a wrongdoer like Ms. A cannot afford to compensate her victim, her insurance is often the injured party's only means of recovery.¹⁴

In light of these competing policy concerns, courts have developed three standards for determining the intent necessary to deny insurance coverage. A minority of jurisdictions, favoring the deterrence goal, applies an objective test.¹⁵ These courts construe intent broadly, applying the exclusion whenever the resulting injuries are the "natural and probable consequences" of the insured's act. A second group of courts narrowly construes the exclusionary clause in order to compen-

TALS OF RISK AND INSURANCE 425 (5th ed. 1989) (noting that homeowner's insurance includes personal liability coverage). See *Homeowners Form HO-3*, reprinted in ALLIANCE OF AMERICAN INSURERS, 1989 POLICY KIT FOR STUDENTS OF INSURANCE 18-32 (1988) [hereinafter *Homeowner's Policy*], for a prototype of the standard homeowner's policy form.

10. BICKELHAUPT, *supra* note 2, at 712-13; see also *infra* notes 23-24 and accompanying text (discussing the requirement that damages result from an accident).

11. See generally KEETON & WIDISS, *supra* note 1, § 5.4(d); JERRY, *supra* note 1, § 63B; Sam P. Ryneason, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513 (1984).

12. KEETON & WIDISS, *supra* note 1, § 5.4(d)(1); 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 (1990); Catherine A. Salton, Comment, *Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity upon Intent*, 78 CAL. L. REV. 1027 (1990).

13. Courts have emphasized that, if people could insure themselves against intentional wrongdoing, "the deterrence attributable to financial responsibility would be missing." *E.g.*, *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 606 (N.J. 1978); see also KEETON & WIDISS, *supra* note 1, § 5.4(d)(1); Fischer, *supra* note 12, at 95; Kristin Wilcox, Note, *Intentional Injury Exclusion Clauses — What is Insurance Intent?*, 32 WAYNE L. REV. 1523, 1528 (1986).

14. Salton, *supra* note 12, at 1030-31; Wilcox, *supra* note 13, at 1528.

15. See, e.g., *Rankin v. Farmers Elevator Mut. Ins. Co.*, 393 F.2d 718 (10th Cir. 1968); *Boyd v. Great Cent. Ins. Co.*, 401 So. 2d 19 (Ala. 1981); *Casualty Reciprocal Exch. v. Thomas*, 647 P.2d 1361 (Kan. Ct. App. 1982); *Allstate Ins. Co. v. Miller*, 438 N.W.2d 638 (Mich. Ct. App. 1989); *Hins v. Heer*, 259 N.W.2d 38 (N.D. 1977).

sate the victim as often as possible.¹⁶ Courts taking this view apply a strict subjective approach, finding intent only when an insured intends both the act and the precise injury that results. The majority of jurisdictions has adopted a hybrid "inferred intent" approach that addresses both policy interests.¹⁷ These courts combine elements of the objective and subjective tests, deeming the insured to have intended the actual injuries where the nature of his act suggests that some harm was virtually certain to result.

The dispute becomes more complicated when an insured commits an apparently intentional act while voluntarily intoxicated. In these cases, courts must decide whether a lack of capacity to form the required intent due solely to the effects of alcohol should insulate an insured from the intentional injury exclusion clause. Because courts did not consider these mentally deficient insureds when developing the three intent standards, they often find it difficult to reconcile their views regarding allowance of a voluntary intoxication defense with their traditional interpretations of intent. Courts ignore the inability of alcohol abusers to control their drinking patterns even when faced with possible financial liability. Therefore, attempts to craft a defense that addresses both deterrence and victim compensation concerns have failed even among those courts employing the inferred intent approach.

This Note argues that the current voluntary intoxication defense to the intentional injury exclusion clause should be modified to allow insurers subrogation rights against insureds who commit intentional acts while voluntarily intoxicated, subject to an exception for alcoholic insureds who successfully complete alcohol treatment programs. Part I discusses the public policy concerns of victim compensation and deterrence and how they influence courts deciding between the three traditional approaches to "intent." Part II analyzes the impact of these intent standards on courts' decisions to allow a voluntary intoxication defense and concludes that the defense as currently formulated promotes victim compensation at the expense of deterrence. Part III argues that public policy considerations mandate an exception to the general rule that insurers cannot bring subrogation actions against

16. See e.g., *State Auto Mut. Ins. Co. v. McIntyre*, 652 F. Supp. 1177, 1194, 1218-19 (N.D. Ala. 1987); *Breland v. Schilling*, 550 So. 2d 609, 612-13 (La. 1989); *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 892 (Me. 1981); *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1167 (N.H. 1984); *Lumberman's Mut. Ins. Co. v. Blackburn*, 477 P.2d 62, 65 (Okla. 1970).

17. See e.g., *State Farm Fire & Casualty Co. v. Bomke*, 849 F.2d 1218 (9th Cir. 1988); *Steinmetz v. National Am. Ins. Co.*, 589 P.2d 911 (Ariz. Ct. App. 1978); *Butler v. Behaeghe*, 548 P.2d 934 (Colo. Ct. App. 1976); *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1167 (Idaho 1986); *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975); *Barton v. Allstate Ins. Co.*, 527 So. 2d 524 (La. Ct. App.), writ denied, 532 So. 2d 157 (La. 1988); *State Farm Fire & Casualty Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984); *State Farm Fire & Casualty Co. v. Victor*, 442 N.W.2d 880 (Neb. 1989); *Western Natl. Assurance Co. v. Hecker*, 719 P.2d 954 (Wash. Ct. App. 1986); *Raby v. Moe*, 450 N.W.2d 452 (Wis. 1990).

their own insureds for intentional acts committed when voluntarily intoxicated. These considerations also favor limitations on subrogation to encourage alcohol-abuse treatment. This Note concludes that allowing insurers to bring subrogation actions, subject to an exception for alcoholic insureds who successfully complete alcohol rehabilitation programs, best accommodates the conflicting public policy goals of victim compensation and deterrence.

I. THE DEVELOPMENT AND INTERPRETATION OF THE MODERN INTENTIONAL INJURY EXCLUSION CLAUSE

Courts interpreting intentional injury exclusion clauses in homeowner's policies define *intent* in light of competing public policy concerns: deterring wrongdoers and compensating injured victims. A court's decision regarding how much weight to give to each goal determines its choice of intent standard. This Part examines these competing insurance law public policy interests and analyzes their effect on the three approaches. Section I.A discusses the development of the intentional injury exclusion clause and the public policy concerns that influence courts' attempts to define *intent*. Section I.B sets out the three "intent" standards — objective, subjective, and inferred — in light of these concerns and discusses applications of each test. This Part concludes that only the inferred intent approach addresses both the public interest in deterring wrongful conduct and the public interest in adequately compensating injured victims.

A. Public Policy's Role in Interpreting the Intentional Injury Exclusion Clause

Prior to 1966, standard liability insurance policies¹⁸ only provided coverage for bodily injury or property damage "caused by accident."¹⁹ Because policies did not define the term *accident*, courts favoring coverage looked to whether the injury was "accidental" from the standpoint of the victim rather than from the standpoint of the insured.²⁰ These courts required coverage whenever there was no evidence that the victim provoked the injury.²¹

In 1966, the National Bureau of Casualty Underwriters and the

18. The liability insurance policy referred to in this section is included as part of the standard homeowner's policy. See *supra* note 9 and accompanying text.

19. See generally Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1219-22 (1969); Ryneanson, *supra* note 11, at 513-18, 521-22; H. Karen Cuttler, Case Comment, *Liability Insurance for Intentional Torts — Subrogation of the Insurer to the Victim's Rights Against the Insured: Ambassador Insurance Co. v. Montes*, 32 RUTGERS L. REV. 155, 159-62 (1979); Wilcox, *supra* note 13, at 1524-25.

20. See, e.g., *New Amsterdam Casualty Co. v. Jones*, 135 F.2d 191 (6th Cir. 1943); *Hartford Accident & Indem. Co. v. Wolbarst*, 57 A.2d 151 (N.H. 1948); see also Farbstein & Stillman, *supra* note 19, at 1221 (discussing cases that take this view).

21. Cuttler, *supra* note 19, at 160 n.37 (citing cases).

Mutual Insurance Rating Bureau revised the standard liability policy to provide coverage for an "occurrence" rather than an "accident."²² The language provides that "[the insurance c]ompany agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, to which this insurance applies, caused by an occurrence. . . ."²³ *Occurrence* is defined as "an accident, including injurious exposure to conditions which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."²⁴ The revised standard makes clear that whether an injury is intentional is determined from the standpoint of the insured rather than from the standpoint of the victim.²⁵ However, the lan-

22. Ryneanson, *supra* note 11, at 513; Wilcox, *supra* note 13, at 1524.

23. WILLIAM F. YOUNG, JR., CASES AND MATERIALS ON INSURANCE 684 (1971); *see also* Farbstein & Stillman, *supra* note 19, at 1236-37 (quoting NATIONAL BUREAU OF CASUALTY UNDERWRITERS, STANDARD PROVISIONS FOR GENERAL LIABILITY POLICIES (1966)).

24. Farbstein & Stillman, *supra* note 19, at 1237 (quoting NATIONAL BUREAU OF CASUALTY UNDERWRITERS, STANDARD PROVISIONS FOR GENERAL LIABILITY POLICIES (1966)); *see also* Ryneanson, *supra* note 11, at 513. In 1984, the policy was changed again to its current form. *See* ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE app. at 39-40 (1992). The writers emphasized that intentional injuries were to be excluded from the definition of *occurrence* by placing the exclusionary clause in a separate section entitled "Exclusions." The current language provides:

DEFINITIONS

5. . . . "occurrence" means an accident, including exposure to conditions, which results, during the policy period, in:
- bodily injury*; or
 - property damage*.

EXCLUSIONS

1. . . . *Personal Liability* . . . do[es] not apply to *bodily injury* or *property damage*:
- which is expected or intended by the *insured*; . . .

Homeowner's Policy, *supra* note 9, at 18, 28; *see also* VAUGHAN, *supra* note 9, at 731, 741. Thus, although the writers changed the format of the intentional injury exception, they retained the substance of the exclusion. This Note discusses cases pertaining to both the 1966 and the 1984 versions but does not distinguish between them.

Furthermore, courts disagree over whether the words *intended* and *expected* as used in intentional injury exclusion clauses are synonymous. Some courts take the view that including both words would be redundant if they had the same meaning. *See, e.g.,* Scudder v. Hanover Ins. Co., 559 N.E.2d 559, 562 (Ill. App. Ct. 1990) ("[A] greater degree of proof is required to establish intent than expectation."); Badger Mut. Ins. Co. v. Murray, 370 N.E.2d 295, 299 (Ill. App. Ct. 1977) (emphasizing that the words *expected* and *intended* are not synonymous); Farm Bureau Town & Country Ins. Co. v. Turnbo, 740 S.W.2d 232 (Mo. Ct. App. 1987) (interpreting the word *expected* to mean "reckless" rather than "intentional," thereby precluding insurers from having to defend actions alleging either "reckless" or "intended" conduct). *But see* Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888 (Me. 1981); Hanover Ins. Co. v. Newcomer, 585 S.W.2d 285 (Mo. Ct. App. 1979); United Servs. Auto Assn. v. Elitzky, 517 A.2d 982 (Pa. Super. Ct. 1986), *appeal denied*, 528 A.2d 957 (Pa. 1987) (all concluding that the words *expected* and *intended* both require the same showing of intentional wrongdoing for the intentional injury exclusion clause to apply). *See generally* James A. Rigelhaupt, 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 & Supp. 1991).

A discussion of this disagreement is beyond the scope of this Note. The subsequent analysis will assume that the two terms are synonymous.

25. Farbstein & Stillman, *supra* note 19, at 1237; Wilcox, *supra* note 13, at 1524-25. The

guage does not attempt to define *intent*.²⁶

In interpreting *intent*, courts have imported general tort law public policy goals to the insurance context. Tort law focuses primarily on compensating victims for their injuries while leaving criminal law to punish wrongdoers and to deter them and others from behaving similarly in the future.²⁷ However, tort law addresses both interests in the area of intentional torts.²⁸ When wrongdoers commit intentional or deliberate acts, many courts allow juries in tort actions to award the victim "punitive" or "exemplary" damages.²⁹ Courts force wrongdoers to pay the victim damages in excess of the amount necessary for full compensation in order to further the criminal law policies of punishment and deterrence.³⁰ Courts emphasize that in the case of an intentional tort, the wrongdoer has thought about his actions and made a conscious choice to disregard his victim's interests. The expectation is that financial responsibility for these actions will help to deter the wrongdoer from making the same choice in the future.³¹

Courts have addressed the tort law concepts of deterrence and victim compensation in defining *intent* when insurers invoke intentional injury exclusion clauses to avoid providing coverage for injuries resulting from intentional torts. Denying coverage to intentional wrongdoers promotes the public interest in deterrence.³² Consistent with

revision would seem to deny coverage that would have been available under the pre-1966 standard. Wilcox points out that some courts view the purpose of the revisions as being "to deny indemnification to intentional tortfeasors." *Id.* at 1525.

26. Wilcox, *supra* note 13, at 1528.

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984).

28. *Id.* § 2, at 9; see also Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (emphasizing that civil damages can also serve the function of punishing malicious tortfeasors); Tuttle v. Raymond, 494 A.2d 1353, 1355-56, 1361 (Me. 1985) (explaining that civil law and criminal law goals merge in cases of deliberate tortious acts).

29. KEETON ET AL., *supra* note 27, § 2, at 9; see, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991) (upholding jury's discretion to award punitive damages based on instructions describing the purpose of punitive damages as "'not to compensate the plaintiff for any injury' but 'to punish the defendant' and 'for the added purpose of protecting the public by [detering] the defendant and others from doing such wrong in the future'" (citation omitted)); Wegman v. Pratt, 579 N.E.2d 1035, 1044 (Ill. App. Ct. 1991) (holding that trial court acted inappropriately in striking plaintiff's prayer for punitive damages for injuries arising out of a battery because a battery is an intentional tort). See generally 22 AM. JUR. 2D Damages § 733 (1988).

30. See, e.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (acknowledging that punitive damages can be awarded under 42 U.S.C. § 1983 to deter or punish violations of constitutional rights); see also Bryant v. Silverman, 703 P.2d 1190 (Ariz. 1985) (applying Arizona law which allows punitive damages in wrongful death actions to punish and deter).

31. See, e.g., Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 344 (W. Va. 1978) (rejecting interspousal immunity defense based partly on conclusion that allowing abused wives to recover punitive damages from their husbands for intentional assaults "may stay such violence").

32. See, e.g., Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 15 (N.J. 1970) ("The exclusion of

intentional tort policy rationales, courts fear that if insureds who commit intentional acts could insure themselves "against the economic consequences of [their] wrongdoing, the deterrence attributable to financial responsibility would be missing."³³ From a financial perspective, insureds would have a license to engage in wrongful conduct.³⁴

But courts are reluctant to deny compensation;³⁵ when wrongdoers cannot afford to compensate their victims, insurance may be the vic-

intentional injury from coverage stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences."); *Long v. Coates*, 806 P.2d 1256, 1259 (Wash. Ct. App.), *review denied*, 807 P.2d 884 (Wash. 1990) (adopting the view taken in *Burd*). See generally KEETON & WIDISS, *supra* note 1, § 5.4(d)(1); Cuttler, *supra* note 19, at 157-58; Farbstein & Stillman, *supra* note 19, at 1245-46.

33. *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 606 (N.J. 1978); see also *Northwestern Natl. Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), observing:

Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. . . . [P]ublic policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately . . . on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers.

307 F.2d at 440-41.

34. *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 244 (Ind. Ct. App. 1975); Cuttler, *supra* note 19, at 157-58; Eric J. Olsson, Appellate Decisions, *Insanity: How Does it Affect Liability Insurance Exclusions for Intentional Torts? Arizona Adopts the Ruvolo Test*, 24 ARIZ. L. REV. 1046 (1982); Wilcox, *supra* note 13, at 1528.

Allowing indemnification for intentional conduct also contravenes the function of insurance policies. Insurance companies protect policyholders against risk of accidental losses by spreading the losses over a large number of insureds. Linda J. Kibler, Note, *Intentional Injury Exclusionary Clauses: The Question of Ambiguity*, 21 VAL. U. L. REV. 361, 362 (1987); Salton, *supra* note 12, at 1029-30; see also VAUGHAN, *supra* note 9, at 29 (identifying four risk characteristics insurers require before offering coverage: (1) a large number of insureds who want to be insured against (2) a definite and measurable loss which would be (3) catastrophic and (4) fortuitous). Each insured pays a portion of the total expected losses in the form of premiums. Kibler, *supra*, at 362. Insurers calculate premiums based on the assumption that the recurrence of future fortuitous losses will approximate the frequency with which similar past losses occurred. VAUGHAN, *supra* note 9, at 29; see also *Transamerica Ins. Group v. Meere*, 694 P.2d 181, 185-86 (Ariz. 1984) (discussing the principles behind calculation of insurance premiums). If insureds received coverage for intentional losses, they would control the risk of loss, thereby preventing insurers from calculating accurate premium rates. VAUGHAN, *supra* note 9, at 29; see also 7A JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4492.01 (Walter F. Berdal ed., 1979); Kibler, *supra*, at 363; Salton, *supra* note 12, at 1029-30 (all emphasizing that the intentional injury exclusion clause is necessary for insurers to be able to set rates). Moreover, insurers would pass on their added liability to all insureds in the form of higher premiums. See, e.g., *Northwestern Natl. Casualty Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962) (pointing out that requiring insurance companies to provide coverage for punitive damages would result in higher premiums for all insureds).

35. See Cuttler, *supra* note 19, at 158-59; Salton, *supra* note 12, at 1030-31; Wilcox, *supra* note 13, at 1528. Courts have also recognized this conflicting concern. See, e.g., *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7, 15 (N.J. 1970).

tims' only source of recovery. One technique courts use to reduce the likelihood of leaving victims without compensation under the intentional injury exclusion clause is to invoke the contract doctrine of *contra proferentum*.³⁶ Under this doctrine, courts construe ambiguous insurance policy provisions against the insurer.³⁷ Thus, the insured obtains coverage whenever the facts can reasonably be interpreted to fall outside the intentional injury exclusion clause. These concerns color courts' interpretations of intent.

B. Traditional Approaches for Determining Intent

Courts have adopted one of three standards of intent in interpreting intentional injury exclusion clauses; each reflects a determination of the relative importance of deterrence and victim compensation. This section analyzes the three standards: objective, subjective, and inferred intent. It concludes that the inferred-intent standard provides the best interpretation of intent under the intentional injury exclusion clause because, unlike the other standards, it properly balances the competing public policy goals of deterrence and victim compensation.

A minority of courts, focusing on the deterrence rationale, have adopted an objective standard of intent.³⁸ Under this approach, courts apply tort law's "reasonable person" test to determine if the insured acted with intent. They presume that insureds intend the natural and probable consequences of their acts, denying coverage whenever a reasonable insured would have foreseen the injuries resulting from his intentional actions.³⁹ Because courts applying the objective test only

36. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) defines the doctrine: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Courts have frequently cited this principle. See, e.g., *State Farm Fire & Casualty Co. v. Morgan*, 364 S.E.2d 62, 64 (Ga. Ct. App. 1987), *aff'd*, 368 S.E.2d 509 (Ga. 1988); *Breland v. Schilling*, 550 So. 2d 609, 610 (La. 1989); *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 891 (Me. 1981); *Northwestern Natl. Casualty Co. v. Phalen*, 597 P.2d 720, 724 (Mont. 1979); *Ruvolo v. American Casualty Co.*, 189 A.2d 204, 208 (N.J. 1963). See generally *Salton*, *supra* note 12, at 1031; *Wilcox*, *supra* note 13, at 1529 (both discussing the relationship between this principle of contract interpretation and the public policy of compensating injured victims).

37. *Salton*, *supra* note 12, at 1031. Commentators explain that the doctrine of *contra proferentum* is especially applicable to insurance policies because they are adhesion contracts. Their terms are usually standardized, providing little opportunity for insureds to bargain. See *id.*; *Wilcox*, *supra* note 13, at 1529. The doctrine of plain meaning, under which words should be given the meaning an average person would give them, and the doctrine of protecting purchasers' reasonable expectations are also used to restrict the scope of the exclusionary clause. *Salton*, *supra* note 12, at 1031; *Wilcox*, *supra* note 13, at 1529-30; see also, e.g., *American Family Mut. Ins. Co. v. Peterson*, 405 N.W.2d 418, 422 (Minn. 1981) (explaining that "policy language is to be construed in accordance with the reasonable expectations of the insured . . . and that words such as 'intended' are to be given their ordinary meaning" (citation omitted)).

38. See *supra* note 15 and accompanying text; see also *Wilcox*, *supra* note 13, at 1534 n.65 (stating that as of 1986, 10 states had applied the objective test).

39. See, e.g., *JERRY*, *supra* note 1, § 63B[b]; *Cuttler*, *supra* note 19, at 161; *Wilcox*, *supra* note 13, at 1534; see also *supra* note 15 (citing cases applying this approach). Under the objective

focus on what a reasonable person would have intended, insureds cannot escape responsibility for intentional acts by claiming that they did not actually intend to cause any harm.⁴⁰ For example, the Kansas Court of Appeals ignored an insured's claim that, although he intentionally fired a gun at close range, he did not intend to injure his victim.⁴¹ The injuries were a natural and probable result of the shooting and therefore intentional.⁴²

By interpreting intent broadly, objective-intent courts put insureds on notice that they will bear the financial consequences of all injuries foreseeably resulting from their intentional acts whether or not they intended any harm. As a result, the objective standard may successfully deter insureds from committing harmful acts.⁴³ However, this deterrence effect is achieved at the expense of many uncompensated victims.

A second group of courts tries to correct this deficiency by applying a strict subjective standard of intent. These courts narrowly construe intent to deny coverage only upon a finding that the insured actually intended both the act and the precise injury which resulted.⁴⁴ The Louisiana Supreme Court recently applied the subjective approach to allow coverage where an insured punched an opposing softball team member during an altercation at a game.⁴⁵ The court reasoned that, although the insured intended to hit the plaintiff, he did

standard, an insured need not subjectively desire to cause any injury. However, it is not clear whether the objective tort standard also applies to the act causing the injury or whether the insured must subjectively intend the act. One commentator has suggested that "the objective standard would apply to the determination of whether the insured intended to do the *act* from which the injury or loss resulted. . . ." Fischer, *supra* note 12, at 128 (emphasis added). Nevertheless, courts tend to apply the objective approach only to the resulting injuries. For example, in *Hins v. Heer*, 259 N.W.2d 38, 39-40 (N.D. 1977), the court determined from the facts surrounding the incident that the insured subjectively intended to hit his victim. It then applied the objective test to determine whether the injuries were intentional. "Where an intentional act *results in injuries which are the natural and probable consequences of the act, the injuries, as well as the act, are intentional.*" 259 N.W.2d at 40 (emphasis added) (quoting *Rankin v. Farmers Elevator Mut. Ins. Co.*, 393 F.2d 718, 720 (10th Cir. 1968)); see also *Casualty Reciprocal Exch. v. Thomas*, 647 P.2d 1361, 1363 (Kan. Ct. App. 1982) (applying *Rankin's* objective test to find the victim's injuries intentionally caused, only after determining from the facts of the case that the insured subjectively intended to fire a gun at his victim).

40. See, e.g., *Rankin*, 393 F.2d at 719-20 (applying objective test to find that an insured who intentionally drove his truck into a motorcyclist intended the resulting injuries notwithstanding the insured's claims that they were accidental); *Hins*, 259 N.W.2d at 40 (finding that broken jaw resulting from an intentional blow to victim's face was foreseeable regardless of insured's claim that he did not actually intend the injuries).

41. *Casualty Reciprocal Exch. v. Thomas*, 647 P.2d 1361 (Kan. Ct. App. 1982).

42. 647 P.2d at 1363-64.

43. The impact of possible criminal liability on an insured's decision is beyond the scope of this Note. See *infra* note 108.

44. See *supra* note 16 and accompanying text. See generally JERRY, *supra* note 1, § 63B[b]; Fischer, *supra* note 12, at 127-28; Joseph R. Long, II, Note, N.N. v. Moraine Mutual Insurance Co.: *The Liability Insurance Intentional Injury Exclusion in Cases of Child Sexual Abuse*, 1991 Wis. L. REV. 139, 142; Salton, *supra* note 12, at 1032-33.

45. *Breland v. Schilling*, 550 So. 2d 609 (La. 1989).

not subjectively intend to "[cause the] plaintiff any serious harm."⁴⁶ From the insured's perspective, "the broken jaw [suffered by the plaintiff] was just a 'freak accident.'"⁴⁷ The court concluded that "when minor injury is intended, [but] a substantially greater or more severe injury results, whether by chance, coincidence, accident, or whatever, [insurance] coverage for the more severe injury is not barred."⁴⁸

Thus, under the subjective test, courts face the problem of determining exactly what the insured intended at the time he acted.⁴⁹ For example, if an insured drops a rock out of a tenth story window, no one but the insured knows whether he wants to see how long it takes to land or whether he intends to strike the person below whom it hits. Further, even if he intends to hit a pedestrian, he may only intend to cause minor injuries rather than the serious skull fracture which results. The issue, therefore, becomes one of credibility. Insureds who can convince a court that they did not intend the resulting harm receive coverage notwithstanding the fact that a reasonable person would have foreseen the risk of the injuries.⁵⁰

Because subjective-intent courts require such a precise level of intent before denying coverage, they compensate victims more often than objective intent courts do. However, in ensuring victim compensation, they sacrifice deterrence. Threats of financial responsibility are unlikely to dissuade insureds in subjective-intent jurisdictions from committing intentional tortious acts because they will perceive the risk of resulting liability to be very low.⁵¹ Consequently, neither objective- nor subjective-intent courts adequately address both deterrence and compensation concerns.

The majority of jurisdictions use a third approach of inferred intent which attempts to strike a balance between victim compensation and deterrence.⁵² According to this view, an insured must intend both the act and *some* injury.⁵³ Thus, in contrast to the subjective ap-

46. 550 So. 2d at 614.

47. 550 So. 2d at 614.

48. 550 So. 2d at 614; *see also* Vermont Mut. Ins. v. Dalzell, 218 N.W.2d 52, 55-56 (Mich. Ct. App. 1974) (granting insurance coverage upon conclusion that although a 17-year-old insured intended to throw a pumpkin over the side of a highway overpass, there was no evidence that he intended to injure the motorist passing below).

49. Under the objective test, *see supra* notes 38-43 and accompanying text, the insured would not receive coverage despite claims of lack of subjective intent to harm.

50. *See Dalzell*, 218 N.W.2d at 52.

51. *See infra* note 108.

52. *See supra* note 17 and accompanying text. *See generally* JERRY, *supra* note 1, § 63B[b]; Wilcox, *supra* note 13, at 1531-32.

53. *See, e.g.,* Butler v. Behaeghe, 548 P.2d 934, 937 (Colo. Ct. App. 1976) (finding that an insured intends to cause injury for purposes of the intentional injury exclusion clause if he intends to "cause some harm to the person injured, whether the actual injury inflicted is of the same type and degree as that intended or not"); Western Natl. Assurance Co. v. Hecker, 719 P.2d 954, 960 (Wash. Ct. App. 1986) ("[T]he insured must have intended the act *and* to cause some kind of bodily injury."); Pachucki v. Republic Ins. Co., 278 N.W.2d 898, 901 (Wis. 1979)

proach, the inferred-intent test does not require the insured to have actually intended any harm.⁵⁴ Rather, the injury requirement is satisfied by imputing to the insured as a matter of law an intent to cause injury based on the nature and circumstances of the insured's act.⁵⁵ In *Pachucki v. Republic Insurance Co.*,⁵⁶ the Wisconsin Supreme Court inferred an intent to injure when the defendant insureds struck the plaintiff in the eye during a "greening pin war."⁵⁷ Although the defendants insisted that they did not intend to injure the plaintiff in any way, testimony revealed not only that obtaining any degree of accuracy when shooting greening pins was impossible, but also that one of the defendants had suffered an injury causing bleeding during a previous greening pin fight.⁵⁸ Thus, where the act is such that some harm is virtually certain to occur, the insured will be deemed to have intended harm even if he actually did not.⁵⁹

Once a court infers that the insured intended to cause some harm, it will deem the insured to have also intended the actual injury that

(pointing out that the inferred intent approach requires the insured to have intended the act and some bodily injury); see also JERRY, *supra* note 1, § 63B[b]; J. Lobrano, Recent Development, Breland v. Schilling: *The Intentional Act Exclusion Clause in the General Liability Policy — What Did You Intend?*, 65 TUL. L. REV. 443, 445 (1990).

54. Many inferred-intent courts appear to require the insured to have actually intended to cause some injury. These courts then impute to the insured an intent to cause the extent of the resulting harm. For example, in *Butler*, the Colorado Court of Appeals found that the insured actually intended to injure his victim by hitting him in the stomach with a pipe. However, the victim ducked and the insured struck him in the head, causing severe injuries. The court interpreted the inferred intent standard to apply "if the insured acts with the intent or expectation that bodily injury will result even though the bodily injury . . . that does result is different either in character or magnitude from the injury that was intended." 548 P.2d at 938. Thus, the court deemed the insured to have intended to cause the resulting head injuries only after finding that the insured subjectively intended to cause his victim some harm.

Other inferred-intent courts, though, interpret the test not to require the insured to have actually intended any harm. These courts infer both an intent to cause some harm and an intent to cause the resulting injuries. This Note's discussion focuses on courts that take this approach.

55. See, e.g., *State Farm Fire & Casualty Co. v. Williams*, 355 N.W.2d 421, 424 (Minn. 1984) (inferring intent to cause injury as a matter of law where insured inflicted nonconsensual sexual acts upon physically disabled adult victim); *Jones v. Norval*, 279 N.W.2d 388, 391 (Neb. 1979) (inferring intent to cause injury as a matter of law where defendant intentionally hit plaintiff in the face with his fist); *Raby v. Moe*, 450 N.W.2d 452, 457 (Wis. 1990) (finding that intentional participation in armed robbery was so substantially certain to result in some type of bodily injury that "the law will infer an intent to injure on behalf of the insured actor"); see also Wilcox, *supra* note 13, at 1532.

56. 278 N.W.2d 898 (Wis. 1979).

57. 278 N.W.2d at 899. The court explained that a greening pin war is comparable to shooting paper clips with rubber bands.

58. 278 N.W.2d at 903.

59. See, e.g., *Clark v. Allstate Ins. Co.*, 529 P.2d 1195, 1196 (Ariz. Ct. App. 1975) (inferring an intent to harm where insured insisted he did not intend to injure the plaintiff despite admitting that he intended to strike the victim in the face); *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240, 242-43 (Ind. Ct. App. 1975) (inferring an intent to injure despite insured's claims that, although he intended to strike his neighbor, he did not intend to inflict the resulting injuries); *Vascocu v. Singletary*, 434 So. 2d 597 (La. Ct. App. 1983) (deeming insured to have intended to shoot victim in the leg despite insured's insistence that he only intended to shoot the floor to scare the victim).

resulted.⁶⁰ Courts emphasize that the intentional injury exclusion clause applies even if "the bodily injury that does result is different either in character or magnitude from the injury that was [inferred to be] intended."⁶¹ Thus, in *Pachucki*, it was irrelevant that the eye injury the plaintiff actually suffered was more serious than the type of injury the court envisioned as virtually certain to occur.⁶²

The inferred-intent approach is best viewed as a hybrid standard. Courts using this approach apply a narrower objective test to impute to the insured a subjective intent to harm based on the nature of the insured's act. As under the objective test, an insured under the inferred-intent standard may be deemed to have intended harm he did not actually contemplate causing.⁶³ However, while the objective standard applies a broad "natural and probable consequences" test, the inferred-intent approach imputes intent to the insured only when "an act may be so certain to cause a particular harm that it can be said that a person who performed such an act [actually] intended the harm."⁶⁴ Thus, the inferred-intent standard requires an insured's act

60. See, e.g., *Clark*, 529 P.2d at 1196 (deeming insured to have intended to crush plaintiff's cheekbone after inferring that defendant intended to cause plaintiff some injury by striking plaintiff in the face); *Butler v. Behaeghe*, 548 P.2d 934 (Colo. Ct. App. 1976) (deeming insured to have intended to fracture plaintiff's skull after inferring that defendant intended to cause plaintiff some harm by intentionally striking plaintiff with a steel pipe); *Barton v. Allstate Ins. Co.*, 527 So. 2d 524 (La. Ct. App. 1988) (deeming insured to have intended to cause plaintiff's gunshot wound after inferring that insured intended to cause plaintiff some injury by intentionally firing a gun through the closed bathroom door behind which plaintiff stood).

61. *Butler*, 548 P.2d at 938; see also *State Farm Fire & Casualty Co. v. Victor*, 442 N.W.2d 880, 883 (Neb. 1989) ("[I]t makes no difference if the actual injury is more severe or of a different nature than the injury intended." (quoting *Jones v. Norval*, 279 N.W.2d 388, 391 (Neb. 1979))); *Western Natl. Assurance Co. v. Hecker*, 719 P.2d 954, 960 (Wash. Ct. App. 1986) ("[O]nce intent to cause injury is [inferred], it is immaterial that the actual injury caused is of a different character or magnitude than that intended."); *Pachucki*, 278 N.W.2d at 901 ("[T]he intent to injure may be inferred by the nature of the act . . . even though the actual injury is different in character or magnitude."). See generally JERRY, *supra* note 1, § 63B[b].

62. 278 N.W.2d at 903-04.

63. Some commentators have focused solely on this similarity and have argued that the inferred-intent approach applies the same inquiry as the objective test. For example, Olsson, *supra* note 34, at 1047-48, maintains that the inferred-intent test "is an objective one Disregarding the subjective intent of the actor, intent to cause the resulting injuries would be inferred from the actual consequences of the act through use of the objective 'natural and probable consequences' test." See also Peter E. Hutchins, *The "Intentional Act" Exclusion in New Hampshire After MacKinnon v. Hanover Insurance Co.*, 26 N.H. B.J. 221, 222 (1985) (viewing the inferred-intent approach as an objective test); Salton, *supra* note 12, at 1033 n.38 (noting that some commentators view the inferred-intent standard as an objective test). These commentators overlook the fact that the inferred-intent standard requires an insured's act to have a much higher probability of causing harm than the objective standard does. See *infra* note 64 and accompanying text.

Also like the objective standard, the inferred-intent approach prevents insureds from avoiding the intentional injury exclusion clause by asserting that they did not intend to inflict the resulting serious harm. See *supra* notes 49-50 and accompanying text for a discussion of the loophole present in the subjective test.

64. *Clark*, 529 P.2d at 1196 (emphasis added); see also *Steinmetz v. National Am. Ins. Co.*, 589 P.2d 911, 914 (Ariz. Ct. App. 1979) (quoting *Clark*, 529 P.2d at 1196); *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898, 903 (Wis. 1979).

to have a much higher probability of causing harm than the objective standard does.

For example, assume Mr. M and Ms. N get into a fight. Believing no one else to be in the vicinity, Ms. N shoots a gun into the air solely to scare Mr. M. However, the bullet injures a third person. A court applying the objective test may find the probability of a third party's suffering injuries under these circumstances "sufficiently foreseeable" to deny Ms. N insurance coverage. However, a court applying the inferred-intent standard may not find the probability of a third party's suffering injuries as a result of a gun's being fired into the air virtually certain and thus will not infer intent by Ms. N to cause harm.

The inferred-intent standard can also be distinguished from the subjective-intent standard. According to the subjective approach, an insured must actually intend to cause the precise injury that occurs.⁶⁵ Under the inferred-intent approach, courts only deem the insured to have subjectively intended the resulting harm where the nature of the act suggests that an injury was so likely to result that the insured *must* have contemplated it.⁶⁶ Thus, a remote possibility remains that the insured really did not intend to harm the victim.

The inferred-intent approach finds middle ground between the subjective and objective approaches: actual intent is not required, but resulting injuries must be more certain than "reasonably foreseeable." By combining elements of the objective and subjective tests, the inferred-intent approach balances the competing public policy interests of deterrence and victim compensation. Consistent with the deterrence rationale, an insured will not receive coverage under the inferred-intent approach for an act which he must have known would cause injury.⁶⁷ Yet victims receive compensation more often under this standard than under the "natural and probable consequences" approach taken by objective intent jurisdictions. The inferred-intent standard requires more certainty of causing harm on the part of the insured than the objective test does before coverage will be denied. Thus, this hybrid standard most effectively addresses these competing

65. See *supra* note 44 and accompanying text.

66. Some commentators view the inferred intent approach as a second prong of the subjective intent standard. See, e.g., Long, *supra* note 44, at 142 (taking the position that "to infer harmful intent . . . is to determine *subjectively* the actor's actual state of mind"); Wilcox, *supra* note 13, at 1531-33 ("The majority of courts apply a two-prong specific intent standard to insurance policies. . . . Even under the [second prong], in which a court infers intent from the egregious nature of the event, the focus is on the *policyholder's desire* as evidenced by the context of her acts."). These characterizations, though, ignore the fact that the inferred intent approach only *imputes* to the insured a subjective desire to cause harm. An insured who is found to have intended harm under the inferred intent approach may not have actually intended to cause the resulting injury at the time he acted. See *supra* note 59 and accompanying text.

67. See, e.g., *Barton v. Allstate Ins. Co.*, 527 So. 2d 524 (La. Ct. App.), writ denied, 532 So. 2d 157 (La. 1988); *Pachucki*, 278 N.W.2d at 898 (discussed *supra* notes 56-58 and accompanying text).

public policy concerns for purposes of the intentional injury exclusion clause.

II. THE VOLUNTARY INTOXICATION DEFENSE

Courts face a complication in interpreting the intentional injury exclusion clause when an insured commits an apparently intentional act while voluntarily intoxicated. Suppose Mr. X gets drunk while hosting a party at his home and starts an argument with Ms. Y. Mr. X becomes enraged and pulls out a gun. He threatens to shoot Ms. Y if she does not leave. A third person tries to reason with Mr. X. Mr. X refuses to listen and insists that there is only one way for him to avoid ever seeing Ms. Y again. He then shoots her.

Under any of the three intent standards examined in Part I, Mr. X would be denied coverage if he were not drunk. Under the objective approach, injuries suffered by Ms. Y would be characterized as intentional because they are the natural and probable result of being shot at close range.⁶⁸ Because Mr. X verbally expressed his intention to shoot Ms. Y in order to avoid ever seeing her again, courts applying the subjective approach would also deny coverage.⁶⁹ Finally, intent can be inferred because Mr. X must have been aware that shooting Ms. Y at close range would cause injury.⁷⁰

However, because Mr. X was intoxicated, courts must decide whether to allow a civil defense for voluntary intoxication. They try to fit their decisions into the framework developed in Part I. For example, a number of inferred intent jurisdictions try to maintain the balance between victim compensation and deterrence by rejecting a voluntary intoxication defense and holding Mr. X to the same standard of intent as if he had shot Ms. Y while sober.⁷¹

The majority of courts admit evidence of intoxication to decide whether the insured possessed the mental capacity to form the required intent to act.⁷² If a court concludes that the insured lacked the

68. See *supra* notes 38-43 and accompanying text.

69. See *supra* notes 44-48 and accompanying text. Courts applying the subjective test must determine what the insured actually intended. Thus, coverage will usually turn on whether the insured verbally expressed his intent as Mr. X did.

70. See *supra* notes 63-67 and accompanying text. The Louisiana Court of Appeals applied this reasoning in *Barton*, 527 So. 2d at 524, to deny coverage to an insured who must have been aware that shooting a gun through a bathroom door would injure the person behind it.

71. See, e.g., *Allstate Ins. Co. v. Sherrill*, 566 F. Supp. 1286 (E.D. Mich. 1983), *aff'd.*, 735 F.2d 1363 (6th Cir. 1984); *Prudential Property & Casualty Ins. Co. v. Kerwin*, 576 N.E.2d 94 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 133 (Ill. 1991); *Economy Fire & Casualty Ins. Co. v. Meyer*, 427 N.W.2d 742 (Minn. Ct. App. 1988); *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661 (Mo. Ct. App. 1982) (all holding that voluntary intoxication is not a defense to the intentional injury exclusion clause).

72. See, e.g., *Parkinson v. Farmers Ins. Co.*, 594 P.2d 1039 (Ariz. Ct. App. 1979); *State Farm Fire & Casualty Co. v. Morgan*, 364 S.E.2d 62 (Ga. Ct. App. 1987), *aff'd.*, 368 S.E.2d 509 (Ga. 1988); *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166 (N.H. 1974); *Safeco Ins. Co. v. House*, 721 P.2d 862 (Or. Ct. App.), *review denied*, 726 P.2d 1185 (Or. 1986); *N.N. v. Moraine Mut. Ins.*

capacity to intend his act, it allows a voluntary intoxication defense to the intentional injury exclusion clause, and the insurer must provide coverage.⁷³ Conversely, in situations where a court finds that the insured had sufficient capacity to form the intent to act despite intoxication, it denies the defense and applies its usual intent standard to decide whether the resulting injuries were intended.⁷⁴ Because the defense is more likely to succeed as an insured's level of intoxication rises, it promotes victim compensation at the expense of deterring insureds from drinking to the point where they lose control and cause harm. Despite this result, even courts favoring the deterrence rationale examine evidence of intoxication in considering intent.⁷⁵ Accordingly, these courts promote deterrence only when they deny the defense.⁷⁶ Thus, by trying to fit the current defense within traditional intent standards, objective-intent courts fail to address the policy concern most important to them, and inferred-intent courts upset the optimal balance between victim compensation and deterrence.

This Part analyzes how a court's choice of an intent standard influences its decision to allow a voluntary intoxication defense to the intentional injury exclusion clause. Section II.A discusses the rationale behind the decisions of some inferred-intent courts not to allow a voluntary intoxication defense. Section II.B sets out the two-step intent analysis followed by the majority of courts under which they admit evidence of voluntary intoxication to negate intent. The section then examines why the voluntary intoxication defense promotes victim compensation at the expense of deterrence. Part II concludes that only modifying the current voluntary intoxication defense will adequately address both these interests.

A. *The Minority View: Courts That Refuse To Allow a Voluntary Intoxication Defense*

Outside the area of voluntary intoxication, courts that want to ad-

Co., 434 N.W.2d 845 (Wis. Ct. App. 1988) (all admitting evidence of voluntary intoxication to negate the intent required under the intentional injury exclusion clause).

73. See, e.g., *Nettles v. Evans*, 303 So. 2d 306 (La. Ct. App. 1974); *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7 (N.J. 1970); *Long v. Coates*, 806 P.2d 1256 (Wash. Ct. App.), review denied, 807 P.2d 884 (Wash. 1990) (all concluding, based on evidence of insured's level of intoxication, that insured lacked the mental capacity to form the required intent when he acted).

74. See, e.g., *Lawler Mach. & Foundry Co. v. Pacific Indem. Ins. Co.*, 383 So. 2d 156 (Ala. 1980) (applying objective approach and concluding that injuries were natural and probable consequence of insured driving his truck through a restaurant); *Parkinson v. Farmers Ins. Co.*, 594 P.2d 1039 (Ariz. Ct. App. 1979) (applying inferred intent approach to find that insured intended to shoot victim notwithstanding the fact that insured was intoxicated); *Kenna v. Griffin*, 481 P.2d 450 (Wash. Ct. App. 1971) (applying inferred intent approach to find that intoxicated insured intended to commit a battery).

75. See, e.g., *Lawler*, 383 So. 2d at 156 (applying objective test upon concluding that despite intoxication, defendant intended to drive his truck through the wall of a restaurant).

76. See *infra* notes 113-17 and accompanying text.

dress both deterrence and victim compensation concerns choose the inferred-intent standard.⁷⁷ A minority of these jurisdictions⁷⁸ try to maintain the balance between deterrence and victim compensation⁷⁹ in cases of harm caused by intoxicated insureds. They hold intoxicated insureds to the same standard of intent as any other insured,⁸⁰ emphasizing that the law should not permit insureds to use alcohol as a way to escape financial liability for "otherwise intentional" actions — actions that would be intentional but for the wrongdoer's intoxicated state.⁸¹ As an illustration, the Illinois Court of Appeals recently rejected the intoxication defense where a drunk insured shot his victim during an altercation in a tavern parking lot.⁸² "[I]t would be against [the] public policy [of deterring wrongful conduct] to relieve citizens of the consequences of their acts based upon their voluntary intoxication."⁸³ The court concluded that the insured was not entitled to coverage because, but for the insured's intoxication, his actions would be deemed intentional under the inferred intent standard.⁸⁴ Thus, although courts rejecting the defense appear to focus on deterrence, they address victim compensation by requiring the insured to possess the inferred-intent standard's high level of intent before denying coverage.⁸⁵

77. See *supra* notes 63-67 and accompanying text.

78. See, e.g., *Prudential Property & Casualty Ins. Co. v. Kerwin*, 576 N.E.2d 94 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 133 (Ill. 1991); *Economy Fire & Casualty Ins. Co. v. Meyer*, 427 N.W.2d 742 (Minn. Ct. App. 1988); *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661 (Mo. Ct. App. 1982); *Hanover Ins. Co. v. Newcomer*, 585 S.W.2d 285 (Mo. Ct. App. 1979). As explained *infra* notes 80-85 and accompanying text, these courts have attempted to maintain the balance between victim compensation and deterrence by rejecting the voluntary intoxication defense in the insurance context.

79. See *infra* note 85 and accompanying text.

80. The author's research has not revealed any subjective- or objective-intent jurisdictions that take this view. In fact, one objective-intent court partly rationalized its decision to admit evidence of voluntary intoxication by pointing out that only inferred-intent jurisdictions have rejected the defense:

[I]n each case [rejecting the defense,] the court had adopted a rule that from certain acts intent should be inferred as a matter of law. Against this legally required inference, the courts held intoxication unavailing. In the present case, we . . . have adopted the different standard of intent or expectation in fact. The cases cited are, therefore, not on point.

MacKinnon v. Hanover Ins. Co., 471 A.2d 1166, 1168-69 (N.H. 1984).

81. See, e.g., *Newcomer*, 585 S.W.2d at 289 ("[T]he law must not permit the use of . . . stimuli [such as alcohol] to become a defense for one's actions."); see also *American Family Mut. Ins. Co. v. Peterson*, 405 N.W.2d 418, 422 (Minn. 1987); *Cole*, 631 S.W.2d at 664 (both adopting the *Hanover* court's reasoning).

82. *Prudential Property & Casualty Ins. Co. v. Kerwin*, 576 N.E.2d at 94.

83. 576 N.E.2d at 97.

84. 576 N.E.2d at 97.

85. For example, in *Allstate Ins. Co. v. Sherrill*, 566 F. Supp. 1286, 1288 (E.D. Mich. 1983), *aff'd*, 735 F.2d 1363 (6th Cir. 1984), the court rejected the voluntary intoxication defense, reasoning that "public policy demands that a voluntary departure of one's good judgment and rational decision-making abilities should not permit the insured to abrogate his financial responsibility to those he brutally injures." The court also addressed the victim compensation concern by applying the inferred intent standard. See also *Allstate Ins. Co. v. Hampton*, 433

These courts implicitly assume that all people can control their intake of alcohol. Consequently, they believe that prohibiting the defense will deter people from consuming alcohol to the point where they lose control and harm someone. Although this approach may successfully deter nonalcoholics — those people who can control the quantity of alcohol they consume — from drinking to the point of causing harm, it may have no effect on alcoholics.⁸⁶ Studies show that threats of financial liability do not cause alcohol abusers to alter their drinking patterns.⁸⁷ Treatment may be the only solution.⁸⁸

Courts who reject the defense and deny coverage disregard the questionable utility of using liability to prevent alcoholics from repeatedly engaging in destructive behavior. In *American Family Mutual Insurance Co. v. Peterson*,⁸⁹ the Minnesota Supreme Court refused to grant an intoxication defense where a drunken insured struck his girlfriend's landlady on the head with a hammer "for no apparent reason."⁹⁰ Testimony revealed that the insured was a confirmed alcoholic who attacked the landlady during an alcoholic blackout.⁹¹ The *Peterson* court, though, ignored this fact and focused only on the importance of not "creat[ing] a situation where the more drunk an insured can prove himself to be, the more likely he will have insurance coverage."⁹² Therefore, courts that completely reject the voluntary intoxication defense do not adequately address both deterrence and victim compensation in all cases.

B. *The Majority View: Courts That Admit Evidence of Voluntary Intoxication*

The majority of courts allow insureds to support with evidence a plea of voluntary intoxication offered as a defense to the intentional injury exclusion clause.⁹³ This section examines the two-step test that

N.W.2d 334, 336 (Mich. Ct. App. 1988) (rejecting the voluntary intoxication defense under the *Sherrill* court's reasoning and denying the defendant insured coverage pursuant to the inferred intent approach).

86. See *infra* note 182 for the definition of the term *alcoholic*.

87. See *infra* note 194 and accompanying text. But see also *infra* notes 189-92 and accompanying text (discussing the counterarguments made by some experts).

88. This Note assumes that alcoholics become *voluntarily* intoxicated when they consume alcohol. Although alcoholics cannot control their current intake of alcohol, they voluntarily chose to start drinking excessively, see *infra* note 184 and accompanying text, and they can choose to stop drinking by seeking treatment. See *infra* notes 185-86 and accompanying text.

89. 405 N.W.2d 418 (Minn. 1987).

90. 405 N.W.2d at 419.

91. 405 N.W.2d at 420. The *Peterson* court explained that alcoholics retain no memory of what occurred when they suffer blackouts.

92. 405 N.W.2d at 422.

93. See Fischer, *supra* note 12, at 146 (indicating that admitting evidence of voluntary intoxication to negate intent is the majority view). The author's research indicates that all courts applying the strict subjective approach or the objective approach as well as some of the inferred intent jurisdictions admit evidence of voluntary intoxication to negate intent.

these courts apply in determining whether an insured possessed sufficient intent to act and cause harm. First, regardless of the intent standard they usually apply, courts determine whether an insured subjectively possessed the mental capacity to intend his act. Courts then pursue one of two possible courses depending on the conclusion reached under step one. If the insured's intoxication destroyed his ability to form the required intent to act, a court will grant the insured coverage and end the inquiry. Conversely, if a court concludes that an insured possessed the capacity to intend his act, despite his intoxicated state, it will apply traditional intent standards to determine whether the insured intended the resulting injuries. This section concludes, in the context of this majority framework, that the current voluntary intoxication defense is inadequate because it promotes victim compensation at the expense of deterrence.

1. *Step One: Examine Evidence of Voluntary Intoxication*

All courts recognizing a voluntary intoxication defense to the intentional injury exclusion clause initially determine whether alcohol destroyed an insured's mental capacity to form the required intent to act.⁹⁴ In doing so, courts examine all evidence regarding the effects of alcohol on the insured's state of mind at the time he acted. In *Long v. Coates*,⁹⁵ the Washington Court of Appeals concluded on the basis of expert testimony that an intoxicated insured who stabbed an off-duty police officer in the back did not possess sufficient intent to implicate the intentional injury exclusion clause. Evidence showed that the insured's "blood alcohol level was about .24% at the time of the stabbing and he was severely intoxicated."⁹⁶ A psychiatrist opined that "individuals with blood alcohol levels well above .1% will be so impaired they are unable to form an intent."⁹⁷ Based on these statements, the court concluded that the insured's level of intoxication sufficiently prevented him from forming the required intent, and it upheld coverage.⁹⁸

Similarly, the Louisiana Court of Appeals, in *Nettles v. Evans*,⁹⁹ considered all available information in determining that an intoxicated insured who attacked a woman in a parking lot did not possess suffi-

94. See, e.g., *State Farm Fire & Casualty Co. v. Morgan*, 364 S.E.2d 62 (Ga. Ct. App. 1987), *aff'd*, 368 S.E.2d 509 (Ga. 1988); *Lawrence v. Moore*, 362 So. 2d 803 (La. Ct. App.), *writ granted*, 365 So. 2d 230 (La. 1978), *appeal dismissed*, 368 So. 2d 121 (La. 1979); *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166 (N.H. 1986); *Safeco Ins. Co. v. House*, 721 P.2d 862 (Or. Ct. App.), *review denied*, 726 P.2d 1185 (Or. 1986) (all recognizing a voluntary intoxication defense and therefore considering evidence of the insured's mental capacity to form the required intent).

95. 806 P.2d 1256, 1260 (Wash. Ct. App. 1990), *review denied*, 807 P.2d 884 (Wash. 1991).

96. 806 P.2d at 1259.

97. 806 P.2d at 1259.

98. 806 P.2d at 1260.

99. 303 So. 2d 306 (La. Ct. App. 1974).

cient intent under the intentional injury exclusion clause. It considered eyewitness testimony, expert testimony concerning the effects of the drugs and alcohol the insured had ingested prior to the incident, and the insured's testimony regarding his state of mind at the time he acted.¹⁰⁰ The court emphasized the importance of considering the insured's own testimony to determine his actual state of mind: "[W]e have [the insured's] description of a hallucination at the time of the incident, which, although self-serving is consistent with the expert's opinion as to what reactions could be expected under the circumstances."¹⁰¹

Thus, courts considering evidence of voluntary intoxication rely not only on expert testimony but also on the insured's own recollection. A court's conclusion regarding the credibility of the insured's story may determine whether the court holds the insured financially responsible for his act. The next subsection examines the consequences of this conclusion.

2. *Step Two: Decide Whether To Grant the Voluntary Intoxication Defense*

After examining evidence of voluntary intoxication, courts follow one of two possible analyses. A court may either conclude that the insured's intoxication destroyed his capacity to form the required intent to act and thus grant the insured coverage or, conversely, may conclude that an insured intended his act despite his intoxicated state and apply its traditional intent standard to determine whether the insured intended the resulting injuries. This subsection examines these two possibilities. It concludes that the current voluntary intoxication defense must be modified to accommodate adequately both victim compensation and deterrence policy concerns.

a. *The consequences of a court's determination that intoxication destroyed intent.* If a court concludes that the insured's intoxication destroyed his ability to form the required intent to act, the court invokes the voluntary intoxication defense to grant the insured coverage for the economic consequences of his wrongdoing. However, rather than trying to balance the competing policy concerns of deterrence and victim compensation, the current defense promotes victim compensation at the expense of deterrence. The more drunk an insured becomes, the more likely he is to receive coverage.¹⁰² The coverage in turn goes toward compensating the insured's victims for their injuries.

To illustrate, suppose instead of suddenly getting mad at Ms. Y at

100. 303 So. 2d at 307-09.

101. 303 So. 2d at 309.

102. See, e.g., Olsson, *supra* note 34, at 1053-55 (acknowledging that the voluntary intoxication defense promotes victim compensation to the exclusion of deterrence).

a party, Mr. X has been building up hatred for Ms. Y for months. He decides the only way to get her out of his mind is to kill her. If Mr. X invites Ms. Y to his home and shoots her while he is sober, he will certainly be denied coverage under any interpretation of the intentional injury exclusion clause.¹⁰³ The clause was designed specifically to prevent people like Mr. X from avoiding financial responsibility for planned incidents.¹⁰⁴

However, if Mr. X were more devious, he could take advantage of the voluntary intoxication defense loophole and receive coverage by getting drunk before carrying out his plan.¹⁰⁵ Expert testimony only reveals an insured's blood alcohol level and the medically known effects of that amount of alcohol on a person's mental capacity. From that evidence, Mr. X could appear to have been just as impaired as the insured in *Long v. Coates*.¹⁰⁶ The court's ultimate decision, assuming there were no witnesses to Mr. X's plan, will necessarily turn on the credibility of Mr. X's own testimony concerning his mental state. If Mr. X can convince a court that he did not know what he was doing when he shot Ms. Y, as the insured was able to do in *Nettles v. Evans*,¹⁰⁷ he will receive coverage. Thus, the current version of the voluntary intoxication defense allows insureds to drink away financial responsibility for their intentional wrongdoing.¹⁰⁸

b. The consequences of a court's determination that intoxication did not destroy intent. If a court concludes that the insured intended

103. See *supra* notes 68-70 and accompanying text.

104. See *supra* notes 32-34 and accompanying text.

105. At least one court has stated that "it is not obvious that a refusal to consider relevant evidence of intoxication on the issue of actual intent would have any appreciable effect on the behavior of insured persons." *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1169 (N.H. 1984). However, the *MacKinnon* court offered no objective proof for this conclusion. The court simply assumed that insureds will not take advantage of the fact that they can receive coverage for otherwise intentional wrongdoing simply by consuming alcohol beforehand. *But see infra* note 115 and accompanying text.

106. 806 P.2d 1256 (Wash. Ct. App. 1990), *review denied*, 807 P.2d 884 (Wash. 1991) (discussed *supra* notes 95-98 and accompanying text).

107. 303 So. 2d 306 (La. Ct. App. 1974) (discussed *supra* notes 99-101 and accompanying text).

108. Intentional torts that implicate the intentional injury exclusion clause usually also constitute criminal acts. See, e.g., *State Farm Fire & Casualty Co. v. Abraio*, 874 F.2d 619, 622-23 (9th Cir. 1989) (finding that sexual molestation constituted both an intentional tort in a civil damage action and a criminal act); *Wegman v. Prat*, 579 N.E.2d 1035, 1044 (Ill. App. Ct. 1991) (indicating that a battery constituted both an intentional tort for civil purposes and a criminal act); *Kemp v. Kemp*, 723 S.W.2d 138 (Tenn. Ct. App. 1986) (assault and battery committed upon spouse constituted both an intentional tort entitling victim to damages and a crime entitling victim to press criminal charges). Therefore, people like Mr. X risk both financial and criminal liability in deciding to commit an intentional act. The deterrent effect of possible criminal liability on Mr. X's decision is beyond the scope of this Note. However, most states admit evidence of voluntary intoxication to negate specific intent to commit criminal acts. PETER W. LOW, *CRIMINAL LAW* 139 (1984). Accordingly, Mr. X may believe that getting drunk before committing an intentional act will allow him to escape all liability. A court's ability to detect people like Mr. X in the criminal context is also beyond the scope of this Note.

his act despite his intoxicated state, it will deny a voluntary intoxication defense to the insured and apply its traditional intent standard to determine whether the insured intended the resulting injuries. Following this analysis, the Louisiana Court of Appeals applied a subjective-intent test after denying an intoxication defense to an insured who admitted in his deposition that he intended to hit the plaintiff even though he was intoxicated.¹⁰⁹ The court held that the insured was not entitled to coverage under the subjective standard because he admitted to intending the actual harm which occurred.¹¹⁰ Similarly, in *Lawler Machinery & Foundry Co. v. Pacific Indemnity Insurance Co.*,¹¹¹ the Alabama Supreme Court applied an objective-intent test upon concluding that the defendant insured intended to drive his truck through the wall of a restaurant notwithstanding the fact that he was intoxicated. The court denied the insured coverage under the objective test, reasoning that the resulting injuries were the natural and probable consequence of the insured's act.¹¹²

Courts that deny the voluntary intoxication defense to nonalcoholic insureds implicitly acknowledge the importance of deterrence. These courts send a signal to drinkers that they cannot use alcohol to shield their decisions to commit harmful acts. For example, the *Lawler* court denied the defendant the defense notwithstanding evidence that he had been "drinking beer throughout the day and evening, [and] was seen to stagger in the restaurant."¹¹³ The rationale is that potential liability may dissuade some individuals from starting to drink excessively¹¹⁴ or from intentionally consuming alcohol to the point where they lose control and cause harm.¹¹⁵ Moreover, insureds

109. *Lawrence v. Moore*, 362 So. 2d 803, 804 (La. Ct. App.), writ granted, 365 So. 2d 230 (La. 1978), appeal dismissed, 368 So. 2d 121 (La. 1979).

110. 362 So. 2d at 805. The court was able to find subjective intent here in contrast to *Vermont Mut. Ins. v. Dalzell*, 218 N.W.2d 52 (Mich. Ct. App. 1974) (discussed *supra* note 48), only because the insured admitted to intending the actual injuries which occurred.

111. 383 So. 2d 156 (Ala. 1980).

112. 383 So. 2d at 158.

113. 383 So. 2d at 156.

114. See *infra* note 193 and accompanying text.

115. Several studies have revealed evidence that people do consume alcohol in order to escape liability for otherwise intentional acts. For example, Dwight B. Heath, *Alcohol and Aggression: A "Missing Link" in Worldwide Perspective*, in *ALCOHOL, DRUG ABUSE AND AGGRESSION* 89 (Edward Gottheil et al. eds., 1983), notes:

[A] wide variety of ethnographic accounts reinforce the anecdotal findings of police psychologists, psychiatrists, and others in our own society, to the effect that individuals . . . often admit to planning some asocial or antisocial act and then drinking — not so much to muster their courage as to "have an excuse." . . . [I]n our own society, even the most severe critics of alcohol accept the estimate that no more than 10 percent of drinkers have alcohol-related problems This means that at least 90 percent of drinkers in this country seem to feel that alcohol lets them do what they want to do.

Id. at 100. Thus, alcohol has become a license to harm.

ROBERT R. ROSS & LYNN O. LIGHTFOOT, *THE TREATMENT OF THE ALCOHOL-ABUSING OFFENDER* 14 (1985), point out that some people consume alcohol to provide them with "an excuse to behave in an antisocial manner." They cite a study in which abusive husbands were

like Mr. X, who actually retain control when acting, will not be able to rely on apparent intoxication to avoid financial responsibility for intentional tortious acts.¹¹⁶ Of these courts, those that deny the defense and then apply the subjective- or inferred-intent approaches to determine whether the insured intended the resulting injuries also address the interest in compensating victims.¹¹⁷

Denying the voluntary intoxication defense to alcoholics as a class may not deter them for the same reasons that fully rejecting the defense may not.¹¹⁸ Consequently, courts sacrifice deterrence not only when they grant the current voluntary intoxication defense,¹¹⁹ but also when they deny the defense to alcoholics.¹²⁰ The next Part proposes a modification to the defense to account better for both deterrence and victim compensation in all situations.

III. SUBROGATION AND COERCIVE ALCOHOL TREATMENT: ALTERNATIVES TO THE CURRENT VOLUNTARY INTOXICATION DEFENSE

The current voluntary intoxication defense to intentional injury exclusion clauses promotes victim compensation at the expense of deterrence. Insureds who become so drunk that they cannot form the required intent escape financial responsibility for their acts. Thus, the defense condones excessive drinking when over ten million Americans suffer from alcohol abuse.¹²¹ Secondary costs of alcohol are stunning as well. Alcohol is involved in approximately fifty percent of all ar-

found to use alcohol as a scapegoat for their desire to beat their wives. *Id.*; see also Richard H. Blum, *Violence, Alcohol, and Setting: An Unexplored Nexus*, in *DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR* 110, 133 (James J. Collings, Jr. ed., 1981) (arguing that people use alcohol as a justification to carry out antisocial plans); Robert G. Niven, *Alcohol and the Family*, in *ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC* 91, 107 (1984) [hereinafter *ALCOHOLISM AND RELATED PROBLEMS*] ("[I]t has been suggested that alcohol is used as an excuse for violent behavior . . . in an attempt to escape legal punishment for violent acts."). Because intentional torts usually constitute crimes, see *supra* note 108, individuals in the above studies may drink to escape both financial and criminal liability.

116. See *supra* note 108.

117. But see *infra* note 120. When courts grant the defense, they emphasize victim compensation at the expense of deterrence. However, objective-intent courts that deny the defense do the opposite. Courts justify decisions to hold intoxicated insureds responsible for their acts on the ground that doing so will prevent insureds from using alcohol as an excuse to harm others in the future. Because the objective test focuses on deterrence, courts that apply it to the resulting injuries sacrifice the victim's interest in compensation.

118. See *supra* text accompanying notes 86-88.

119. See *supra* text accompanying notes 102-108.

120. Although subjective- and inferred-intent courts that deny the defense acknowledge the importance of compensating victims, see *supra* note 117 and accompanying text, denial of the defense usually results in denial of insurance coverage for the victim. See *supra* text accompanying notes 109-12. This problem similarly arises when courts deny the defense to alcoholics.

121. ALLAN LUKS, *WILL AMERICA SOBER UP?* 13 (1983); Leonard Saxe et al., *The Effectiveness and Cost of Alcoholism Treatment: A Public Policy Perspective*, in *THE DIAGNOSIS AND TREATMENT OF ALCOHOLISM* 485, 487 (Jack H. Mendelson & Nancy K. Mello eds., 2d ed.

rests;¹²² additionally, eighty percent of homicides, seventy percent of serious assaults, and seventy-two percent of robberies annually may be the products of intoxication.¹²³ One means of reducing the current alcohol problem in the United States, and the injuries that result, is to modify the voluntary intoxication defense in the insurance context through state legislation.

This Note proposes legislation which draws on the approaches taken both by courts who currently reject the voluntary intoxication defense and by courts who currently examine evidence of intoxication to determine whether to grant the defense to individual insureds. All courts would initially follow the approach taken by courts who reject the defense, i.e., apply the inferred-intent standard to determine whether the insured committed an otherwise intentional act. Doing so would ensure that courts strike an initial balance between victim compensation and deterrence¹²⁴ which they could then maintain by applying the proposed modifications to the voluntary intoxication defense. Also, courts would avoid the problem of deciding whether particular insureds such as Mr. X intended their acts despite their intoxicated state.

Courts that concluded a tortfeasor would have intended the action either but for or in spite of the influence of alcohol would then invoke a modified voluntary intoxication defense. The modified defense would require insurers to provide coverage for all victims injured by insureds who act while voluntarily intoxicated subject to an insurer right of reimbursement against those insureds who committed otherwise intentional acts. This aspect of the defense would ensure that all victims receive compensation while deterring nonalcoholic wrongdoers from consuming alcohol to the point where they would lose control and cause harm. However, because treatment may be the only means of deterring alcoholic insureds from drinking and committing intentional torts, the defense would allow the diagnosed alcoholic to avoid reimbursing the insurer if he successfully completed an alcohol treatment program. Rather than allowing alcohol abusers to avoid the fi-

1985); see also GARY G. FORREST, GUIDELINES FOR RESPONSIBLE DRINKING 22 (1989) (estimating that 13 million Americans suffer from alcoholism).

122. Louis J. West, *Alcoholism and Related Problems: An Overview*, in ALCOHOLISM AND RELATED PROBLEMS, *supra* note 115, at 1, 13; see also Saxe, *supra* note 121, at 487 (estimating that alcohol is implicated in 50% of all homicides and automobile accidents and 25% of all suicides).

123. West, *supra* note 122, at 13; Stewart G. Wolf, *Alcohol and Health: The Wages of Excessive Drinking*, in ALCOHOLISM AND RELATED PROBLEMS, *supra* note 115, at 27, 35. See generally JAMES J. COLLINS, NATIONAL INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, ALCOHOL USE AND CRIMINAL BEHAVIOR 2-4 (1981); John Kaplan, *Alcohol, Law Enforcement, and Criminal Justice*, in ALCOHOLISM AND RELATED PROBLEMS, *supra* note 115, at 78, 79-82 (both discussing studies done on the correlation between intoxication and crime).

124. See *supra* section I.B.

nancial consequences of their wrongdoing, the modified defense would force them to get help.

This Part analyzes this proposal. Section III.A examines courts' traditional reluctance to allow insurers to bring subrogation actions against their own insureds. It then argues that the prohibition is inappropriate in cases involving intentional injuries. Section III.B considers the proposal that an exception to the general prohibition be extended to voluntarily intoxicated insureds who commit otherwise intentional acts. It argues that although subrogation would effectively deter nonalcoholics from consuming alcohol in order to take advantage of the intoxication loophole in the intentional injury exclusion clause, it would not adequately deter alcoholics from committing intentional acts. Section III.B therefore concludes that subrogation alone is not a sufficient solution to the defects in the current voluntary intoxication defense. Section III.C examines the second aspect of the modified defense that insurer subrogation rights be subject to an exception for alcoholic insureds who successfully complete alcohol rehabilitation programs. The section analyzes the success of current state statutes that mandate alcohol treatment and concludes that analogous legislation in the insurance context would effectively address the public interest in deterring alcoholic intentional wrongdoers that is ignored under the current voluntary intoxication defense.

A. *The Traditional Rule: Insurers Cannot Maintain Subrogation Actions Against Their Insureds*

Subrogation allows an insurer who pays a loss covered by its insured's policy to recover the amount paid from the person whose tortious act caused the loss.¹²⁵ The doctrine thus ensures that the wrongdoer does not escape financial responsibility.¹²⁶ "Subrogation is intended to work justice, and a just result is having the loss fall ultimately on the party legally responsible for it."¹²⁷

There are two types of subrogation. "Equitable subrogation" is an equitable doctrine that arises by operation of law rather than by contract.¹²⁸ Principles of equity require that the party primarily liable for

125. See generally 6A APPLEMAN, *supra* note 34, § 4051; RONALD C. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 3-6, 11-14 (1964); JERRY, *supra* note 1, §§ 96[a]-[c].

126. 8B APPLEMAN, *supra* note 34, § 4941; HORN, *supra* note 125, at 12; JERRY, *supra* note 1, § 96[a]; see also A. & B. Auto Stores v. Newark, 279 A.2d 693 (N.J. 1971); Hartford Fire Ins. Co. v. Advocate, 560 N.Y.S.2d 331, 335 (App. Div. 1990), *appeal granted*, 569 N.E.2d 1026 (N.Y.), *order revd.*, 581 N.E.2d 1335 (N.Y. 1991) (both pointing out that subrogation places responsibility on the wrongdoer).

127. JERRY, *supra* note 1, § 96[c]; see also HORN, *supra* note 125, at 3 ("[O]ur society feels that, in equity and good conscience, debt should be ultimately discharged by the party(ies) primarily responsible. . .").

128. See, e.g., *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 877 (1st Cir. 1990); *Stafford Metal Works, Inc. v. Cook Paint & Varnish Co.*, 418 F. Supp. 56, 58 (N.D. Tex. 1976); *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 607 (N.J. 1978) (all citing the definition of equitable

the loss pay even though the parties have not expressly provided for it.¹²⁹ In contrast, "conventional subrogation" occurs when parties provide for subrogation rights by contract.¹³⁰ In those situations, subrogation is governed by the agreed-upon terms¹³¹ regardless of whether equity would allow it.

Traditionally, absent "clear and unequivocal language" to the contrary,¹³² insurers cannot maintain subrogation actions against their insureds.¹³³ This section explains the rationale behind the rule and then analyzes the recent willingness of some courts to make exceptions for intentional injuries. It concludes that the reasoning used by these courts should be extended to grant insurers a right of reimbursement against voluntarily intoxicated insureds who commit intentional acts.

1. The Traditional Rule

Courts emphasize several reasons why insurers cannot maintain subrogation actions against their insureds.¹³⁴ First, insurer subroga-

subrogation); see also Bruce B. Zager, Note, *Conflicts Regarding the "No Subrogation Against Insured" Rule*, 29 DRAKE L. REV. 811, 814 (1979-80). See generally JERRY, *supra* note 1, § 96[b].

129. New York Bd. of Fire Underwriters v. Trans Urban Constr. Co., 458 N.Y.S.2d 216 (App. Div.), *order aff'd*, 458 N.E.2d 1255 (N.Y. 1983); JERRY, *supra* note 1, § 96[b]. Insurers wishing to invoke this type of subrogation must satisfy four requirements. First, the party seeking subrogation must have already paid the debt. Second, the party seeking subrogation must have paid the debt under legal compulsion. Third, the party claiming subrogation must be secondarily liable for the debt. Fourth, no injustice must be done by allowing subrogation. *Id.* § 96[b], at 463.

130. JERRY, *supra* note 1, § 96[b].

131. 6A APPLEMAN, *supra* note 34, § 4052, at 128-29.

132. Great Lakes Transit Corp. v. Steamship Co., 301 U.S. 646, 654 (1937); *Farr Man & Co.*, 903 F.2d at 879; United States Fidelity & Guar. Co. v. Williams, 676 F. Supp. 123, 126 (E.D. La. 1987); Employers of Wausau v. Purex Corp., 476 F. Supp. 140, 143 (E.D. Pa. 1979); United States Natl. Bank of Or. v. American Home Assurance Co., 347 F. Supp. 311, 313 (D. Or. 1972), *aff'd*, 505 F.2d 742, 744 (9th Cir. 1974). These cases recognize that pursuant to conventional subrogation, discussed *supra* notes 130-31 and accompanying text, parties can successfully modify subrogation rights in contracts regardless of equitable considerations. See generally JERRY, *supra* note 1, § 96[b].

133. See, e.g., *Great Lakes Transit*, 301 U.S. at 654; *Farr Man & Co.*, 903 F.2d at 878; *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp.*, 135 Cal. Rptr. 120, 126 (Ct. App. 1976); *Home Ins. Co. v. Pinski Bros.*, 500 P.2d 945, 949 (Mont. 1972); *Pennsylvania Gen. Ins. Co. v. Austin Power Co.*, 480 N.Y.S.2d 88, 91 (Sup. Ct. 1984), *order rev'd*, 496 N.Y.S.2d 173 (1985), *modified*, 502 N.E.2d 982 (N.Y. 1986) (all stating general rule that insurer cannot maintain subrogation action against its own insured); see also 6A APPLEMAN, *supra* note 34, § 4055; JERRY, *supra* note 1, § 96[g].

An exception to this general prohibition could be written into insurance policies for voluntarily intoxicated insureds who commit intentional acts. See *supra* notes 130-31 and accompanying text. However, this Note analyzes whether insurers should be able to maintain equitable subrogation actions against their insureds. See *supra* notes 128-29 and accompanying text.

134. See, e.g., *Medical Protective Co. v. Bell*, 716 F. Supp. 392, 400 (W.D. Mo. 1989), *rev'd*, 912 F.2d 244 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991); *Stafford Metal Works, Inc. v. Cook Paint & Varnish Co.*, 418 F. Supp., 56, 58-59 (N.D. Tex. 1976); *Pinski Bros.*, 500 P.2d at 949 (all discussing rationale behind prohibition set out *infra* notes 135-36, 148-50, 157 and accompanying text).

tion actions against insureds may create serious conflicts of interest.¹³⁵ This problem arises particularly in situations where an insurance company insures both the wrongdoer and the injured party under different policies.¹³⁶ For example, in *Stafford Metal Works, Inc. v. Cook Paint and Varnish Co.*,¹³⁷ Cook Paint and Varnish Co. (Cook) allegedly supplied Stafford Metal Works (Stafford) with defective insulation, causing a fire in Stafford's plant.¹³⁸ Stafford recovered property damages under a fire insurance policy issued to it by Continental Casualty Co. (Continental).¹³⁹ Continental then filed a subrogation action against the alleged tortfeasor, Cook, for the amount paid under the fire insurance policy.¹⁴⁰ However, Continental had issued a liability policy to Cook agreeing to defend Cook in any suit seeking to hold Cook liable for property damage.¹⁴¹ Thus, Continental had a duty to defend Cook in the subrogation action it brought against Cook.¹⁴²

The court prohibited the subrogation action, noting that it provided too many opportunities for conflicts of interest.¹⁴³ Continental used its in-house counsel to pursue its subrogation claim against Cook while hiring outside counsel for Cook's defense.¹⁴⁴ This decision raised suspicions regarding the independence of Cook's counsel given that the attorney was being paid by Continental. The court pointed out that Cook's attorneys performed no discovery while defending Cook¹⁴⁵ and suggested that this situation presented a new type of conflict of interest: the "insurer might play favorites between its insureds."¹⁴⁶ Based on these fears, the court concluded that public policy required it to prohibit the insurer from bringing a subrogation action against its insured.¹⁴⁷

A second concern is that permitting insurers to sue their own insureds would allow insurance companies to avoid responsibility for

135. See, e.g., *Keystone Paper Convertors v. Neemar*, 562 F. Supp. 1046, 1050 (E.D. Pa. 1983); *Stafford Metal Works*, 418 F. Supp. at 62-63; *Pinski Bros.*, 500 P.2d at 949 (all noting that permitting insurers to sue insureds would create impermissible conflicts of interest).

136. See, e.g., *Stafford Metal Works*, 418 F. Supp. at 56 (discussed *infra* text accompanying notes 137-147); see also *Zager*, *supra* note 128, at 821-22.

137. 418 F. Supp. 56 (N.D. Tex. 1976).

138. 418 F. Supp. at 57.

139. 418 F. Supp. at 57.

140. 418 F. Supp. at 57.

141. 418 F. Supp. at 57.

142. 418 F. Supp. at 57.

143. See 418 F. Supp. at 62-63.

144. 418 F. Supp. at 63.

145. See 418 F. Supp. at 63.

146. 418 F. Supp. at 63.

147. See 418 F. Supp. at 63. See generally *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 557-59 (Tex. 1973) (discussing proper steps an attorney must follow when conflict of interest arises between insurer and insured).

coverage that their insureds had purchased.¹⁴⁸ Insurance companies include the risk of loss due to an insured's own negligence in their calculations of premiums.¹⁴⁹ Therefore, if insurers could maintain subrogation actions against negligent insureds, they could recover money they had previously agreed to pay the insured.¹⁵⁰

*Chenoweth Motor Co. v. Cotton*¹⁵¹ illustrates this concern. Chenoweth Motor Company loaned the defendant an automobile while the defendant's car was being repaired.¹⁵² The defendant negligently caused damage to the borrowed vehicle.¹⁵³ Chenoweth's insurance company paid for the repairs and then brought suit to recover from the defendant the amount paid.¹⁵⁴ The court found that the defendant, as bailee of Chenoweth, was an insured under the terms of the Motor Company's insurance policy.¹⁵⁵ Since the policy included coverage for negligently caused damage, a suit allowing the insurance company to recover from the defendant "would clearly be permitting an insurance company to avoid coverage of its own insured, which the insured had previously paid for."¹⁵⁶ Thus, courts worry that allowing subrogation actions against insureds would "give judicial sanction to the breach of the insurance policy by the insurer . . . and constitute judicial approval of a breach of the insurer's relationship with its own insured."¹⁵⁷ These public policy reasons lead courts to prohibit insurers from seeking reimbursement from their insureds.

148. See, e.g., *Federal Ins. Co. v. Tamiami Trail Tours, Inc.*, 117 F.2d 794, 796 (5th Cir. 1941); *Medical Protective Co. v. Bell*, 716 F. Supp. 392, 400 (W.D. Mo. 1989), *rev'd*, 912 F.2d 244 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991); *Stafford Metal Works*, 418 F. Supp. at 58-59; *Home Ins. Co. v. Pinski Bros.*, 500 P.2d 945, 949 (Mont. 1972); *Rural Mut. Ins. Co. v. Peterson*, 395 N.W.2d 776, 779 (Wis. 1986) (all noting that permitting insurers to sue insureds allows insurers to avoid providing coverage insureds purchased); see also *Cuttler*, *supra* note 19, at 163-64. See generally JERRY, *supra* note 1, § 96[g].

149. *Tamiami Trail Tours*, 117 F.2d at 796; *Stafford Metal Works*, 418 F. Supp. at 58.

150. *Great Lakes Transit Corp. v. Steamship Co.*, 301 U.S. 646, 654 (1937); *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 878 (1st Cir. 1990); *Stafford Metal Works*, 418 F. Supp. at 58; *Pinski Bros.*, 500 P.2d at 949.

151. 207 N.E.2d 412 (Ohio Mun. Ct. 1965).

152. 207 N.E.2d at 413.

153. 207 N.E.2d at 413.

154. 207 N.E.2d at 413.

155. See 207 N.E.2d at 413.

156. 207 N.E.2d at 413; see also *Middlesex Mut. Fire Ins. Co. v. Ballard*, 148 So. 2d 865 (La. Ct. App. 1963) (reaching the same conclusion under similar fact pattern).

157. *Medical Protective Co. v. Bell*, 716 F. Supp. 392, 400 (W.D. Mo. 1989) *rev'd*, 912 F.2d 244 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991); see also *Keystone Paper Convertors v. Neemar*, 562 F. Supp. 1046, 1050 (E.D. Pa. 1983); *Royal Exchanger Assurance v. Adams*, 510 F. Supp. 581, 583 (W.D. Wash. 1981); *Stafford Metal Works v. Cook Paint & Varnish Co.*, 418 F. Supp. 56, 58-59 (N.D. Tex. 1976); *Home Ins. Co. v. Pinski Bros.*, 500 P.2d 945, 949 (Mont. 1972).

2. *A Recent Departure: Some Courts Make an Exception for Intentional Injuries*

Courts have begun to recognize that, in the context of intentional injuries, the subrogation principle of placing financial responsibility on the wrongdoer outweighs the policies behind the general rule prohibiting insurer subrogation actions against insureds.¹⁵⁸ The New Jersey Supreme Court provided support for this view in *Ambassador Insurance Co. v. Montes*.¹⁵⁹ Ambassador Insurance was obligated to defend its insured, who intentionally set a building on fire, because the insured's policy did not contain an express intentional injury exclusion clause.¹⁶⁰ However, the court permitted Ambassador to assert a right of subrogation against the insured.¹⁶¹ The court emphasized that equity requires that financial responsibility be placed on "the person who in good conscience should pay."¹⁶² Whether the wrongdoer was an insured or a third party was irrelevant.¹⁶³ Underlying the *Ambassador* court's decision is the principle that insureds cannot insure themselves against the economic consequences of intentional wrongdoing.¹⁶⁴ Because the insurance policy at issue did not contain an intentional injury exclusion clause, subrogation provided a way for the court to uphold this principle.¹⁶⁵

Similarly, the Wisconsin Court of Appeals in *Madsen v. Threshermen's Mutual Insurance Co.*¹⁶⁶ recently allowed an insurer to recover from its insured the damages paid to the owner of a building that the insured had intentionally burned. The court pointed out:

In this instance, . . . adhering to [the traditional rule prohibiting insurers from seeking subrogation against their own insureds] would defeat a purpose of subrogation, which is to ultimately place the loss on the wrongdoer. Here, the wrongdoer and the insured are the same person

158. Outside the area of voluntary intoxication, several commentators have suggested that allowing insurers to bring subrogation actions against insureds who commit intentional acts is the best way to accommodate the competing interests in compensating victims and punishing wrongdoers. See, e.g., Cuttler, *supra* note 19, at 167-68; John G. Fleming, Notes of Cases, *Insurance for the Criminal*, 34 MOD. L. REV. 176, 179-80 (1971).

159. 388 A.2d 603 (N.J. 1978).

160. 388 A.2d at 605.

161. See 388 A.2d at 607-08.

162. 388 A.2d at 606.

163. The court implicitly concluded that principles of equity outweigh all policy reasons arguing against insurer subrogation actions against insureds. Thus, the court felt it more important to hold wrongdoers responsible for their actions than to prevent possible conflicts of interest. See 388 A.2d at 606-07.

164. See *supra* notes 33-34 and accompanying text.

165. Also implicit in the court's discussion was its belief that, notwithstanding the absence of an intentional injury exclusion clause, Ambassador did not intend this act to be covered by the policy. Accordingly, Ambassador did not include the risk of insureds committing intentional acts in calculating its insurance premiums. See 388 A.2d at 605-06.

166. 439 N.W.2d 607 (Wis. Ct. App. 1988), *review denied*, 443 N.W.2d 311 (Wis. 1989).

Thus, requiring [the insured] to reimburse [the insurer] would appropriately place the loss on the wrongdoer.¹⁶⁷ The court implicitly concluded that, in cases involving intentional acts, this policy concern outweighed the reasons behind the traditional rule.

B. *Extending the Exception to Voluntarily Intoxicated Insureds*

The policy interest of holding a wrongdoer responsible discussed in *Ambassador* and *Madsen* also outweighs the concerns behind the general prohibition on insurer subrogation actions against voluntarily intoxicated insureds who commit intentional acts. This section analyzes why principles of equity support insurer subrogation rights against all insureds who commit otherwise intentional actions while voluntarily intoxicated. It argues that subrogation also corrects the deficiency in the current voluntary intoxication defense when applied to nonalcoholic insureds by adequately accommodating both the public interest in victim compensation and the interest in deterring wrongdoers. However, evidence indicates that subrogation may not adequately deter alcoholic insureds from committing intentional acts while intoxicated. Consequently, this section concludes that, despite principles of equity, subrogation should be rejected as the sole alternative to the current voluntary intoxication defense for alcoholic insureds.

1. *Subrogation: A Solution to the Intentional Injury Exclusion Clause Loophole*

Public policy supports recognition of insurer subrogation rights against insureds who commit otherwise intentional acts while voluntarily intoxicated.¹⁶⁸ “[S]ubrogation is . . . an equitable mechanism to force the ultimate satisfaction of an obligation by the person who in good conscience should pay.”¹⁶⁹ Thus, a right of reimbursement against these insureds would fulfill equity’s requirement that loss be placed on the responsible party.¹⁷⁰

Further, courts’ concerns that allowing insurer subrogation rights

167. 439 N.W.2d at 610 (citation omitted); see also *West Bend Mut. Ins. Co. v. DeLong*, 451 N.W.2d 805 (Wis. Ct. App. 1989) (per curiam) (holding that an insurer could maintain a subrogation action against its own insured who was convicted of arson because of the strong public policy interest in placing the loss on the wrongdoer), *review denied*, 451 N.W.2d 298 (Wis. 1990).

168. This discussion assumes that courts use the inferred intent standard to determine whether an act was otherwise intentional. See *supra* text accompanying note 124.

169. *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 607 (N.J. 1978); see also *Camden Trust Co. v. Cramer*, 40 A.2d 601, 603 (N.J. 1945) (“Subrogation is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it.”). This rule does not expressly require that the wrongdoer and the insured be two different people.

170. See *supra* notes 125-27 and accompanying text. Providing for subrogation in lieu of denying the defense to people like Mr. X will save courts the difficulty of determining insureds’ motives behind committing intentional acts while voluntarily intoxicated. See *supra* text accompanying note 116. However, courts will still face the task of determining whether the insured is

against insureds would allow insurers to avoid coverage of risks their insureds purchased is not present here. Insurance only protects policyholders against the economic consequences of fortuitous circumstances.¹⁷¹ Insurers do not include risk of intentional wrongdoing in calculating their insurance premiums.¹⁷² Accordingly, because insurance companies do not insure against intentional acts, no reason exists to treat insureds differently from any other intentional wrongdoer. The insured stands in the same position as a third-party tortfeasor in this situation.

Allowing insurers a right of reimbursement against insureds who consume alcohol to avoid financial responsibility also corrects a deficiency in the current voluntary intoxication defense. The defense promotes the public interest in victim compensation at the expense of deterrence.¹⁷³ Subrogation, though, should act to deter intentional wrongdoers like Mr. X who become intoxicated to avoid liability for premeditated intentional acts¹⁷⁴ while still providing compensation to injured victims.¹⁷⁵ Mr. X considered the fact that he could receive coverage under the voluntary intoxication loophole in the intentional

an alcoholic and therefore entitled to choose between subrogation and treatment. *See infra* note 230 and accompanying text.

Several commentators who have analyzed the impact of insanity on the intentional injury exclusion clause advocate insurer rights of reimbursement against insureds who suffer self-induced mental derangement — i.e., mental incapacity due to the effects of voluntarily ingested drugs or alcohol. *See, e.g.,* Olsson, *supra* note 34, at 1054-55 (suggesting that Arizona could balance the competing interests of deterrence and victim compensation by adopting a right of reimbursement for self-induced mental incapacity in conjunction with the *Ruvolo* insanity determination test). *But see* Salton, *supra* note 12, at 1061-62 n.268. Salton rejects the notion of insurer subrogation rights against insureds, relying on the standard rule discussed *supra* notes 133-36, 148-50, 157 and accompanying text. Salton, however, overlooks the equitable principles behind subrogation that demand its application to intentional injuries. Thus, although Appelman states that as a general rule insurers cannot maintain subrogation actions against their insureds, 6A APPLEMAN, *supra* note 34, § 4055, he acknowledges that “[t]he right of subrogation, or more properly called indemnification where sought from its own insured, is enforced where it would be inequitable to deny such remedy.” 8B APPLEMAN, *supra* note 34, § 4945, at 104-05.

171. *See supra* notes 12, 34 and accompanying text.

172. *See supra* note 34.

173. *See supra* note 102 and accompanying text.

174. *See supra* note 115 and accompanying text.

175. *See* Cuttler, *supra* note 19, at 169; Olsson, *supra* note 34, at 1054. The threat of subrogation will not deter Mr. X if he is judgment-proof. However, equity mandates that the victim not bear the risk that wrongdoers will be judgment-proof. As between the insurer and the victim, the insurer can better bear the risk of not recovering from the wrongdoer. The insurer will spread the loss over all of its insureds in the form of slightly higher premiums while the victim would bear the whole loss himself.

This concern led states to pass legislation requiring liability policies to contain a “bankruptcy provision.” This provision provides that “the insured’s insolvency . . . does not relieve the insurer of its obligations.” JERRY, *supra* note 1, § 95[c]. The subrogation proposal here should include a provision obligating insurers to provide coverage for intentional acts committed by nonalcoholic insureds like Mr. X regardless of whether insurers will subsequently be able to recover from their insureds.

The impact of possible criminal liability on Mr. X’s decision is beyond the scope of this Note. *See supra* note 108. However, any deterrence attributable to criminal responsibility should still

injury exclusion clause when deciding to commit an intentional act.¹⁷⁶ Subrogation closes the loophole by holding voluntarily intoxicated insureds responsible for otherwise intentional acts. Accordingly, Mr. X will be less likely to commit the act.

Subrogation will also address deterrence missing in the current scheme where a nonalcoholic insured, rather than drinking as an excuse to commit an intentional act, unintentionally loses control after consuming alcohol and intentionally harms someone. The current defense allows nonalcoholic insureds to ignore the consequences of drinking too much.¹⁷⁷ If they lose control and harm someone, their insurance companies will take responsibility. Although these insureds, unlike Mr. X, may not be able to control themselves at the time they act,¹⁷⁸ they should still be held responsible for their actions. They voluntarily chose to consume alcohol to the point of losing control.¹⁷⁹ Consequently, the policy reasons behind subrogation still retain force here.¹⁸⁰ By redistributing responsibility to these insureds, subrogation should help deter nonalcoholics from drinking excessively in the future to the point of losing control and committing an intentional act.¹⁸¹

2. Subrogation Alone: An Inadequate Deterrent for Alcoholics

Subrogation actions against alcoholic insureds who commit otherwise intentional acts while intoxicated will also satisfy equity's mandate that loss be placed on the responsible party. However, it is unclear whether threatening alcoholics¹⁸² with financial responsibility will deter them so as to correct the deficiency in the current voluntary intoxication defense. This section presents the arguments made on

influence Mr. X despite his insolvency. Thus, allowing subrogation in the case of judgment-proof insureds may not come at the complete expense of deterrence.

176. See *supra* note 115 and accompanying text.

177. The deterrence impact of potential criminal liability is beyond the scope of this Note. See *supra* note 108.

178. See *infra* notes 192-93 and accompanying text. But see *infra* notes 189-91 and accompanying text (arguing that alcoholics should be held responsible for their acts). The same reasoning should apply to nonalcoholics.

179. Although courts that reject the voluntary intoxication defense take this view, *supra* section II.A, they fail to recognize the questionable deterrent effect of imposing financial liability on alcoholics. See *infra* notes 194-204 and accompanying text; see also *supra* note 170.

180. See *supra* notes 125-27 and accompanying text.

181. See *supra* text accompanying note 114. Equity's requirement that loss be placed on the responsible party, *supra* text accompanying notes 129, 169-70, should outweigh any loss in deterring first-time intentional wrongdoers.

182. Experts have defined the term *alcoholic* in various ways. See, e.g., JOHN J. FAY, THE ALCOHOL/DRUG ABUSE DICTIONARY AND ENCYCLOPEDIA 6 (1988) ("a person unable to correct the physiological and other bodily disturbances which have accumulated as the result of his drinking"); LUKS, *supra* note 121, at 2 ("continual alcohol abusers"); George N. Thompson, *The Psychiatry of Alcoholism*, in ALCOHOLISM 452, 452-53 (George N. Thompson ed., 1956) ("any person who uses alcohol in amounts sufficient to impair his efficiency or to interfere with his occupational, social, or economic adjustment").

both sides of the issue and concludes that subrogation should be rejected as the sole solution to the problems with the current defense.

a. *The view that alcoholics can be deterred.* Many experts emphasize that alcoholism,¹⁸³ unlike mental illness, is a self-induced disease.¹⁸⁴ Although alcoholics may not be able to control their current alcohol consumption, by seeking help for their drinking problem they can control their loss of mental capacity to appreciate wrongfulness.¹⁸⁵ Studies show that the effects of alcohol on attitude and behavior can be cured through treatment.¹⁸⁶

Moreover, alcoholism has been described as an addiction which "feeds on itself."¹⁸⁷ The more an alcoholic drinks, the more she needs to drink to get through her daily routine. The shock of committing a tortious act may be the impetus an alcoholic needs to realize that alcohol makes her life harder, not easier. She may be persuaded to get help to prevent another similar occurrence.¹⁸⁸

Further, it is not evident that alcoholics who commit intentional acts while voluntarily intoxicated lack the requisite intent at the time they act. Experts note that many alcoholics never commit crimes while intoxicated.¹⁸⁹ "Despite frequent recourse to, and dependence

183. FAY, *supra* note 182, defines *alcoholism* as

a chronic and usually progressive disease, or a symptom of an underlying psychological or physical disorder, characterized by dependence on alcohol (manifested by loss of control over drinking) for relief from psychological or physical distress or for gratification from alcohol intoxication itself, and by a consumption of alcoholic beverages sufficiently great and consistent to cause physical or mental or social or economic disability . . .

Id. at 6; see also West, *supra* note 122, at 1 ("Alcoholism is an illness caused by the prolonged ingestion of ethyl alcohol . . . and manifested by a variety of harmful physical, mental, behavioral, and social effects.").

184. See LUKS, *supra* note 121, at 4; Kaplan, *supra* note 123, at 87; Jack H. Mendelson & Nancy K. Mello, *Diagnostic Criteria for Alcoholism and Alcohol Abuse*, in THE DIAGNOSIS AND TREATMENT OF ALCOHOLISM, *supra* note 121, at 1, 1-2; West, *supra* note 122, at 7; Wolf, *supra* note 123, at 28, 55 (all taking the view that "alcoholism" is a self-induced disease); see also DON CAHALAN, UNDERSTANDING AMERICA'S DRINKING PROBLEM 61-62 (1987) ("[A] substantial number of people have regarded alcoholism as both self-imposed and a disease."); JAMES E. ROYCE, ALCOHOL PROBLEMS AND ALCOHOLISM 162 (1981) ("It is naive to argue that alcoholism cannot be a disease because it is self-inflicted; any experienced physician has seen many self-inflicted illnesses."). See generally E.M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 45-52 (1960).

185. See, e.g., FORREST, *supra* note 121, at 22 (arguing that alcoholics cannot stop drinking and recover without long-term treatment); HARRISON M. TRICE, ALCOHOLISM IN AMERICA 38, 107 (1966) (emphasizing that physiological effects such as lack of memory and loss of control can only be cured through treatment).

186. Wolf, *supra* note 123, at 41.

187. LUKS, *supra* note 121, at 69.

188. "Traditional thinking believed there was no way to break [the alcoholic's] cycle. The alcoholic could be treated successfully only when he wanted help; he had to hit his 'bottom' first, be truly suffering." *Id.* Committing a tortious act may be sufficient to trigger a cry for help.

189. See, e.g., Joseph Hirsh, *Public Health and Social Aspects of Alcoholism*, in ALCOHOLISM, *supra* note 182, at 3, 36; Niven, *supra* note 115, at 109 ("It is important to recognize . . . that a large percentage of alcohol users experience no problems with its use.").

on, alcohol they do not commit crimes unless criminality is part of their character and personality.”¹⁹⁰ Accordingly, financial responsibility should deter alcoholics to the same extent it deters any other criminal from committing intentional acts. Because intentional tortfeasors behave analogously to criminals, this argument should apply likewise to alcoholics who commit intentional torts.¹⁹¹

Experts also suggest that “some individuals learn to expect to behave more aggressively when drinking and act so regardless of the disinhibiting effect of alcohol itself.”¹⁹² If these injurers faced economic consequences of their wrongdoing, they might change their expectations and control their aggressive behavior despite their intoxicated state. Finally, even if voluntarily intoxicated tortfeasors facing financial responsibility refuse to admit that they have a drinking problem and continue their destructive behavior, the risk of financial liability may help dissuade some people from starting to drink excessively.¹⁹³ Thus, in the long run, the threat of financial responsibility will cause a decrease in the number of intentional acts committed by voluntarily intoxicated insureds.

b. The view that alcoholics cannot be deterred. Other studies conclude that placing financial responsibility on alcoholics will not deter them from drinking and committing intentional harmful acts.¹⁹⁴

190. Hirsh, *supra* note 189, at 36 (emphasis omitted); see also COLLINS, *supra* note 123, at 23-24. Collins expresses skepticism over whether crimes involving alcohol occur because of the alcohol or in spite of it. “[A]lcohol has been blamed for problems in the absence of sufficient justification. There is a tendency, for example, to assume . . . that the mere presence of alcohol in an assaultive encounter was responsible for the assault.” *Id.* at 24.

191. See *supra* notes 27-31, 108 and accompanying text.

192. Niven, *supra* note 115, at 107. Joan F. McCord, *Alcohol in the Service of Aggression, in ALCOHOL, DRUG ABUSE AND AGGRESSION*, *supra* note 115, at 270, 277-78, conducted a study to evaluate the effects of alcoholism on aggressiveness. Elementary school teachers were asked to describe boy subjects as aggressive or nonaggressive. Forty years later, McCord identified the subjects as alcoholic or nonalcoholic. She then looked at their conviction records to study links between aggression, alcohol, and crime. McCord found that both early aggression and alcoholism contributed to the probability of being convicted of a crime. However while aggressiveness appeared to be more closely tied to crimes involving unintentional injuries, alcoholism appeared to be more closely related to crimes involving intentional injuries. McCord concluded that some of the subjects consumed alcohol to provide an excuse for their unlawful intentional acts. “The intentional nature of the crimes for which aggressive alcoholics had been convicted suggests that at least some of these men use alcohol to permit the expression of their aggression.” *Id.* at 278.

193. See, e.g., Ernest P. Noble, *Prevention of Alcohol Abuse and Alcoholism, in ALCOHOLISM AND RELATED PROBLEMS*, *supra* note 115, at 140, 169 (acknowledging that some experts maintain that legal sanctions including threats of fines dissuade alcoholics from committing unlawful acts). Studies also show that increasing the price of alcohol causes some people to reduce their consumption levels and not develop alcoholism. See, e.g., CAHALAN, *supra* note 184, at 89, 115 (noting that increases in alcohol taxes reduce alcohol consumption); ROYCE, *supra* note 184, at 182 (citing studies that show that increases in the price of alcohol prevent some people from consuming the large amounts of alcohol necessary to develop alcoholism). Because intentional tortious acts usually also constitute crimes, *supra* note 108, individuals may consider both the risk of financial liability and the risk of criminal liability in deciding to start drinking. The deterrent impact of possible criminal responsibility is beyond the scope of this Note.

194. See e.g., GARY G. FORREST & ROBERT H. GORDON, *SUBSTANCE ABUSE, HOMICIDE,*

For example, several criminal law studies, evaluating the effects of tougher drunk driving laws, reveal that alcohol problems decline only in the short run.¹⁹⁵ Once "the novelty effects wear off and the . . . publicity diminish[es],"¹⁹⁶ individuals drive while intoxicated just as often as before the new laws went into effect.¹⁹⁷ Experts supporting this view emphasize that alcohol abusers suffer physiological effects, including memory loss, weakening of social restraints, impairment of psychomotor skills, and decreasing mental capacity, over which they have no control.¹⁹⁸ As a result, intoxication involuntarily increases a person's likelihood of committing an intentional harmful act.¹⁹⁹

Furthermore, legal sanctions do not prevent alcoholics from repeating deviant behavior because alcohol abusers continue to deny that they have a drinking problem.²⁰⁰ Alcoholics may deny all memories of the event in question²⁰¹ or try to blame the victim for what happened.²⁰² These studies conclude that neither criminal punishment nor financial threats will cause alcohol abusers to alter their drinking patterns.²⁰³ Treatment is the only solution.²⁰⁴

AND VIOLENT BEHAVIOR 119 (1990) ("[P]unishment rarely 'works' as a deterrent to alcoholism and chemical dependency, and thus [it] will *not* be effective in . . . successfully rehabilitating addicted or substance-abusing offenders . . ."); ROSS & LIGHTFOOT, *supra* note 115, at 5-6 (arguing that punishment may not serve as a deterrent for persons convicted of alcohol-related crimes); ROYCE, *supra* note 184, at 310-11 ("[L]egal sanctions to control intoxication have been found ineffective. . ."); Noble, *supra* note 193, at 168-69 (pointing out that stronger drunk driving penalties have no long-term deterrent effect on drunk drivers). These same arguments should apply when courts award punitive damages to punish intentional tortfeasors who act while intoxicated. See *supra* note 108.

195. Noble, *supra* note 193, at 169.

196. *Id.*

197. *Id.*

198. Philip J. Cook, *The Economics of Alcohol Consumption and Abuse*, in ALCOHOLISM AND RELATED PROBLEMS, *supra* note 115, at 56, 60; Mendelson & Mello, *supra* note 184, at 11-12; Wolf, *supra* note 123, at 35.

199. Cook, *supra* note 198, at 60.

200. See LUKS, *supra* note 121, at 105 (discussing the difficulty in getting alcoholics to admit that they have a problem); Mendelson & Mello, *supra* note 184, at 2 ("The stigma usually associated with alcoholism has led to denial by the patient. . .").

201. See, e.g., Allstate Ins. Co. v. Sherrill, 566 F. Supp. 1286, 1287 (E.D. Mich. 1983), *affd.*, 735 F.2d 1363 (6th Cir. 1984) (no recollection of abducting victim at gunpoint and sexually assaulting her while intoxicated); Prudential Property & Casualty Ins. Co. v. Kerwin, 576 N.E.2d 94, 96 (Ill. App. Ct. 1991) (no recollection of altercation with victim or of subsequently shooting victim while drunk); Economy Fire & Casualty Ins. Co. v. Meyer, 427 N.W.2d 742, 742 (Minn. Ct. App. 1988) (insured could not recall stabbing girlfriend's visitor with knife and fork while intoxicated); see also ROSS & LIGHTFOOT, *supra* note 115, at 41 (noting that people suffer memory impairment when they are intoxicated); ROYCE, *supra* note 184, at 60-61 (explaining that people who consume alcohol may not remember events occurring while they were intoxicated because the alcohol caused a temporary failure of the memory-storage processes of the brain).

202. LUKS, *supra* note 121, at 105; see also TRICE, *supra* note 185, at 33 (noting that problem drinkers often blame others for driving them to drink).

203. Sheila B. Blume, *Public Policy Issues: A Summary*, in ALCOHOLISM AND RELATED PROBLEMS, *supra* note 115, at 176, 186; see also *supra* note 194 and accompanying text.

204. Blume, *supra* note 203, at 186.

C. Coercive Alcohol Treatment: An Alternative to Subrogation

There is enough doubt among experts regarding financial responsibility's deterrent effect on alcoholics that subrogation should be rejected as the sole alternative to the current voluntary intoxication defense. Alcoholics can control the physiological effects of alcohol on themselves only by ceasing to drink.²⁰⁵ Thus, until alcohol abusers enter treatment programs, there may be no way to deter their alcohol-induced deviant behavior.

This section proposes a modification to the current voluntary intoxication defense that accommodates the competing public policy interests in compensating victims and in deterring wrongdoers. States should adopt legislation granting insurers subrogation rights against insureds who commit otherwise intentional acts while voluntarily intoxicated, subject to an exception for alcoholic insureds who successfully complete alcohol treatment programs. This section analyzes the success of state statutory schemes that mandate alcohol treatment for alcoholic welfare recipients and convicted drunk drivers and concludes that similar legislation will work equally well in the insurance context.

1. The Success of Coercive Alcohol Treatment Programs

Society has recognized that alcoholics may never get help unless they are forced to do so.²⁰⁶ Consequently, states have passed statutes outside the area of insurance law compelling alcoholics to seek treatment.²⁰⁷ For example, some states require alcoholics on public assist-

205. See, e.g., CAHALAN, *supra* note 184, at 134, 139 (pointing out that the traditional Alcoholics Anonymous model insists on total abstinence as the only way to effectively treat alcoholism); ROYCE, *supra* note 184, at 171 (noting that, although a body can return to normal after years of sobriety, any experimentation with drinking can cause a recovered alcoholic to digress to the stage he was at when he quit drinking); TRICE, *supra* note 185, at 38, 107 (emphasizing that physiological effects such as lack of memory, loss of control, and convulsions can only be cured through treatment aimed at complete abstinence). But see, e.g., CAHALAN, *supra* note 184, at 134-36 (citing a study conducted by the Rand Corporation which found that recovering alcoholics returned to "normal drinking" 18 months after treatment "without apparent medical or social consequences." However, a second report evaluating alcoholics four years after treatment found much more frequent relapse. Fifty-one percent had returned to the same center for treatment.).

206. See LUKS, *supra* note 121, at 69; see also LECLAIR BISSELL & PAUL W. HABERMAN, ALCOHOLISM IN THE PROFESSIONS 83 (1984) ("When home remedies have failed, the alcoholic may be forced by others . . . to seek help."); ROYCE, *supra* note 184, at 216-17 (noting the effectiveness of group confrontation as a way to force an alcoholic to seek treatment); TRICE, *supra* note 185, at 109 (pointing out that "[f]ew if any alcoholics decide to stop drinking until some pressure is put on them, such as threatened loss of job [or] family" (quoting Frederick Lemere et al., *Motivation in the Treatment of Alcoholism*, 19 Q.J. STUD. ON ALCOHOL 428, 430 (1958))).

207. See, e.g., CAL. VEH. CODE § 23205 (West 1985) (allowing judges to impose alcohol treatment in traffic cases if the convicted would benefit); FLA. STAT. ch. 948.03(6)(a) (1991) (requiring alcohol treatment as a condition of probation); ILL. ANN. STAT. ch. 111 1/2 ¶ 6360-2 (Smith-Hurd 1988 & Supp. 1992) (requiring alcohol treatment as a condition of probation); MASS. GEN. LAWS ANN. ch. 90, § 24D (West 1988) (requiring convicted drunk drivers to enter

ance to seek treatment. In this context, alcoholics are defined as those people who are unable to remain gainfully employed because of drinking.²⁰⁸

States also allow judges to order alcoholics who disrupt the family relationship to seek treatment or face legal sanctions, including a jail sentence or a court order not to return home.²⁰⁹ A New York judge recently required a juvenile delinquent to reside in a treatment center "to assist [the youth] in effectively addressing the attitudes and circumstances which have led to his . . . [alcohol] abuse."²¹⁰ The court noted that the child's condition required enrollment in an alcohol rehabilitation program.²¹¹

Most states require convicted drunk drivers to enter alcohol treatment programs or face harsher penalties including heavier fines or jail terms.²¹² Oregon goes so far as to allow judges to require any person convicted of a crime committed while intoxicated to attend an alcohol treatment program if the judge "has probable cause to believe the person is an alcoholic or problem drinker and would benefit from treat-

alcohol treatment programs); N.C. GEN. STAT. § 20-179.1 (1991) (authorizing judge to order alcohol treatment for convicted drunk drivers as condition of probation); OR. REV. STAT. § 430.850 (1989) (allowing court to require any defendant convicted of a crime committed while intoxicated to enter alcohol treatment program); 42 PA. CONS. STAT. ANN. § 9754(c)(12) (1982) (allowing court to attach participation in an alcohol treatment program as a condition of probation); see also Jeffrey C. Filcik, Recent Developments, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 WASH. U. J. URB. & CONTEMP. L. 291, 307 & n.57 (1990) (explaining that some states require judges to impose mandatory attendance at alcohol treatment programs on convicted defendants who are alcoholics).

208. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 385.2(g)(2) (1991). This section requires public assistance recipients, deemed unemployable for medical reasons, to accept the medical care necessary to restore employability or lose their aid. New York courts have interpreted "medical care" to include alcohol treatment for people who cannot maintain jobs because of drinking problems. See *Hansen v. D'Elia*, 450 N.Y.S.2d 874, 875 (App. Div. 1982). In *Hansen*, the Department of Social Services discontinued the petitioner's public assistance after he failed to comply with § 385's requirement that all employable recipients participate in a jobs program or forfeit their aid. The court acknowledged that the petitioner's alcohol problems could affect his employability and therefore exempt him from participation in the jobs program. The court ordered the Department to investigate the petitioner's situation, suggesting that, if the petitioner required alcohol treatment to be employable, he would be ordered to seek help. *Id.*; see also LUKS, *supra* note 121, at 69.

209. See, e.g., LUKS, *supra* note 121, at 71, 177 (interpreting DEL. CODE ANN. tit. 10, § 950(5) (1975) to allow judges to order alcoholic family members disrupting the family relationship to seek alcohol treatment); see also *In re Patricia O.*, 573 N.Y.S.2d 716, 717 (App. Div. 1991) (terminating mother's parental rights after she failed to meet condition of seeking alcohol treatment). Some judges initiate their own coercive remedies. See, e.g., Janice Castro, *A Judge Whose Ideas Nearly Got Him Killed*, TIME, Mar. 9, 1992, at 12, 16 (interviewing Judge Howard Broadman of the Visalia, California Superior Court who developed his own coercive remedies including alcohol treatment for convicted drunk drivers and "Norplant" birth control implants for child abusers).

210. *In re Lyman M.*, 560 N.Y.S.2d 948, 952 (Fam. Ct. 1990).

211. 560 N.Y.S.2d at 951-52.

212. See *supra* note 207 for examples of states requiring convicted drunk drivers to seek alcohol abuse treatment.

ment”²¹³ Under most of these statutes, the court grants the defendant probation subject to the condition that he attend an alcoholic treatment program.²¹⁴ If the defendant fails to fulfill his obligation, the judge can revoke his probation and order him to serve a jail sentence.²¹⁵ In effect, the defendant receives credit against a jail sentence for successful attendance at and completion of a substance abuse rehabilitation program.²¹⁶

Despite arguments that these measures violate the Eighth Amendment’s protection against cruel and unusual punishment, they have not been declared unconstitutional.²¹⁷ Courts note that mandatory alcohol treatment cannot violate the Eighth Amendment because it is not punishment.²¹⁸ Rather, it “is a means of necessary rehabilitation.”²¹⁹ Alcoholic rehabilitation programs “increas[e] the likelihood that alcoholics will gain control over their decision[s]” not to commit crimes.²²⁰

213. OR. REV. STAT. § 430.850(1) (1989). An Ohio court has even stayed part of an attorney’s suspension from the practice of law (for failure to disclose his client’s misrepresentations in bankruptcy court) on the condition that the attorney receive treatment for alcoholism. *Columbus Bar Assn. v. Wright*, 568 N.E.2d 1218, 1218-19 (Ohio 1991) (per curiam).

214. *See, e.g.*, FLA. STAT. ch. 948.03(6) (1991) (failure to attend alcohol treatment program violates probation); ILL. ANN. STAT. ch. 111 1/2 ¶ 6360-2 (Smith-Hurd 1988 & Supp. 1992) (same); KY. REV. STAT. ANN. § 198A.040(d) (Michie/Bobbs-Merrill 1991) (failure of convicted drunk driver to complete treatment program reinstitutes all suspended penalties); N.C. GEN. STAT. § 20-179.1 (1989) (failure of convicted drunk driver to attend substance abuse rehabilitation program revokes probation); 42 PA. CONS. STAT. ANN. § 9754(c)(12) (1982) (court can order participation in alcohol treatment program as condition of probation).

215. *See, e.g.*, *State v. Short Horn*, 427 N.W.2d 361, 362-63 (S.D. 1988) (reinstating jail sentence where defendant was discharged from alcohol treatment program for a poor attitude toward treatment and aggressive behavior).

216. *Compare* *Commonwealth v. Conahan*, 589 A.2d 1107, 1110 (Pa. 1991) (holding that convicted drunk driver was entitled to credit against mandatory jail term for time successfully served in an inpatient alcohol rehabilitation center) *with* *Bryce v. State*, 545 N.E.2d 1094 (Ind. Ct. App. 1989) (reinstating jail sentence where defendant was terminated from a treatment program due to lack of progress).

217. *See, e.g.*, *State v. Reed*, Case No. 1611, 1981 WL 5378, at *5 (Ohio Ct. App. Dec. 19, 1981) (unpublished opinion) (holding that confinement at a drug treatment facility as a condition of probation did not violate the Eighth Amendment); *Short Horn*, 427 N.W.2d at 363 (rejecting defendant’s argument that conditioning probation on completion of alcohol treatment program constituted cruel and unusual punishment); *see also* LUKS, *supra* note 121, at 71 (arguing that requiring attendance at an alcohol treatment program as a condition of probation does not violate the Eighth Amendment).

218. *E.g.*, *Short Horn*, 427 N.W.2d at 363.

219. *Short Horn*, 427 N.W.2d at 363; *see also* *State v. Robinson*, 399 N.W.2d 324, 327 (S.D. 1987) (holding that it is humane to provide treatment that is required to cure any illness). Courts have held, however, that prohibiting alcoholics from consuming alcohol rather than ordering them to get help does violate the Eighth Amendment because it has the effect of punishing a defendant solely because he is an alcoholic. *See, e.g.*, *Wickham v. Dowd*, 914 F.2d 1111, 1115 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2897 (1991).

220. *Conahan*, 589 A.2d at 1110; *see also* SIXTY-SIXTH AM. ASSEMBLY ON PUBLIC POLICY ON ALCOHOL PROBLEMS, FINAL REPORT 8 (1984) (recommending that “[t]reatment should be much more extensively provided to alcoholic individuals within the criminal justice system. This will decrease the likelihood of criminal recidivism and thus reduce danger and cost to society.”); FORREST & GORDON, *supra* note 194, at 121 (acknowledging that correctional alcohol rehabili-

Experts have traditionally maintained that alcohol abuse treatment only succeeds if the abuser seeks help voluntarily.²²¹ However, studies indicate that "[w]here legal or economic coercion has been employed to 'force' people into treatment, it is remarkable that such alcoholic persons do as well or better than those who allegedly seek treatment voluntarily."²²² For example, a one-year evaluation of 288 alcoholics coerced into treatment at Minnesota's Hazelden Rehabilitation Center revealed that 79.2% of them completed treatment compared to 74% of voluntary patients.²²³ One year later 50.7% of court-referred patients and 49.4% of voluntary patients were still sober.²²⁴

Therapists also indicate that successful completion of alcohol treatment programs depends more on the rehabilitation staff than on whether the alcoholic voluntarily sought help.²²⁵ Therapists must develop supportive relationships with their patients.²²⁶ When they can convince court-referred patients that treatment benefits rather than punishes them, alcoholics will respond positively.²²⁷

tation programs can successfully reduce parole failure and recidivism); ROSS & LIGHTFOOT, *supra* note 115, at 29-30 (rejecting conclusions of some researchers that alcohol treatment programs do not reduce recidivism and citing studies indicating that treatment can reduce recidivism by as much as 60%).

221. See, e.g., LUKS, *supra* note 121, at 69; E. Mansell Pattison, *The Selection of Treatment Modalities for the Alcoholic Patient*, in THE DIAGNOSIS AND TREATMENT OF ALCOHOLISM, *supra* note 121, at 189, 222; see also FORREST & GORDON, *supra* note 194, at 121 ("At best, . . . 'forced' treatment [was] viewed as ineffective."); ROSS & LIGHTFOOT, *supra* note 115, at 100 (citing studies indicating the lack of success of compulsory treatment programs).

222. Pattison, *supra* note 221, at 222; see also HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 184 n.44 (1979) (noting studies that indicate that coercion is beneficial to the treatment of alcoholics); FORREST & GORDON, *supra* note 194, at 132 (Suggesting that forcing criminal homicide offenders to seek alcohol treatment obtains better results than voluntary entry: "It should be noted that court-ordered or coercive treatments have been successful."); ROSS & LIGHTFOOT, *supra* note 115, at 101 (acknowledging that coercion can be "essential" for successful treatment of alcoholics in the workforce); TRICE, *supra* note 185, at 108-09 (finding that treatment works best when an alcoholic attends under threat of losing his family or job).

223. LUKS, *supra* note 121, at 78-79. See generally J.C. LAUNDERGAN ET AL., ARE COURT REFERRALS EFFECTIVE? JUDICIAL COMMITMENT FOR CHEMICAL DEPENDENCY IN WASHINGTON COUNTY, MINNESOTA (1979) (discussing the research done at Hazelden).

224. LUKS, *supra* note 121, at 79. A 1982 study in Minnesota and Wisconsin revealed that the number of patients still on welfare six months after treatment fell by 50% and was cut in half again one year after discharge. *Id.* at 89. Courts also recognize the success of court-mandated alcohol treatment. See, e.g., *Commonwealth v. Conahan*, 589 A.2d 1107, 1109 (Pa. 1991) (finding that defendant successfully completed alcohol treatment program and remained sober).

225. See LUKS, *supra* note 121, at 80; see also ROSS & LIGHTFOOT, *supra* note 115, at 111-12 (indicating that the success of coercive alcohol treatment programs depends on a well-qualified, persistent staff); ROYCE, *supra* note 184, at 215-16 (pointing out that because forced treatment has been shown to work, a client's lack of motivation is the fault of the counselor).

226. LUKS, *supra* note 121, at 80.

227. "A 'positive treatment relationship' can be created with coerced alcoholics . . . if therapists demonstrate that the patients are their main concern." *Id.*

2. *The Extension of Coercive Alcohol Treatment Programs to Insurance Law*

Coercive alcohol treatment should be equally successful in the insurance context.²²⁸ Allowing alcoholic insureds who commit otherwise intentional acts²²⁹ while voluntarily intoxicated to choose between financial responsibility and alcohol abuse treatment effectively accommodates the insurance law public policy interests in compensating injured victims and in deterring wrongdoers. Insureds who suffer from alcohol abuse may not be able to control the behavioral consequences of their uncontrolled alcohol consumption even under threat of financial responsibility. This proposal recognizes that treatment may be the only solution.²³⁰

Successful completion of coercive alcohol rehabilitation programs removes the impetus behind alcoholics' deviant acts.²³¹ It restores their ability to control their behavior and to respond effectively to the threat of financial responsibility. Therefore, coercive alcohol treatment not only immediately deters alcoholics from committing wrongful acts, but it also restores the effectiveness of society's normal deterrent mechanisms on alcoholics.²³²

The proposed solution still ensures that innocent victims of alcoholics receive compensation from insurers. Insurance premiums, however, should not increase significantly. Under the current voluntary intoxication defense, insurers are often obligated to provide cover-

228. Intentional acts may also involve criminal sanctions. See *supra* note 108. If courts allowed mandatory treatment as an alternative to imprisonment, they could also credit it against a subrogation judgment. Coercive alcohol treatment would serve the same deterrent purpose in insurance law as it does in criminal law.

229. The proposal requires courts to apply the inferred intent standard to determine whether an act was otherwise intentional — i.e., the act and resulting injuries would be intentional but for the wrongdoer's intoxicated state. See *supra* section I.B and text accompanying note 124.

230. The proposal distinguishes between alcoholics and nonalcoholics. These labels are only used for purposes of clarity. Studies show that labeling individuals *alcoholics* often dissuades them from accepting treatment. See, e.g., ROSS & LIGHTFOOT, *supra* note 115, at 102. Patients tend to respond more favorably to the term *alcohol abusers*. *Id.* Consequently, states should try to avoid including the word *alcoholic* in legislation describing those eligible for treatment.

The procedure by which an insured will be determined to be an alcoholic or alcohol abuser and therefore eligible for treatment is beyond the scope of this Note. The proposal may encourage nonalcoholic insureds to try to plead alcoholism and avoid subrogation. However, convincing a medical professional of a nonexistent drinking problem might be very difficult. More importantly, the disruption of life and social stigma attached to alcohol treatment should discourage almost all such attempts.

231. See *supra* text accompanying notes 198-99.

232. Inpatient programs serve as an immediate deterrent by separating alcoholics from the rest of society whom they can harm. Outpatient programs closely monitor alcoholics' behavior to make sure they do not revert to their prior habits. Also, many court-referred alcoholics would face possible imprisonment resulting from the criminal aspect of their acts if they began drinking again. They would likely rather attend alcohol treatment sessions than be incarcerated.

In the long run, successful treatment of alcoholism restores an alcoholic's ability to live normally in society. ROYCE, *supra* note 184, at 225, 270. At that point, a recovered alcoholic should respond effectively to normal deterrent mechanisms.

age to voluntarily intoxicated insureds with no chance of reimbursement.²³³ In contrast, under this proposal, some alcoholic insureds may elect the reimbursement option.²³⁴ Consequently, insurers may end up spending less money under this scheme.²³⁵ Also, these threats may deter some people from becoming alcoholics.²³⁶ Thus, in the long run, subrogation subject to an exception for alcoholics who successfully complete alcohol treatment may cause a decrease in the number of tortious acts committed and consequently a decrease in the amount of litigation over insurance coverage.

CONCLUSION

Intentional injury exclusion clauses in homeowner's policies exclude coverage for intentionally caused harm. Many courts currently create an exception, though, for those insureds who act while too intoxicated to form the required intent. This exception not only condones the behavior of nonalcoholic insureds who drink in order to avoid the economic consequences of their wrongdoing, but it also fails to help alcoholics who need treatment. Although the voluntary intoxication defense compensates victims, it does so at the expense of deterrence.

States can correct this deficiency by adopting legislation granting insurers a right of reimbursement against insureds subject to an exception for alcoholic insureds who successfully complete alcohol treatment programs. This proposal provides injured victims with compensation while effectively deterring insureds from committing intentional acts. The threat of financial responsibility should not only deter premeditated wrongdoers from taking advantage of the current loophole in the intentional injury exclusion clause, but it should also help deter all nonalcoholic insureds from drinking to the point where they lose control and cause harm.

Subrogation, however, may have no effect on insureds who cannot control their alcohol consumption or its consequences. Treatment may be the only way to stop alcoholics' deviant behavior. Thus, this proposal not only addresses insurance law public policy concerns, but

233. See *supra* notes 95-101 and accompanying text for examples of cases where insurers were required to provide coverage for intentional acts committed by voluntarily intoxicated insureds.

234. Legislation should include a requirement that insolvent alcoholic insureds cannot choose the subrogation alternative.

235. The alcohol treatment programs should be funded by the states rather than by liability insurers' charging increased premiums. Alcoholics present a threat to everyone when intoxicated. Accordingly, society as a whole, rather than just insureds, has an interest in helping alcoholics control their drinking problems.

236. See *supra* note 193 and accompanying text.

directly responds to the need to ensure that alcoholics receive appropriate treatment for their illness before they do further harm to themselves or to society.