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Robert A. Prentice

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Of Tort Reform and Millionaire Muggers: Should An Obscure Equitable Doctrine Be Revived To Dent the Litigation Crisis?

ROBERT A. PRENTICE*

"No polluted hand shall touch the pure fountains of justice."
—Chief Justice Wilmot.[1]

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."
—Lord Mansfield.[2]

"Bernard McCummings, a New York City mugger, became a millionaire last week when the U.S. Supreme Court let stand a ruling that a police officer used excessive force by shooting him in the back as he fled a crime scene in 1984. McCummings, paralyzed from the chest down from the shooting, had been awarded $4.3 million in damages by a New York Court."[3]

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* Smith Centennial Professor of Business Law, Graduate School of Business, University of Texas at Austin.

1. 14 Collins v. Blantern, [1767] 2 Wilson 341, 350, 95 Eng. Rep. 847, 852 (K.B.).

2. Holman v. Johnson, [1775] 1 Cowp. 342, 343, 98 Eng. Rep. 1120, 1121 (K.B.). This dictum is often cited as the origin of the *ex turpi causa* doctrine. Plaintiff sued to recover the purchase price of tea pursuant to a sale made in Scotland. The court held that because the contract was perfectly legal in Scotland, defendant could not raise as a defense the fact that the seller may have known that defendant buyer intended to smuggle the tea into England.

3. Paul Clegg, *A Mugger Millionaire*, SACRAMENTO BEE, Dec. 5, 1993, at A25.

In a world of anecdote-driven tort reform movements, few stories other than the infamous cup of very hot McDonald's coffee have more power to outrage than that of Bernard McCummings, the "millionaire mugger" who was awarded $4.3 million by a jury after he was shot by a police officer allegedly using excessive force. A seldom-invoked equitable doctrine—ex turpi causa non oritur actio *("no cause of action can arise out of an immoral act") has been invoked more liberally in other western common-law nations than in the United States and could be revived by U.S. courts and legislatures to bar recovery in cases like that of McCummings and, potentially, in a much broader range of cases as well. However , this Article demonstrates that when the initial outrage of newspaper editorial writers is replaced by reasoned analysis, it becomes clear that the* ex turpi causa doctrine *should, other than in very exceptional circumstances, not bar recovery by even the most unsympathetic tort plaintiffs.*

I. INTRODUCTION

Many believe that the United States faces a litigation crisis of unparalleled dimensions. The crisis supposedly consists of the filing of far too many lawsuits, particularly tort actions. Former Vice-President Dan Quayle, for example, noted in his capacity as chairman of the President's Council on Competitiveness that eighteen million new civil cases were filed in the United States in 1989 alone.[4] The ill effects caused by such filings supposedly include loss of jobs, burdens to the U.S. economy, suppression of product innovation, and general injury to U.S. competitiveness in the global economy.[5]

Suggestions for remedying the crisis have come from many quarters and have taken several shapes and forms. Most states have passed tort reform legislation and at the time of this writing the Republicans' "Contract with America" is proposing more federal changes, yet no proponent of the "litigation crisis" theory would suggest that these reforms constitute anything more than a starting point for necessary

4. Talbot "Sandy" D'Alemberte, *Restarting Engine of Law Reform*, A.B.A. J., Oct. 1991, at 8.

5. *See generally* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); PETER W. HUBER, THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

change.[6]

Americans have often looked abroad for helpful reform ideas, especially because other nations are generally perceived as having less litigation than the United States.[7] Most prominently, many suggest that America borrow the "English rule" regarding attorneys' fees, so that a losing plaintiff will have to pay the attorneys' fees of a prevailing defendant. Such a rule, which prevails in most of the rest of the western world, supposedly will discourage the filing of frivolous lawsuits.[8]

This Article also looks abroad to other western common-law jurisdictions that, suffering their own increases in tort litigation, use the *ex turpi causa non oritur actio* doctrine (which means, essentially, that no lawsuit may be brought by a person who has committed an illegal or immoral act) much more often than U.S. courts. The doctrine is used to dismiss tort litigation brought by a particularly troublesome type of plaintiff—a person, such as Bernard McCummings (the "millionaire mugger" referred to above), who is himself (or herself) guilty of wrongdoing in a legal or moral sense.[9] Indeed, the *ex turpi causa*

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6. The author has elsewhere expressed the opinion that over-litigiousness is not one of America's more pressing problems. Robert A. Prentice & Mark E. Roszkowski, *"Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 254-71 (1992) (suggesting that claims of a "liability crisis" are overblown). Nonetheless, the author, too, would be pleased if fewer frivolous lawsuits were filed. Although aware that our current rules for tort litigation are not perfect, the author has defended strict products liability, one of the most controversial areas of tort law. *Id.* at 272-300. However, the author has also suggested helpful modifications to the current tort law system. *See* Robert A. Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 REV. LITIG. 113 (1988) (expressing doubt as to existence of a punitive damages "crisis," but suggesting that judges use "judicial remittitur" of punitive damage awards in appropriate circumstances to induce defendants to remove dangerous products from the market).

7. On the other hand, there is evidence that despite the widespread perception to the contrary, U.S. citizens are no more litigious than citizens of other western industrialized nations. Bob Gibbins, *Propositions Built on Myth*, NAT'L L.J., Oct. 7, 1991, at 17, 17-18.

8. *See* Edward A. Snyder, *An English Reform for American Law*, WALL ST. J., Aug. 9, 1991, at A8 (strongly supporting U.S. adoption of the English rule); Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54 (questioning the efficacy of the English rule).

9. Proponents of tort reform are almost as fond of citing examples of tort recoveries by criminals or drunk drivers as they are of citing excesses by "greedy" plaintiffs' attorneys. *E.g.*, *Capping the Courts*, WALL ST. J., Dec. 3, 1985, at 30 (editorial) (citing such examples). Of course, many of these tales are simply legal versions of "the urban legend." *See generally* Fred Strasser, *Have 'Anecdotes,' Not Facts, Fueled Tort Crisis?*, NAT'L L.J., Feb. 24, 1986, at 15.

defense has enjoyed a positive revival in recent years in Anglo-Australian jurisdictions.[10] Yet, the words *ex turpi causa* almost never appear in modern American court opinions.[11] Furthermore, the doctrine has received virtually no attention in American legal literature,[12] and the only American decision which could be deemed a "landmark" in the area was decided in 1845.[13]

This Article seeks (a) to explain the essence of the *ex turpi causa* doctrine,[14] (b) to examine how it is applied in various forms in selected western common law jurisdictions (Australia, England, Canada, New Zealand, and the United States),[15] (c) to evaluate the various specific approaches to application of the *ex turpi causa* defense which have evolved in these nations,[16] and (d) to give an overall appraisal of the

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The Bernard McCummings case, however, is not apocryphal. *See* McCummings v. New York City Transit Auth., 613 N.E.2d 559 (N.Y.), *cert. denied*, 114 S. Ct. 548 (1993). It also led to howls of protest. *See, e.g.*, Eric Breindl, *Who Says Crime Doesn't Pay?*, WALL ST. J., Dec. 15, 1993, at A17; *Mugging the System*, ATLANTA J. & CONST., Dec. 3, 1993, at A17; *The Mugger and His Millions*, WASH. TIMES, Dec. 5, 1993, at B2; Richard Cohen, *A Mugging of Taxpayers*, PLAIN DEALER (CLEVELAND), Dec. 5, 1993, at 3D; Steve Lopez, *A Mugger Shouldn't Profit from Beating*, DALLAS MORNING NEWS, Dec. 4, 1993, at 29A; Tom Knott, *Thuggery Just Isn't What It Used To Be*, WASH. TIMES, Dec. 2, 1993, at C2; Marcia Chambers, *Sua Sponte*, NAT'L L.J., Dec. 20, 1993, at 13 (listing the case as an example of the "foibles of the legal community" in 1993).

10. *See, e.g.*, LEWIS N. KLAR, TORT LAW 326 (1991) (citing *ex turpi causa's* "apparent rebirth in Canadian tort law"); R.F.V. HEUSTON & R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 327 (19th ed. 1987) (*ex turpi causa* defense has enjoyed an "apparent rebirth in Canadian tort law"); ALLEN M. LINDEN, CANADIAN TORT LAW 439 (1977) ("There has been a rebirth of an old, harsh doctrine of the common law—*ex turpi causa non oritur actio*, or what might be called the illegality defence."); C. R. Symmons, Ex Turpi Causa *in English Tort Law*, 44 MOD. L. REV. 585, 588 (1981) (*ex turpi causa* seems "in recent years to have attained greater prominence in tort cases").

11. A quick LEXIS search will confirm the accuracy of this statement. When the phrase does appear, it is almost always in a footnote or a passing reference, with no attempt to explain or justify the doctrine.

12. The last full-scale discussion of the matter was apparently in Harold S. Davis, *The Plaintiff's Illegal Act as a Defense in Actions of Tort*, 18 HARV. L. REV. 505 (1905). The issue has received passing attention in a few more recent articles (*E.g.*, Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 817-22; Robert A. Prentice & Paula C. Murray, *Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships*, 11 J. CONTEMP. L. 67, 93-101 (1984); Louis A. Alexander, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 135-37 (1984); Marc Gary, Comment, *Tort Liability of Participants in Consensual Crimes*, 65 GEO. L.J. 1619, 1629-34 (1977).

13. Bosworth v. Swansey, 51 Mass. (10 Met.) 363 (1845).

14. *See infra* notes 20-75 and accompanying text.

15. *See infra* notes 76-177 and accompanying text.

16. *See infra* notes 178-255 and accompanying text.

doctrine to determine whether it should be revitalized by the courts[17] (or adopted by the legislatures) in the United States[18] as a means of solving the so-called tort litigation crisis.

Whether application of the *ex turpi causa* defense in *tort* cases is an appropriate doctrinal transplantation (from contract law) raises many interesting questions that are basic to the very theoretical underpinnings of tort jurisprudence.[19]

II. *Ex Turpi Causa Non Oritur Actio*: Background And Origins

A. *A Legal Maxim Defined*

As noted earlier, *ex turpi causa non oritur actio* means: "No cause of action can arise out of an immoral (or illegal) inducement (or consideration)."[20]

B. *Roots in Contract Law*

1. *Introduction*

The *ex turpi causa* doctrine originated in contract law;[21] indeed, *ex turpi contractu non oritur actio*[22] is the most familiar application of the doctrine. It is a fundamental concept of contract law that illegal bargains will not be enforced by the courts.[23]

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17. *Ex turpi causa non oritur actio* is a court-developed legal maxim developed for contract cases and occasionally applied in tort cases. Courts invented the doctrine. E. ALLAN FARNSWORTH, CONTRACTS 330 (1982). They have slowly discarded it in tort cases in the United States. Theoretically, they have the power to revive it.

18. *See infra* notes 256-364 and accompanying text.

19. The *ex turpi causa* defense raises many intricate and fascinating philosophical and legal questions, but suffers from the problem raised by Justice Manning when he complained that "a nice point of law has been brought to the surface of an unedifying contest between unmeritorious suitors." Godbolt v. Fittock, 1963 N.S.W. St. R. 617, 624 (Austl.) (paraphrasing Psaltis v. Schultz, 76 C.L.R. 547, 557 (1948) (Austl.) (Dixon, J.)).

20. BALLENTINE'S LAW DICTIONARY 447 (3d ed. 1969).

21. *Godbolt*, 1963 N.S.W. St. R. at 627 (Manning, J.) (The *ex turpi causa* doctrine "had its origin no later than the eighteenth century and was directed primarily to contracts.").

22. Literally, "[f]rom an immoral (or illegal) contract no action can arise." BALLENTINE'S LAW DICTIONARY, *supra* note 20, at 447.

23. 5 SAMUEL WILLISTON, CONTRACTS § 1630 (2d ed. 1937).

The famous English "Highwayman's case," *Everet v. Williams*,[24] illustrates this limitation on the principle of freedom of contract. In *Everet*, one partner sued another, alleging that the defendant had kept more than his share of the partnership's proceeds. The complaint was rather vague in describing the nature of the business, alleging that the parties "proceeded jointly in [dealing for commodities] with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch;" that in Finchley plaintiff and defendant "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things;" that a gentleman from Blackheath had items defendant thought "might be had for little or no money in case they could prevail on the said gentleman to part with the said things."[25]

It is told that when it dawned on the court that the partners were highwaymen, the solicitors for both parties were jailed, and the parties themselves were executed, vividly making the point that courts will not enforce illegal bargains.

2. *Scope of the Doctrine*

The *Restatement of the Law of Contracts* specifies that a contract is "illegal . . . if either its formation or performance is criminal, tortious, or otherwise opposed to public policy."[26] Thus, this is a broad concept, especially so because it gives courts discretion to go beyond criminal acts in order to refuse to give effect to bargains deemed inconsistent with that "unruly horse"[27] of public policy. Public policy has been used to invalidate contracts on grounds of immorality, unconscionability, economic policy, unprofessional conduct, injury to public institutions,

24. The case is partially reproduced and discussed in *The Highwayman's Case* (Everet v. Williams), 9 LAW. Q. REV. 197 (Sir Frederick Pollock ed., 1893).

25. *Id.*

26. RESTATEMENT OF THE LAW OF CONTRACTS § 512 (1932). This statement of the law has been refined in RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

27. Richardson v. Mellish, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.). This unruly horse also evolved over time as standards of morality and business ethics changed. As noted in Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892):

> It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.

Id. at 233-34.

and many other grounds.[28] Courts have, on public policy grounds, refused to enforce numerous types of agreements,[29] including: contracts inducing the commission of a tort,[30] contracts in restraint of trade (such as overly broad covenants-not-to-compete[31]), gambling or lottery contracts,[32] contracts adversely affecting the administration of justice (such as champerty and maintenance contracts[33]), contracts tending to corrupt or to cause a neglect of duty (such as contingent fees for lobbyists[34] or unfair exculpatory clauses[35]), and contracts impeding the marriage relationship.[36]

3. *Rationale of the Doctrine*

Although the common law gives great weight to the freedom of men and women to privately order their own affairs, the illegality defense embodies the legal system's recognition that in some instances the freedom to contract is outweighed by broader societal interests.[37] Assume that A hires B to murder C. Although it is clear that the courts

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28. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 22-1 (2d ed. 1977).

29. *See generally* 14 WALTER H. E. JAEGER & SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1628 (3d ed. 1972); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 430-62 (2d ed. 1965); GROVER C. GRISMORE & JOHN E. MURRAY, JR., PRINCIPLES OF THE LAW OF CONTRACTS 488-503 (rev. ed. 1965).

30. *E.g.*, Sayres v. Decker Auto. Co., 145 N.E. 744 (N.Y. 1924) (holding an agreement to defraud an insurance company unenforceable).

31. *E.g.*, Bryceland v. Northey, 772 P.2d 36 (Ariz. Ct. App. 1989) (finding a covenant too broad temporally to be enforceable).

32. *E.g.*, McFadden v. Bain, 91 P.2d 292 (Or. 1939) (deciding that where a prize was awarded on the basis of mere chance, illicit lottery was involved).

33. *E.g.*, Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 981 (Ky. 1939) (deciding that champerty and maintenance contracts are those contracts that have "the tendency or purpose to stir up and foment litigation, multiply contentions, or unsettle the peace and quiet of a community, or set one neighbor against another" and were therefore void).

34. *E.g.*, Gesellschaft v. Brown, 78 F.2d 410, 412 (D.C. Cir. 1935), *cert. denied*, 296 U.S. 663 (1935) (finding a contingent fee for passage of a bill was void as "a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature").

35. *E.g.*, DeVito v. New York University College of Dentistry, 544 N.Y.S.2d 109 (Sup. Ct. 1989) (holding a release of liability for willful or gross negligence was unenforceable).

36. *E.g.*, McCoy v. Flynn, 151 N.W. 465 (Iowa 1915) (deciding that a promise to pay a woman $5,000 if she remained unmarried for three years was unenforceable).

37. *See* Peat Marwick v. Haass, 775 S.W.2d 698, 710 (Tex. Ct. App. 1989) ("The right of competent parties to make their own bargain is not unlimited.").

should not enforce the agreement at the behest of either party, many cases are not so clear and therefore involve a delicate weighing of public policy factors.

Factors favoring enforcement may include the justified expectations of the parties, any forfeiture that might result from a refusal to enforce, and excusable ignorance of the law by one of the parties.[38] Factors weighing against enforcement include the importance of the public policy involved, the seriousness and deliberateness of the parties' misconduct, and the directness of connection between that misconduct and the agreement.[39] Thus, as a general rule, a plaintiff who has performed a promise and who would face a burdensome forfeiture if the contract were not performed may recover if the illicit act is merely *malum prohibitum*.[40] However, this general rule is filled with exceptions, and the distinction between acts that are *malum prohibitum* ("wrong because prohibited") and those that are *malum in se* ("wrong in themselves") has been harshly criticized.[41]

Among the oft-spoken reasons for the American courts' refusal to enforce illegal or immoral contracts are: (a) to deter illegal or other undesirable conduct,[42] (b) to avoid sullying the machinery of justice,[43] and (c) to regulate contractual morality.[44] Similar reasons are given in

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38. FARNSWORTH, *supra* note 17, at 328.

39. *Id.*

40. CALAMARI & PERILLO, *supra* note 28, at 788 (quoting John E. Rosasco Creameries, Inc. v. Cohen, 11 N.E.2d 908, 909 (N.Y. 1937)).

41. Gibbs v. Consol. Gas Co., 130 U.S. 396, 411-12 (1889) (the distinction between these two concepts "has long since been exploded"). *See generally* ARTHUR L. CORBIN, CORBIN ON CONTRACTS 1169 (1952).

42. *See* McMullen v. Hoffman, 174 U.S. 639, 670 (1899). The *McMullen* Court stated:

> The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Id.; *see also* Sirkin v. Fourteenth St. Store, 108 N.Y.S. 830, 834 (N.Y. App. Div. 1908) ("I think nothing will be more effective in stopping the growth and spread of this corrupting and now criminal custom [of commercial bribery] than a decision that the courts will refuse their aid to a guilty vendor or vendee . . . ."). *See generally* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988) (arguing that the illegality doctrine is based on courts' application of an efficient deterrence approach).

43. Manning v. Noa, 76 N.W.2d 75, 77 (Mich. 1956) ("Our doors are open to both the virtuous and the villainous. We do not, however, lend our aid to the furtherance of an unlawful project, nor do we decide, as between two scoundrels, who cheated whom the more.").

44. Kostritsky, *supra* note 42, at 119.

other common-law jurisdictions.[45]

4. *Effect of Contractual Illegality*

Generally speaking, courts refuse to lend the judicial process to aid *either* party to an illegal bargain. Courts often state that illegal contracts are void *ab initio*, (void from their inception) but it seems more accurate to conclude that courts simply leave the parties to an illegal bargain where they find them,[46] refusing to allow judicial machinery to be used to provide remedies to one who has participated in an illegal transaction.[47]

There are, of course, exceptional situations where the courts will lend a hand in cases involving illegal contracts, including (a) where plaintiff is in the category of persons meant to be protected by the violated statute,[48] (b) where plaintiff is less at fault than defendant,[49] and (c) where a "severable" contract allows the court to enforce the legal

45. *See e.g.*, Euro-diam Ltd. v. Bathurst, [1988] 2 W.L.R. 517 (Eng. C.A.); Bowmakers Ltd. v. Barnet Instruments Ltd., [1945] 1 K.B. 65 (Eng.); Beresford v. Royal Ins. Co. Ltd., [1938] A.C. 586 (Eng.). *See generally* Y. L. Tan, *Stolen Diamonds and Ex Turpi Causa*, 104 LAW Q. REV. 523 (E.M.B. Reynolds ed., 1988).

46. This, of course, often means that one wrongdoer unjustly profits at the expense of another. For example, if A has lost an illegal bet to B and paid on that bet, a court will not assist A in retrieving her money. This result stems not from any solicitude for B, but simply from a reluctance to aid A. FARNSWORTH, *supra* note 17, at 326-27.

47. GRISMORE & MURRAY, *supra* note 29, at 509. Grismore & Murray believe that the essence of the courts' approach is embodied in the following statement from Lord Mansfield:

> The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

Holman v. Johnson, [1775] 1 Cowp. 342, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

48. *E.g.*, Kneeland v. Emerton, 183 N.E. 155 (Mass. 1932) (Deciding that the purchaser of illegal bonds which defendant failed to register under blue-sky law was not denied remedy of enforcement of the bonds).

49. *E.g.*, Stewart v. Wright, 147 F. 321 (C.C. Mo. 1906), *cert. denied*, 203 U.S. 590 (1906) (granting amateur gambler hoodwinked by infamous Buckfoot Gang relief).

portions of a contract that are independent of the illicit provisions.[50]

C. *Ex Turpi Causa: Transplanted to the Tort Context*

1. *Overview*

Although there is little or no historical evidence that the *ex turpi causa non oritur actio* defense was originally intended for application beyond the contractual context, it has been asserted, with varying degrees of success, as a defense in *tort* cases in the United States and, more frequently, in other western common-law jurisdictions. This is so despite the warnings of many that a contract doctrine should not lightly be transplanted to the field of tort law.[51]

In the United Kingdom, Lord Diplock noted in 1964:

> [E]x turpi causa non oritur actio is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, *whether or not such rights arise under contract.* All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right.[52]

In transplanting the *ex turpi causa* defense from contract law into the body of tort law, courts have given the same basic justifications for the doctrine[53] and have provided for many of the same limitations.[54]

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50. *E.g.,* Panasonic Co. v. Zinn, 903 F.2d 1039 (5th Cir. 1990) (deciding that an illegal provision of contract that was not an essential feature of the agreement could be severed and the valid portion of the contract enforced).

51. *E.g.,* G.H.L. Fridman, *The Wrongdoing Plaintiff,* 18 MCGILL L.J. 275, 295 (1972) ("Slavish emulation of the contract principles in an altogether different situation could lead to a confusion of the real issue before a court faced with the tort problem.").

52. Hardy v. Motor Insurers' Bureau, [1964] 2 ALL E.R. 742, 750 (emphasis added).

53. *See infra* notes 256-325 and accompanying text.

54. For example, in tort law the *ex turpi causa* defense does not bar recovery by a wrongful plaintiff who was a member of the class protected by a criminal statute. *E.g.*, Galvin v. Jennings, 289 F.2d 15 (3d Cir. 1961) (state alcoholic beverage regulation intended to protect minors and drunks, so plaintiff was permitted to recover for personal injuries resulting from illegal sale by defendant); Hudson v. Craft, 33 Cal. 2d 654, 201 P.2d 1 (1949) (state law intended to protect amateur boxers, so combatants allowed to recover for injuries resulting from illegal boxing match).

Also, as in contract cases, courts in tort cases often provide compensatory relief to a plaintiff who was significantly less at fault (not *in pari delicto*) than the defendant. *E.g.*, De Vall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936) (plaintiff female seduced into sexual intercourse by defendant's false promise to marry entitled to recover on battery claim for sexually transmitted disease); Panther v. McKnight, 125 Okla. 134, 256 P. 916 (1926) (plaintiff who relied on defendant's false assurance that they were legally

Courts in the common law system do not hold wrongdoing plaintiffs to be *caput lupinum*.[55] Forfeiture and taint of blood are no longer general consequences of criminal activity,[56] yet few courts would aid a burglar who tripped on a defective stair in his suit against the homeowner who failed to post a warning. Before examining the current state of the *ex turpi causa* defense in tort suits brought in western common-law jurisdictions, it might be helpful to examine some factual scenarios to illustrate how a revitalization of the *ex turpi causa* defense in the tort arena would reduce the amount of tort litigation (and ultimate liability of tort defendants) in the United States:

* Consider *McCummings v. New York City Transit Authority*,[57] in which a mugger who was shot by transit police as he sought to escape apprehension was awarded a $4.3 million judgment against the City of New York. In England and other countries, many courts would apply the *ex turpi causa* defense to deny recovery in such cases.[58]
* Consider *Ashmore v. Cleanweld Prods., Inc.*,[59] in which plaintiff was injured while making an illegal pipe bomb that exploded prematurely. The court held that his lawsuit against the manufacturer of one of the components of the pipe bomb could proceed despite the illegal nature of his activities.[60] A vigorous application of the *ex turpi causa* defense would likely lead to an outright dismissal of such

married also entitled to recover for transmission of venereal disease).

55. "Caput lupinum" means a "wolf's head" or outlaw. BALLENTINE'S LAW DICTIONARY, *supra* note 20, at 174. *See* Henwood v. Municipal Tramways Trust, [1938] 60 C.L.R. 438, 446 (Latham, C.J.) ("[T]here is no general principle of English law that a person who is engaged in some unlawful act is disabled from complaining of injury done to him by other persons, either deliberately or accidentally. He does not become *caput lupinum*."); Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) ("The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw."); Rodney v. Rapid Transit Co., 267 N.Y.S. 86, 87 (Sup. Ct. 1933) (allowing recovery for false imprisonment by illegal alien and noting "even the meanest outcast is entitled to protection against unlawful restraint of his person").

56. M.P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 274 (1965).

57. 613 N.E.2d 559 (N.Y.), *cert. denied*, 114 S. Ct. 548 (1993).

58. *E.g.*, Murphy v. Culhane, [1977] Q.B. 94, 98 (Eng. C.A.) (dicta).

59. 672 P.2d 1230 (Or. 1983).

60. *Id.* at 1231.

a suit based on plaintiff's illegal acts.[61]

* Consider *Gonzalez v. Garcia*,[62] in which plaintiff passenger and defendant driver went on a drinking expedition. Plaintiff knew that defendant was extremely drunk, yet voluntarily rode in the car with him and was injured when an accident occurred. Plaintiff recovered a judgment against defendant, and it was held that the trial court properly refused to instruct the jury regarding the assumption of risk defense. In other countries, the *ex turpi causa* defense has been held to completely bar recovery in similar cases.[63]

* Consider *Long v. Adams*,[64] in which plaintiff contracted herpes from defendant during sexual intercourse. Despite the fact that the parties were not married and the intercourse was therefore illicit, plaintiff was allowed to recover on a battery theory. Recognition of the *ex turpi causa* defense might well totally bar recovery in such circumstances because of plaintiff's immoral and possibly illegal acts.[65]

* Consider *Chomatopoulos v. Roma DeNotte Social Club*,[66] in which plaintiff was stabbed eight times while intervening in a fight that occurred at an illegal gambling establishment. Plaintiff sued the operator of the establishment for negligence and was held entitled to recover. In similar cases in other countries, the *ex turpi causa* defense has been used to hold that no duty of care arises to protect a voluntary frequenter of such illicit establishments.[67]

* Consider *Laird v. Illinois Cen. R.R. Co.*,[68] in which a FELA[69] plaintiff was allowed to recover fifty percent of his damages caused by a concurrence of his employer's negligence and his own violation of a safety regulation meant for his own protection. In other countries the *ex turpi causa* defense has sometimes been invoked to totally bar

61. *E.g.*, Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984) (dismissing suit by plaintiff injured while making illegal pipe bomb).
62. 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977).
63. *E.g.*, Miller v. Decker, [1955] 4 D.L.R. 92 (B.C.C.A.) (Smith, J.A.) (denying recovery on *ex turpi causa* grounds to drunken passenger who sued drunken driver).
64. 333 S.E.2d 852 (Ga. 1985).
65. *E.g.*, Hegarty v. Shine, 14 Cox Crim. Cas. 145 (Ir. C.A. 1858) (denying recovery on *ex turpi causa* grounds to woman who was infected with venereal disease while having illicit intercourse with defendant).
66. 515 A.2d 296 (N.J. County Ct. 1985).
67. *E.g.*, Danluk v. Birkner, [1946] 3 D.L.R. 172 (Ont. C.A.) (plaintiff injured when he stepped out of door with no stairway during police raid on defendant's gambling establishment not owed duty by operator of gambling establishment).
68. 566 N.E.2d 944 (Ill. App. Ct. 1991).
69. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1976).

recovery in such cases.[70]

* Consider *Klanseck v. Anderson Sales & Serv., Inc.*,[71] in which plaintiff was injured while driving his brand new motorcycle. Plaintiff had failed to obtain a statutorily mandated license to drive motorcycles. This failure was held to constitute evidence of comparative negligence on plaintiff's part; he recovered only forty percent of his damages from defendant seller. Before the *ex turpi causa* defense fell into virtual disuse in this country, it had been used to completely bar recovery to a wrongdoer such as the plaintiff in this case.[72]

* Consider *Llorence v. State Dep't of Transp.*,[73] in which plaintiff was allowed to recover for injuries sustained in a traffic accident though his speeding was a fifty percent cause of the accident. Stringently applied, the *ex turpi causa* defense might well bar any recovery whatsoever for injuries sustained in an accident occurring while plaintiff was violating the legal speed limit.[74]

Other examples could be given, but the point should be clear: If U.S. courts revived the *ex turpi causa* defense as it once existed in the United States and as it currently exists in some other western common law nations, the face of tort litigation in the United States could be profoundly changed. Not only could mugger Bernard McCummings be denied recovery, but a wide range of less severe illegal or immoral conduct could also disqualify plaintiffs from recovery of tort damages. Resurrection of this defense in the United States by borrowing theoretical approaches developed abroad could substantially reduce the number of successful tort suits.

Would this be a salutary development? This is the essential question explored in this Article. Editorialists addressing the Bernard McCummings case surely would support revival of the doctrine,[75] but a truly satisfactory answer to the question requires an examination of the

70. *E.g.*, Hillen v. I.C.I. (Alkali), Ltd., [1934] 1 K.B. 455 (Eng. C.A.) (stevedores who breached safety regulation not allowed to recover for injuries sustained when hatch coverings collapsed).

71. 393 N.W.2d 356 (Mich. 1986).

72. *E.g.*, Hanson v. Culton, 269 Mass. 471, 169 N.E. 272 (Mass. 1929) (out-of-state plaintiff who had not registered his car in Massachusetts was barred from recovering from negligent defendant).

73. 558 So. 2d 320 (La. Ct. App. 1990), *appeal denied*, 565 So. 2d 442 (La. 1990).

74. *E.g.*, Tuttle v. City of Lawrence, 119 Mass. 276 (1876); Heland v. City of Lowell, 85 Mass. (3 Allen) 407 (1862).

75. *See supra* note 59.

ex turpi causa defense in its various forms and applications. The following part illustrates how courts in selected western common-law jurisdictions have struggled to develop a principled application of the *ex turpi causa* defense in tort cases.

III. APPLICATION OF THE *EX TURPI CAUSA* DEFENSE TO TORT CASES IN WESTERN COMMON-LAW JURISDICTIONS

A. Australia

No jurisdiction has a more developed jurisprudence in this area than Australia. Over time, Australian courts have explicated three separate approaches to applying the *ex turpi causa* doctrine in tort cases. The first has been applied in cases involving a wrongdoing plaintiff; the second two have been applied primarily in cases where injuries were sustained during joint criminal ventures involving both plaintiff and defendant.

1. Legislative Intent

The facts in *Henwood v. Municipal Tramways Trust*[76] were simple enough. Decedent was riding defendant's tram when he became nauseated. He leaned out over a rail on the offside of the train and vomited. While so engaged, decedent's head struck in succession two steel standards which were in the middle of the street, just seventeen inches from the side of the train. The key issue was whether decedent's parents were barred from a negligence recovery against defendant by decedent's violation of section 74 of the Municipal Tramways Trust Act of 1906 which provided: "No passenger shall project or lean his head or other portion of his body or limbs out of any window in any tram. . . ."[77]

Judges McTiernan and Dixon reviewed American cases,[78] determining that "the directness of the connection between the illegality and the injury seems to have emerged as the *discrimen* more generally adopted" in allowing or disallowing recovery.[79] They, however, rejected this causation approach in favor of one keyed to legislative intent:

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76. 60 C.L.R. 438 (1938) (Austl.).

77. *Id.* at 439. In the United States, the case likely would have turned not on the *ex turpi causa* issue, but upon an assumption of risk defense. The tram car carried eight conspicuous notices: "Danger. Do not lean over the rail."

78. Among the U.S. cases discussed were Bosworth v. Swansey, 51 Mass. (10 Met.) 363 (1845) and Lyons v. Desotelle, 124 Mass. 387 (1878). *Id.* at 459.

79. *Id.* For a discussion of this proximate cause approach *see infra* part III.E.1.

> We do not think that, in the absence of English authority requiring us to do so, we ought to adopt as part of the law of torts a general principle that, if the damage suffered by the plaintiff has been directly brought about by an act of his which is unlawful, he can never complain of a wrongful or negligent act or omission on the part of the defendant from which the damage otherwise flows as a reasonable and probable consequence. *It appears to us that in every case the question must be whether it is part of the purpose of the law against which the plaintiff has offended to disentitle a person doing the prohibited act from complaining of the other party's neglect or default,* without which his own act would not have resulted in injury.
>
> [T]he general principle remains that a private right of action is not created by a penal statutory provision unless the statute so intends. In the same way, we think that, *unless the statute so intends,* no penal provision should receive an operation which deprives a person offending against it of a private right of action which in the absence of such a statutory provision would accrue to him.[80]

In *Henwood,* Judges Dixon and McTiernan concluded that depriving a person such as decedent (or his heirs) of a cause of action because of the violation was "[p]robably the last thing intended by the framers."[81]

2. *Public Policy*

A second Australian approach to application of the *ex turpi causa* defense in tort cases was enunciated in *Godbolt v. Fittock,*[82] which involved a simple wreck of a truck driven by defendant in which plaintiff was a passenger. The complicating factor was that the parties' journey involved the theft and contemplated sale of cattle. When the accident occurred at 2:20 a.m., the plaintiff and defendant had already stolen six cattle from three farms and were on their way to market.

Judge Sugerman's opinion denied recovery on the basis of the *ex turpi causa* defense, rejecting what he perceived as the American causation approach. Sugerman enunciated instead a rationale based on public policy considerations:

> The directness of the connection between the criminal purpose and the journey in whose course the injury occurred, rather than a causal association of the injury with the specifically criminal character of the joint venture, is, in my opinion, the true criterion in these cases of mutual criminality. The latter causal association is lacking in the present case. But the former is clearly present, the

80. *Id.* at 460-61 (emphasis added).
81. *Id.* at 461.
82. 1963 N.S.W. St. R. 617 (Austl.).

> accident having occurred in the course of one continuous journey which included in uninterrupted sequence the stealing of the calves and their transportation to market. *The question is not one of causation as between the specifically criminal ingredient in the circumstances and the injury, but one of public policy*, operating in this disabling sense . . . . by way of avoiding the encouragement to crime which would follow if the law lent its aid to the resolution of disputes of the present kind between its practitioners and bent its powers to ensuring that one should receive compensation from another for injuries sustained by negligent acts and omissions in the course of activities directly connected with the execution of a joint criminal purpose.[83]

Unlike *Henwood*, *Godbolt* involved a joint criminal undertaking between plaintiff and defendant. This factor might well justify a different approach to the *ex turpi causa* defense, although why it is less suitable for application of the legislative intent approach is not clear and was not addressed by the court. Nor did the judges state whether they would apply the public policy approach to a case not involving joint wrongdoers. The judges also did not explain which public policy factors, other than "avoiding the encouragement to crime," were to be considered in applying the defense.[84]

This approach, stressing that the courts should not be available to aid wrongdoers when to do so would violate vague concepts of public policy, has gained acceptance in England, Canada, and in some U.S. jurisdictions, as we shall see presently.[85]

3. *The Duty Rule (Parts One and Two)*

The High Court of Australia rendered a very important *ex turpi causa* decision in 1969 in *Smith v. Jenkins*,[86] wherein plaintiff was injured in a wreck while occupying a car driven by defendant. Plaintiff, defendant, and two companions had acquired the keys to the car by exerting some force upon the car's rightful owner in a public lavatory.

Thus, like *Godbolt*, and unlike *Henwood*, *Smith* involved a joint criminal undertaking between plaintiff and defendant. The court reached the same result as in *Godbolt*, and for the same public policy reasons, but through an entirely different route. The most influential opinion in

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83. *Id.* at 624 (emphasis added).

84. Although I have characterized the case as applying a public policy approach, it might also be framed as applying a *direct connection* (as opposed to a causal connection) test. As the quotation above indicates, Judge Sugerman required as a prerequisite to application of the *ex turpi causa* defense not that the injury be caused by the criminal nature of the joint venture, but simply that there be some direct connection between the criminal purpose of the venture and the injury. *Id.*

85. *See infra* notes 122-24 and accompanying text (Canada), notes 109-20 and accompanying text (England), and notes 169-72 and accompanying text (United States).

86. 119 C.L.R. 397 (1969) (Austl.).

the case was penned by Judge Windeyer. Rejecting the *ex turpi causa* defense as applicable solely to contract cases,[87] Judge Windeyer reached the same result as if he had applied the defense by holding that defendant owed no *duty* to plaintiff in light of the illicit joint enterprise.[88] He stated: "If a special relationship be in some cases a prerequisite of a duty of care, it seems to me that in other cases a special relationship [such as that shared by co-conspirators in a criminal venture] can exclude a duty of care."[89]

Judge Owen agreed, stating: "[T]he law does not recognize the relationship between two criminals who are jointly engaged in carrying out a criminal venture as being one which gives rise to a duty of care owed by the one to the other in the execution of the crime."[90] Judge Kitto also agreed, resting his reasoning on the "legal inseverability, for the purposes of responsibility, of the acts which several persons knowingly contribute to the joint commission of a wrong."[91]

The judges in *Smith* specifically held that they were not applying the *ex turpi causa* defense in order to disqualify plaintiff from recovering. Yet, plaintiff was not allowed to recover because no duty could be owed by defendant. Why? Because plaintiff was involved in the same type of activity that would have led to invocation of the *ex turpi causa* defense in *Godbolt*. And for what reasons did the court hold that one criminal in a joint enterprise owes no duty to the other criminal? The same reasons that other courts have used to invoke the *ex turpi causa* defense:

> If two or more persons participate in the commission of a crime, each takes the risk of the negligence of the other or others in the actual performance of the criminal act. That formulation can be regarded as founded on the negation of duty, or on some extension of the rule volenti non fit injuria, *or simply on the refusal of the courts to aid wrongdoers. How it be analysed and explained matters not.*[92]

Thus, while their Honours specifically refused to extend the *ex turpi causa* doctrine to a tort case involving joint wrongdoers, their result,

87. *Id.* at 413-14.
88. Obviously, *Smith*, like *Goldbolt* and unlike *Henwood*, involved a joint criminal enterprise between plaintiff and defendant.
89. *Smith*, 119 C.L.R. at 418.
90. *Id.* at 425.
91. *Id.* at 404.
92. *Id.* at 422 (Windeyer, J.) (emphasis added).

reasoning, and rationale were virtually identical to an application of that doctrine. Realistically, the judges in *Smith* were holding that plaintiff's illegal acts nullified the existence of a duty on the part of defendant which would have existed absent plaintiff's illegal conduct. Indeed, using the *ex turpi causa* defense, the Court of Appeal in New South Wales reached that very result using very similar reasoning in a similar case at about the same time that *Smith* was decided.[93] And subsequent courts have concluded that there is no substantive difference between the *Godbolt* and the *Smith* approaches.[94] In short, the duty approach is merely a somewhat disguised application of the *ex turpi causa* defense.[95] It shall be treated as such in this Article.

The approach of *Smith* constitutes "Part One" of the "duty rule." An important amendment to the duty approach (constituting "Part Two") occurred in *Jackson v. Harrison*,[96] a case which purported to truly differentiate the duty approach from the public policy approach.[97] In *Jackson*, plaintiff was injured while riding in a car driven by defendant, whom plaintiff knew did not possess a valid driver's license. Although plaintiff and defendant were jointly participating in an offense under Australia's Motor Vehicles Act, the court managed to distinguish the case from *Smith*, despite a strong dissent.[98]

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93. Bondarenko v. Sommers, 87 N.S.W.W.N. (pt. 2) 295 (1968) (plaintiff was injured by defendant in a drag race involving a car they had both stolen).

94. *E.g.*, Tallow v. Tailfeathers, 44 D.L.R.3d 55, 66 (Alta. 1973) (Clement, J.A.) ("I think there is no difference in substance between this expression [by Judge Sugerman in *Godbolt*] and the conclusion reached by Judge Kitto in *Smith v. Jenkins* . . . .").

95. W.J. Ford, *Tort and Illegality: The* Ex Turpi Causa *Defence in Negligence Law (Part One)*, 11 MELB. U. L. REV. 32, 40 (1977) ("By subsuming the unlawfulness into the question of duty a court is able to avoid defining the nature and limits of the illegality defence, rather less conspicuously than in a decision explicitly based upon the maxim *ex turpi causa non oritur actio*."); *see also* Jane Swanton, *Plaintiff a Wrongdoer: Joint Complicity in an Illegal Enterprise as a Defence to Negligence*, 9 SYDNEY L. REV. 304, 310 (1981) (viewing *Smith* as an *ex turpi causa* case).

96. 138 C.L.R. 438 (1978) (Austl.).

97. *Jackson* seems to be an attempt to narrow slightly the scope of the *ex turpi causa* defense in Australia after it was given a broad reach in *Smith*. Swanton, *supra* note 95, at 325.

98. In dissent, Chief Justice Barwick noted:

> It seems to me that where there is a joint venture to do an act punishable by fine or imprisonment, no narrow or pedantic view should be taken of the nature and scope of the arrangement between the parties when applying the principle of *Smith v. Jenkins* and that the consequence to one of the participants of any act done in furtherance of the arrangement or in obtaining the benefit of having carried it out should not give rise to a cause of action. The relationship of those participants should not be regarded as giving rise to relevant rights or duties. The public policy which the denial of a cause of action in such circumstances is designed to serve is not satisfied if the miscreant is not denied rights against his co-participant in the commission of the offence in respect of acts related to that commission.

The majority in *Jackson* clearly amended the *Smith* rule that no duty exists between joint criminal venturers. The new approach denies a duty exists in cases of clear joint criminal enterprise of such a nature that no standard of care could be determined (such as in a flight from a pursuing police car), but recognizes the existence of a duty in a case where a standard of care could be determined (such as where both passenger and driver know that the driver does not have a license). Judge Mason stated:

> If a joint participant in an illegal enterprise is to be denied relief against a co-participant for injury sustained in that enterprise, the denial of relief should be related *not to the illegal character of the activity* but rather to the character and incidents of the enterprise and to the hazards which are necessarily inherent in its execution. A more secure foundation for denying relief, though more limited in its application—and for that reason fairer in its operation—is to say that the plaintiff must fail when the character of the enterprise in which the parties are engaged is such *that it is impossible for the court to determine the standard of care which is appropriate to be observed.* The detonation of an explosive device is a case of this kind. But the driving of a motor vehicle by an unlicensed and disqualified driver, so long as it does not entail an agreement to drive the car recklessly on the highway (*see Bondarenko v. Sommers* (1968) 69 S.R. (N.S.W.) 269), stands in a somewhat different position. In this case the evidence indicates that the participants contemplated that the vehicle would be driven carefully—an accident or untoward event might, as in fact it did, lead to discovery of their breach of the law. It is not suggested that either party lacked the experience or ability to drive carefully—that they were unlicensed was due to their having been disqualified as a result of earlier traffic offences . . . . A plaintiff will fail when the joint illegal enterprise in which he and the defendant are engaged is such that the court cannot determine the particular standard of care to be observed. It matters not whether this in itself provides a complete answer to the plaintiff's claim or whether it leads in theory to the conclusion that the defendant owes no duty of care to the plaintiff because no standard of care can be determined in the particular case.[99]

The High Court in Australia recently married the duty and standard of care approaches in *Gala v. Preston*,[100] a suit arising out of injuries sustained in a joy-riding incident. The High Court encapsulated the rationale for the *ex turpi causa* defense as follows: "In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care."[101]

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138 C.L.R. at 445.

99. *Id.* at 455-56 (emphasis added).

100. 172 C.L.R. 243 (1991) (Austl.).

101. *Id.* at 254.

It now appears that the *Henwood* legislative intent approach to the *ex turpi causa* defense will be used in Australia where a plaintiff has violated a safety regulation meant to protect him or her, but the *Smith* duty rule, as amended in *Jackson*, will be applied where plaintiff and defendant were joint venturers in crime.[102]

B. England

For years the *ex turpi causa* defense had little presence in English tort cases.[103] Since at least the 1981 case of *Ashton v. Turner*,[104] however, the illegality defense has bloomed in the tort context in England.[105] *Ashton* adopted the "no duty" approach pioneered in Australia.[106] Several recent English[107] and Scottish[108] cases have followed this approach.

However, another popular approach—a public policy approach keyed to the "public conscience"—has recently appeared as well. The most

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102. *See id.* at 243 (passenger in stolen car who participated in theft and excessive drinking owed no duty by negligent joint venturer/driver); Matthews v. McCullock [1973] 3 N.S.W.L.R. 331, 337 (plaintiff, who was disqualified from holding a license to ride a motorcycle, was not barred from recovering in negligence from defendant driver who rear-ended plaintiff at a stop light).

103. Until the 1980s, there was little reason to dispute Lord Asquith's observation in National Coal Bd. v. England, 1954 App. Cas. 403, 428 (appeal taken from Eng.), that cases where a tort action had been defeated by the *ex turpi causa* defense were "exceedingly rare."

104. [1981] 1 Q.B. 137 (denying recovery to plaintiff passenger in negligence suit against defendant driver where injury occurred during escape from the scene of a crime jointly committed by plaintiff and defendant).

105. In giving life to *ex turpi causa* as a tort defense in England, Judge Ewbank, in *Ashton,* cited three earlier cases which can only with difficulty be read as supporting the existence of the defense in tort cases: National Coal Bd. v. England, 1954 App. Cas. 403 (appeal taken from Eng.); Hardy v. Motor Insurers Bureau, [1964] 2 Q.B. 745; Murphy v. Culhane, [1977] 1 Q.B. 94. *See generally* Charles Debattista, *Ex Turpi Causa Returns to the English Law of Torts: Taking Advantage of a Wrong Way Out*, ANGLO-AM. L. REV., Apr.-June 1984, at 15.

Another case to which Ewbank could have referred, but did not, is Johnson v. Croggan & Co., [1954] 1 W.L.R. 195 (Q.B.), in which, without much explanation, an employee who violated a safety regulation in choosing to use an inadequate ladder which collapsed and injured him, was held barred from recovery on *ex turpi causa* grounds. *But see* Cakebread v. Hopping Bros. (Whetstone) Ltd., [1947] 1 K.B. 641 (Eng. C.A.) (rejecting *ex turpi causa* defense on similar facts).

106. *Ashton*, [1981] 1 Q.B. at 146.

107. *E.g.,* Sullivan v. Sullivan, 79 W.N. 615 (1962) (plaintiff passenger's suit against defendant driver would be dismissed for lack of duty owed, among other grounds, if evidence shows at trial that the parties were at the time of the accident engaged in a joint burglary and were transporting gelignite and detonators).

108. *E.g.,* Weir v. Wyper, 1992 S.L.T. 579, 1992 S.C.L.R. 483 (Outer House); McLean v. Harper, 1992 S.L.T. 1007 (Outer House) (Notes); Ashcroft's Curator Bonis v. Stewart, 1988 S.L.T. 163 (Outer House); Sloan v. Triplett, 1985 S.L.T. 294 (Outer House); Lindsay v. Poole, 1984 S.L.T. 269 (Outer House).

prominent recent case in England is *Pitts v. Hunt*,[109] which involved a familiar scenario. Plaintiff passenger and decedent driver (whose estate was first defendant) were both drunk and aboard decedent's motorcycle (which plaintiff knew he was not licensed to drive). They were weaving recklessly down the road shouting "yippee" and similar remarks when they were clipped by a car driven by the second defendant.

The court of appeal held the plaintiff's recovery to be barred by the *ex turpi causa* doctrine, but the judges' reasoning did little to clarify the law of England in this area. Lord Justices Dillon and Balcombe[110] seemed to prefer the "duty" approach of *Jackson*, even though there was poor factual basis for applying that test.[111] Lord Justice Beldam appeared to accept the "conscience test"[112] earlier explicated in England in such cases as *Saunders v. Edwards*,[113] *Kirkham v. Chief Constable of Manchester*,[114] and *Thackwell v. Barclays Bank*.[115]

The "conscience test" asks two questions: (a) Has there been illegality of which the court should take notice? and (b) Given all the facts, would it be an affront to the *public conscience* if by affording plaintiff relief the court indirectly assisted or encouraged the plaintiff in his criminal act?[116]

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109. [1990] 3 W.L.R. 542 (Eng. C.A.).
110. *Id.* at 558 (Balcombe, L.J.), 567 (Dillon, L.J.).
111. It is arguably difficult to formulate a standard of care applicable when a safecracker is mixing a dynamite charge or a getaway car is speeding away from a bank with the police in hot pursuit. But this case simply involved driving a motorcycle; formulation of a standard of care should not have been at all difficult. Kevin Williams, *Defences for Drunken Drivers: Public Policy on the Roads and in the Air*, 54 MOD. L. REV. 745, 750 (1991).
112. *Pitts*, [1990] 3 W.L.R. at 554.
113. [1987] 1 W.L.R. 1116, [1987] 2 All E.R. 651 (Eng. C.A.) (plaintiff, who in purchasing leasehold obtained defendant's agreement to falsely apportion value of chattels and value of flat in order to minimize stamp duty, was not barred on public conscience grounds from recovering for deceit from defendants who fraudulently misrepresented that the leasehold included an adjoining terrace); *see also* Shelley v. Paddock, [1980] 1 Q.B. 348 (Eng. C.A.) (similar result on similar facts).
114. [1990] 2 W.L.R. 987 (Eng. C.A. 1989) (decedent's act of suicide held not to bar his family's negligence suit against jailers on *ex turpi causa* grounds because suicide was no longer a crime and no longer shocked the public conscience).
115. [1986] 1 All E.R. 676, 687 (Q.B.) (Hutchison, J.) (plaintiff who was knowingly involved in a forged check scheme could not recover from bank for negligently cashing the check).
116. In *Saunders v. Edwards*, Lord Justice Nicholls adopted this formulation, but stated that he would add to the end of the second element the words "or encouraging

The existence of two separate approaches in *ex turpi causa* tort cases in England leaves substantial room for confusion.[117] However, often the two rationales lead to similar results.[118] As noted by Lord Hunter in the Scottish case, *Winnik v. Dick*,[119] which barred a suit by a passenger against the driver of a car when both had been drinking together all day:

> It was submitted that the pursuer's claim was defeated by application of the brocard ex turpi causa non oritur actio, either because in law one joint participant would not in such circumstances owe a duty of care to the other joint participant or because on grounds of public policy, the court would not countenance nor adjudicate on a claim by one such joint participant against another. I see no reason why a Scottish court should not, *on the basis of one or other or both of these principles*, arrive in appropriate circumstances at a result the same as that reached in several cases in other jurisdictions [(*i.e.*, dismissal of the suit)] to which we were referred.[120]

C. *Canada*

Canadian cases have wandered down several paths in an attempt to determine the proper role of the *ex turpi causa* defense.[121] Perhaps their very indecisiveness and confusion helped the Supreme Court of Canada decide, in 1993, to reject the defense almost completely in tort cases. Before we address that landmark decision, however, let us quickly discuss the history of this defense in Canada, a defense that was enjoying a revival until the ax fell in 1993.

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others in similar criminal acts." *Saunders*, [1987] 1 W.L.R. at 1132.

117. The inherent vagueness of the variety of tests available means that "in troublesome cases there may well be disagreements concerning (a) the proper application of the [*ex turpi causa*] doctrine; (b) the quality of turpitude required; (c) the degree of connection necessary between it and the plaintiff's damage; and (d) the purposes to be served by denying the plaintiff a remedy." Williams, *supra* note 111, at 749.

118. For example, in *Pitts*, Lord Justice Beldam refused to allow plaintiff to recover, reasoning that the public conscience was so offended by those who would drink and drive that no court should lend its assistance to a plaintiff injured while jointly engaged in such activity. Pitts v. Hunt, [1990] 3 W.L.R. 542 (Eng. C.A.). Reaching the same result, Justices Balcombe and Dillon refused recovery because, following *Jackson*, they were unable to determine a standard of care owed by defendant driver to plaintiff passenger in such a joint drunken endeavor. *Id.* at 559 (Balcombe, L.J.), 569 (Dillon, L.J.).

119. 1983 Sess. Cas. 48 (Inner House).

120. *Id.* at 189 (emphasis added) (citing cases such as *Smith v. Jenkins*, 119 C.L.R. 397 (1969) (Austl.), and *Ashton v. Turner*, [1981] 1 Q.B. 137).

121. Indeed, some Canadian courts have dismissed cases on the basis of the doctrine without any attempt to develop a theoretical foundation for doing so. *E.g.*, Johnson v. Royal Can. Legion Grandview Branch No. 179, [1988] 5 W.W.R. 267, 271 (B.C.C.A.) (plaintiff's claim for injuries sustained in a fight dismissed on *ex turpi causa* grounds because plaintiff's act of fighting in a public place violated statute).

1. Public Policy

Several earlier Canadian cases had used a public policy approach in invoking the *ex turpi causa* defense to defeat tort claims. A leading Canadian public policy case, *Tallow v. Tailfeathers*,[122] was decided by the Alberta Supreme Court. After drinking all night and stealing a car, plaintiffs were seriously injured when defendant lost control of the car. Thus, like Australia's *Godbolt* and *Smith*, the case involved a joint criminal enterprise.

The *Tallow* court adopted *Godbolt's* public policy approach to determine when *ex turpi causa* should bar recovery by tort plaintiffs. Judge Clement concluded that there were two prerequisites to successful invocation of the defense by defendants: (a) the plaintiff's act had to be one that could be characterized as having "such a quality of turpitude that it must be regarded as anti-social," and (b) the plaintiff's claim had to "arise out of the commission of that act" (requiring a direct, but not a causal, connection).[123]

Cases from several other Canadian provinces had also adopted a public policy approach.[124]

2. Duty

Other Canadian decisions had adopted a "duty" approach, reminiscent of Australia's *Smith* and *Jackson* decisions.[125] Indeed, some courts

122. 44 D.L.R.3d 55 (Alta. 1973).
123. *Id.* at 61.
124. *E.g.*, Caleval v. Miller, 26 Sask. R. 209 (Q.B. 1983) (plaintiff injured while assaulting victim in car when victim attempted to drive away barred from recovery in order to avoid offending the "public conscience"); Mack v. Enns, 30 B.C.L.R. 337, 345 (1984) (plaintiff gang member who kicked car of rival gang in attempt to provoke a fight was barred from recovery against driver of second rival gang car who accidentally ran over plaintiff in the melee; purpose of the defense stated to be "to defend the integrity of the legal system" by avoiding results "manifestly unacceptable to fair-minded, or right-thinking, people"); Danluk v. Birkner, [1946] 3 D.L.R. 172, 178 (Ont. C.A.) (in a case also based in part on duty concept, court denied recovery to gambler who stepped out of second-story door with no attached staircase while escaping a police raid; public policy prevents such a plaintiff from invoking assistance of courts).
125. Phillips v. Vespini, No. 287, 1988 Ont. C.A. LEXIS 158 (plaintiff passenger could not recover from defendant driver for injuries arising out of accident occurring during pursuit by police; court followed *Smith* by denying that it was applying *ex turpi causa* defense, yet reached identical result as if doctrine had been applied); Joubert v.

had gone so far as to hold that the *ex turpi causa* defense in Canada was available *only* in cases of joint criminal enterprise.[126]

3. *Direct Connection*

Several more recent Canadian cases involving joint criminal enterprises barred recovery on *ex turpi causa* grounds based on a "direct connection" rather than a "causal connection" approach.[127] On the other hand, many courts rejected the defense where there was not at least some general causal link between the illegality and the plaintiff's injury.[128] These cases are difficult, if not impossible, to reconcile.

Even in the heyday of the *ex turpi causa* defense in Canada there were courts holding that the defense had been effectively eviscerated by legislation eliminating the all-or-nothing contributory negligence

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Toronto Gen. Trusts Corp., [1955] 3 D.L.R. 685 (Man. C.A.) (intoxicated passenger could not recover for injuries sustained due to carelessness of intoxicated driver where the two were jointly engaged in the criminal venture of drunken driving); Tomlinson v. Harrison, 24 D.L.R.3d 26 (Ont. High Ct. 1971) (same); Rondos v. Wawrin, 68 D.L.R.2d 658 (Man. C.A. 1968) (same); Miller v. Decker, [1955] 4 D.L.R. 92 (B.C.C.A.) (same); Danluk v. Birkner, [1946] 3 D.L.R. 172, 177 (Ont. C.A.) (in a case that also contained some elements of the public policy approach, *ex turpi causa* defense was held to bar recovery by plaintiff who sustained injuries when he ran out a second-story door with no attached staircase during a police raid of an illegal gambling establishment; plaintiff was neither invitee nor a licensee and was therefore owed no duty by defendant). *But see* Foster v. Morton, 4 D.L.R.2d 269 (N.S. 1956) (recovery allowed by decedent passenger's estate against defendant drunken driver).

126. *E.g.,* Betts v. Sanderson Estate, 53 D.L.R.4th 675 (1988) (Can.) (plaintiff's driving while intoxicated alongside intoxicated defendant did not amount to joint criminal enterprise which would bar all recovery by plaintiff under *ex turpi causa* defense); Funk v. Clapp, 35 B.C.L.R.2d 222 (C.A. 1986) (family of prisoner who committed suicide in cell not barred by immorality of the act of suicide from pursuing negligence claim against jailers); Teece v. Honeybourn, 54 D.L.R.3d 549, 5 W.W.R. 592 (B.C. 1974) (plaintiff car thief attempting to resist arrest not barred from recovery against police officer who carelessly shot plaintiff).

127. *E.g.,* Tomlinson v. Harrison, 24 D.L.R.3d 26 (Ont. High Ct. 1971) (denying plaintiff passenger recovery from defendant driver for injuries sustained in accident occurring during police chase after plaintiff and defendant got drunk and stole the car); Rondos v. Wawrin, 68 D.L.R.2d 658, 64 W.W.R. 690 (Man. C.A. 1968) (denying recovery to plaintiff who knew he was riding in a car stolen by defendant driver for injuries sustained in accident occurring during police chase); *see also* Mongovius v. Marchand, 44 C.C.L.T. 18 (B.C. 1988) (dismissing drunken passenger's suit against drunken driver on *ex turpi causa* grounds because of the "demonstrable causal link between the plaintiff's participation in the illegality and the injuries").

128. *E.g.,* Pugliese v. Taxiarchis, 1989 Ont. C.J. LEXIS 96 (Ont.) (noting that illegal drug pickups and sales had largely ended when defendant driver caused accident injuring plaintiff passenger); Bond v. Loutit, 2 W.W.R. 154 (Man. Q.B. 1979) (holding that illegal taking of vehicle had nothing to do with the negligent way in which defendant later drove it, injuring plaintiff).

defense.[129] This fact, coupled with the inconsistent reasoning and results of Canadian *ex turpi causa* cases—only some of which could be explained by province-to-province variations—created a most unsatisfactory situation.[130] Lower courts called for the Canadian Supreme Court to bring clarity to the issue.[131] The Supreme Court's ultimate conclusion surprised many.

4. *Canadian Supreme Court Decisions*

The Canadian Supreme Court first addressed the illegality defense in tort cases in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*,[132] which involved allegations of a business conspiracy by defendants to drive competitors, including plaintiff, out of business. Defendants raised an *ex turpi causa* defense because plaintiff had some level of voluntary participation in defendants' scheme by seeking to become the sole supplier to defendants' combine of lightweight aggregate for the production of concrete. The court discussed several cases, but made no definitive pronouncements, concluding: "Whatever the state of the law [regarding *ex turpi causa*] may be at the present time," plaintiff must lose because there was no causal relationship between the illegal acts of defendants and plaintiff's injury.[133]

The language in *Canada Cement* was, perhaps, a vague hint that the Canadian Supreme Court was not receptive to the *ex turpi causa* defense in tort cases. A clearer signal came in the 1992 case, *Norberg v. Wynrib*,[134] in which a male physician prescribed a painkiller to an addicted female patient in exchange for sexual favors. The patient sued the doctor for damages on several theories, including assault and battery, negligence, and breach of fiduciary duty. The physician raised an *ex*

129. *E.g.*, Lewis v. Sayers, 13 D.L.R.3d 543, 550 (Ont. Dist. Ct.) (defense implicitly abolished by legislation eliminating contributory negligence and replacing it with a comparison of plaintiff's "fault" as well as "negligence"); Funk v. Clapp, 35 B.C.L.R.2d 222, 233 (C.A. 1986) (same).

130. Indeed, one author noted that "[t]he Canadian experience with the defence of *ex turpi causa non oritur actio* has not been happy." 1 G.H.L. FRIDMAN, THE LAW OF TORTS IN CANADA 352 (1989).

131. *E.g.*, Betts v. Sanderson Estate, 53 D.L.R.4th 675, 682 (1988) (Can.).

132. 145 C.L.R.3d 385 (Can. 1983).

133. *Id.* at 404. The court did not discuss what level of causation (direct or proximate) was needed to activate the defense.

134. 92 D.L.R. 4th 449 (Can. 1992).

turpi causa defense, noting that plaintiff had entered a plea of guilty to the criminal offense of "double doctoring" (obtaining narcotic prescription drugs from a doctor without disclosing particulars of prescriptions from other doctors in violation of the Narcotic Control Act). Again, no definitive pronouncement was issued regarding the *ex turpi causa* defense. However, Judge LaForest concluded that the defense should not succeed because there was "no causative link" between the injury and plaintiff's crime. Even if plaintiff had been relying on defendant alone for her drugs, she would have suffered the same harm.[135] Also, Judge Sopinka concluded that the key to the *ex turpi causa* defense was the public policy of preventing the administration of justice from being tainted.[136] Because society's views of what is fair-minded or right-thinking regarding the claims of law-breakers has changed over the years, Sopinka was convinced that "the administration of justice will suffer no disrepute in the eyes of the public by reason of this court's lending its assistance to the [plaintiff] in this case."[137]

The death knell for the *ex turpi causa* defense in most Canadian tort cases was finally sounded by the Canadian Supreme Court in its 1993 decision in *Hill v. Hebert*.[138] Defendant owned a "souped-up muscle car." He and plaintiff had been drinking. The car stalled on a rough gravel road with a sharp drop-off on one side. Defendant concluded that the only way to start the car was a "rolling start," because he could not find the keys that had shaken out of the ignition. Despite plaintiff's arguably intoxicated state, defendant, at plaintiff's request, allowed plaintiff to drive when they started the car rolling. Plaintiff lost control of the car, causing serious injuries to himself. Plaintiff sued defendant in negligence. Defendant raised the *ex turpi causa* defense.

The trial court apportioned liability at seventy-five percent for defendant and twenty-five percent for plaintiff, allowing partial recovery. The court of appeal reversed, holding that the *ex turpi causa* defense barred any recovery whatsoever.[139] The Canadian Supreme Court

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135. *Id.* at 469.
136. *Id.* at 483.
137. *Id.*
138. [1993] 2 S.C.R. 159.
139. 53 B.C.L.R.2d 201 (C.A. 1991). Writing for the majority, Judge Gibbs held that *ex turpi causa* is not limited to cases of joint criminal enterprise, but is available any time a plaintiff's claim is so tainted with criminality or immorality that public policy prevents the courts from aiding plaintiff. *Id.* at 210-11. Dissenting, Judge Southin followed the opinion of Judge Windeyer in *Smith*, holding that *ex turpi causa* has no place in tort law, but reaching precisely the same result as if it did by holding that defendant owed no duty to plaintiff. *Id.* at 215-16.

restored the trial court's judgment in favor of plaintiff.[140]

In an extended opinion, Judge Cory rejected the basic rationales that have been proffered in support of the *ex turpi causa* defense in tort cases. He concluded that the defense undermined the policies that eliminated contributory negligence as an absolute defense, and that "the defence of *ex turpi causa* should not be applied in tort cases."[141]

Judge McLachlin, with whom Judges Iacobucci, LaForest, and L'Heureux-Dube concurred, also harshly criticized the *ex turpi causa* defense in tort cases, reserving its application for an extremely narrow set of factual situations.[142] These limited situations will be explored later in this Article.[143]

After *Hill*, there is very little room for the *ex turpi causa* defense in tort cases in Canada.

D. New Zealand

New Zealand's jurisprudence contains relatively few cases involving *ex turpi causa* in the tort area, but recent decisions have shown an implicit hostility to the defense.[144]

In *Fletcher v. National Mutual Life Nominees, Ltd.*,[145] essentially an accountants' liability case, litigation arose out of the collapse of a group of companies known as the AIC Group. AIC Securities was a money

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140. [1993] 2 S.C.R. at 225. However, the majority did alter the allocation of fault from 75%-25% to 50%-50%. In a dissent, Judge Sopinka explained that he would have denied recovery on *ex turpi causa* grounds, using a public policy approach. *Id.* at 192 ("The true basis for denying recovery in such circumstances is the court's reluctance to lend its assistance to persons involved in serious criminal activity when to do so would reflect adversely on the administration of justice."). However, Judge Sopinka also expressed support for the "no duty" approach of *Smith*. *Id.* at 193. Judge Gonthier generally agreed with Sopinka. *Id.* at 195.

141. *Id.* at 223.

142. *Id.* at 172-79.

143. *See infra* notes 356-64 and accompanying text.

144. Earlier cases exhibited the same hostility. *See* Green v. Costello, 1961 N.Z.L.R. 1010 (Sup. Ct.) (mere fact that the plaintiff is a wrongdoer because he struck the first blow in a fight is not a general defense to tort action); LeBagge v. Buses Ltd., 1958 N.Z.L.R. 630 (Sup. Ct.) (plaintiff's violation of regulatory statute by driving his truck seven straight days without a break of at least 24 hours held to not necessarily affect amount of recovery in suit under Death by Accidents Compensation Act); Canning v. The King, 1924 N.Z.L.R. 118 (decedent driver's violation of statutory regulation requiring stopping at railroad crossing treated as contributory negligence rather than as illegal act).

145. [1990] 1 N.Z.L.R. 97 (High Ct.).

market operator required by New Zealand law to operate under a trustee. National Mutual Life was the trustee and hired Deloitte Haskins & Sells as auditor for AIC. Following collapse of the group of companies, depositors sued National Mutual Life and recovered NZ$6.75 million for negligence and breach of trust. National Mutual Life filed a third party claim for negligence against Deloitte. The primary issue litigated in the case was whether Deloitte owed a duty of care to third party National Mutual Life. However, the High Court in Auckland also addressed Deloitte's *ex turpi causa* defense. Essentially, Deloitte argued that National Mutual Life's own negligence and, more importantly, breach of fiduciary duty, barred its recovery from Deloitte. Judge Henry gave short shrift to the defense:

> The maxim ex turpi causa non oritur actio, certainly when separated from any historical basis it may have provided for the defence of contributory negligence, has no application to the present factual situation. There is a school of thought which places its proper field of application as being in the law of contract. Whether or not that be so, there is no illegality or moral turpitude in the conduct of National Mutual Life Nominees which would give such a defence to Deloitte. Public policy could not possibly require that this action should be dismissed because of lack of diligence in carrying out the duties of a trustee.[146]

Fletcher thus involved a brief discussion of a public policy approach. The "public conscience" theory was applied in *R v. Collis*[147] to reach an interesting result. Police searched Collis's property and found cannabis and NZ$103,000 in cash. Collis initially denied ownership of the money and at trial sought to provide an innocent explanation for his possession of it. After he was convicted, he claimed that the money was his after all, earned through illegal drug dealing. He sought return of the money. He was then charged with selling cannabis, but the charge was dismissed on a technicality. The trial court held that the money belonged to Collis, and ordered that it be paid to reduce a tax liability he owed. The Crown argued that because the money had been illegally obtained, it should have been paid into the government's Consolidated Fund given that courts should not help wrongdoers benefit from their criminal activity.

A spirited dissent by Judge Wylie supported the Crown's position, based on the "conscience test" approach to the *ex turpi causa* defense.[148] However, Judges Casey and Hardie Boys disagreed and ordered the money returned to Collis. An important part of their holding

146. *Id.* at 108 (citations omitted).
147. [1990] 2 N.Z.L.R. 287 (C.A.).
148. *Id.* at 300-07.

appeared to be simply that Parliament had by statute ordered forfeiture of drug money in certain circumstances, and this particular case was not covered by the statute; therefore, to refuse to order return of the funds to Collis would be tantamount to ordering a forfeiture not authorized by Parliament.[149]

Both judges also discussed the "conscience test," emphasizing a limitation upon it as explained by Lord Justice Kerr in *Euro-Diam Ltd. v. Bathurst.*[150] Kerr gave a lengthy synopsis of the public conscience test as he understood it,[151] stating in part that where granting relief to

149. *Id.* at 293.
150. [1987] 2 All E.R. 113 (Q.B.).
151. Kerr stated:

(1) The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts: see para 2(iii) below.

The problem is not only to apply this principle, but also to respect its limits, in relation to the facts of particular cases in light of the authorities.

(2) The authorities show that in a number of situations the ex turpi causa defence will prima facie succeed. The main ones are as follows.

(i) Where the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim: . . . For that purpose it makes no difference whether the illegality is raised in the plaintiff's claim or by way of reply to a ground of defense. . .

(ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct. . .

(iii) Where, even though neither (i) nor (ii) is applicable to the plaintiff's claim, the situation is nevertheless residually covered by the general principle summarized in (i) above. . . .

(3) However, the ex turpi causa defence must be approached pragmatically and with caution, depending on the circumstances. . . . This applies in particular to cases which at first sight appear to fall within para (2)(i) or (ii) above.

Thus: (i) Situations covered by para 2(i) above must be distinguished from others where the plaintiff's claim is not founded on any illegal act, but where some reprehensible conduct on his part is disclosed in the course of the proceedings, whether by the plaintiff himself or otherwise. . . . But where both parties are equally privy to the illegality the plaintiff's claim will fail, whether raised in contract or tort, for potiorest condicio defendantis [the position of the defendant is the stronger]. . . .And an action on a contract the terms of which are falsely recorded in documents intended to conceal the true agreement between the parties may be defeated by the ex turpi causa defence. . . .

(ii) In situations covered by para 2(i) and (ii) above the ex turpi causa

plaintiff would enable him to benefit from his criminal conduct the defense will still fail "*if* his claim is for the delivery up of his goods, or for damages for their wrongful conversion, *and if* he is able to assert a proprietary or possessory title to them, even if this is derived from an illegal contract."[152] Justice Casey stressed that he preferred a very narrow application of the "conscience test."[153] Justice Hardie Boys concluded that Kerr's limitation on the defense "allays in large measure the misgivings I have had about the subjectiveness of a 'conscience test'."[154]

Thus, *ex turpi causa* has a relatively small presence in New Zealand jurisprudence.[155]

E. The United States

The doctrine of *ex turpi causa* has a long and checkered history in American tort law, although, as noted earlier, it has virtually disappeared in recent years.

Two strains of American tort cases apply the *ex turpi causa* doctrine. The first is a public policy strain keyed to the notion that courts should not lend assistance to those whose injuries are related to their own illegal actions.[156] These cases stress the moral component of the law. Indeed, a tone of strong moral outrage permeates many of the cases recognizing the *ex turpi causa* defense.[157] The second strain relates to

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> defence will also fail if the plaintiff's claim is for the delivery up of his goods, or for damages for their wrongful conversion, and if he is able to assert a proprietary or possessor title to them even if this is derived from an illegal contract.

Id. at 28-29.

152. *Collis*, [1990] 2 N.Z.L.R. at 293 (Casey, J.).

153. *Id.*

154. *Id.* at 299.

155. *But see* Tamworth Indus. Ltd. v. Attorney-General, [1991] 3 N.Z.L.R. 616 (following *R v. Collis* in refusing to use *ex turpi causa* to bar return to plaintiff of unexplained cash seized by police).

156. This is, of course, an important part of the rationale for refusing to enforce illegal contracts. It also accounts for a second line of cases wherein U.S. courts, unlike their New Zealand counterparts just discussed, refuse to allow plaintiffs to profit from their wrongdoing in cases where plaintiffs seek to recover money or other property seized by police. *E.g.,* Carr v. Hoy, 2 N.Y.2d 185 (1957) (plaintiff who pleaded guilty to outraging public decency following scheme that charged persons $10 each for privilege of attending a farm outing and there photographing female models, some of whom posed nude, could not recover ticket moneys seized by sheriff).

157. For example, in Lencioni v. Long, 361 P.2d 455 (Mont. 1961), plaintiff bartender was sprayed in the eye with tear gas as he looked through an uncovered peephole to turn away drunken patrons from a house of prostitution. Recovery from plaintiff's employer was denied on *ex turpi causa* grounds, the court complaining that "the salient facts are rampant with a reeking libidinous atmosphere that should never

the causal link between the plaintiff's illegal acts and the injuries sustained.

1. Proximate Causation

The causation approach will be discussed first. The principle case with respect to this approach is *Bosworth v. Swansey*,[158] which pronounced what is known as the "Massachusetts rule." The plaintiff in *Bosworth* was injured because of a defect in a road for which defendant was responsible. The injury occurred on a Sunday, however, as plaintiff traveled in violation of a Massachusetts statute prohibiting Sunday travel for secular purposes. The court denied recovery on grounds of the *ex turpi causa* defense. Because the injury occurred as plaintiff traveled illegally, plaintiff was barred from recovery. In a "but for" sense, the plaintiff's illegal action caused his own injury. However, in no manner could one argue that proximate causation was present.[159] Nonetheless, *Bosworth* and similar cases were strongly defended on grounds that the plaintiff's own actions were the "immediate, active cause of the damage" sustained.[160]

The Massachusetts rule was quite popular in the mid-to-late 1800s. Plaintiffs were denied recovery not only because they illicitly traveled on Sundays, but also because they violated traffic regulations,[161] other

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permeate a claim of alleged negligence." *Id.*.

158. 63 Mass. (10 Met.) 363 (1845); *see also* Lyons v. Desotelle, 124 Mass. 387 (1878) (holding that unlawful traveling on Sunday necessarily contributes to an accident and therefore bars recovery); Hinckley v. Inhabitants of Penobscot, 42 Me. 89 (1856) (same).

159. Eventually, most courts rejected the *Bosworth* result for two reasons: (1) lack of proximate cause, and (2) insufficient gravity of the criminal offense to justify denial of recovery.

160. Davis, *supra* note 12, at 513. Davis's reasoning seems curious today. He essentially concluded that among all the conditions that lead to an injury, the active one occurring most immediately preceding the accident is the cause of the accident. For example, according to Davis, if defendant builds a defective bridge and carelessly maintains it, this creates a mere passive condition. The actual cause of the accident is plaintiff's riding across the bridge on his way from home to work in violation of a Sunday traveling ordinance, regardless of the fact that the same accident would have occurred on Monday morning (when plaintiff was traveling the same route completely legally) if it had not occurred on Sunday. *Id.* at 509.

161. *E.g.*, Heland v. City of Lowell, 85 Mass. (3 Allen) 407 (1862) (plaintiff exceeding speed limit barred from recovery because of illegal nature of act); Tuttle v. Lawrence, 119 Mass. 276 (1876) (same).

safety regulations,[162] or public morals,[163] even if those violations were not causally related to their injuries. Through this rule and related strategies,[164] courts in Massachusetts and other jurisdictions created a milieu extremely hostile to personal injury litigation.

Bosworth's overly broad view of causation was eventually rejected, however, because it erroneously assumed "that a mere concurrence of the illegal act with the accident in point of time is to be treated as a concurring cause of the injury, which it is not, but rather a condition or incident merely."[165] Virtually all American jurisdictions had rejected the Massachusetts rule by the early 1900s, substituting a requirement that the illegality not just coincide with the timing of the injuries but *proximately cause* the injuries.[166] Proximate causation was viewed as

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162. *E.g.*, Read v. Boston & Albany R.R. Co., 4 N.E. 227 (Mass. 1885) (plaintiff locomotive engineer barred from recovering for injuries caused by defective track because he was running an unauthorized Sunday train).

163. *E.g.*, Curtis v. Murphy, 22 N.W. 825 (Wis. 1885) (plaintiff not allowed to recover from hotel whose clerk stole plaintiff's money because plaintiff checked into hotel with prostitute).

164. For a time, Massachusetts courts also threw out similar cases by labeling plaintiffs as trespassers disentitled to the law's protection. *E.g.*, Widronak v. Lord, 168 N.E. 799 (Mass. 1929) (passenger in car being driven the wrong way down a one-way street was an outlaw and trespasser not owed any duty by negligent defendant); Hanson v. Culton, 169 N.E. 272 (Mass. 1929) (plaintiff from Rhode Island who had not registered his car in Massachusetts was a trespasser who could not recover from negligent defendant who caused auto accident). *See generally* Irving S. Altshuler, Note, *Automobiles—Use and Operation in Violation of Statute—Effect on Civil Rights*, 10 B.U. L. REV. 211 (1930).

165. Broschart v. Tuttle, 21 A. 925, 928 (Conn. 1890) (allowing recovery by a speeding horseman whose violation of the speed limit did not cause the accident complained of).

166. *E.g.*, Currelli v. Jackson, 58 A. 762 (Conn. 1904) (failure of employee to obtain town clerk's written permission to use dynamite did not bar suit against employer for injuries sustained due to employer's alleged negligence in requiring employee to use frozen dynamite); Gilman v. Central Vermont Ry., 107 A. 122 (Vt. 1919) (fact that plaintiff was driving unregistered vehicle did not bar recovery from railroad for negligence because violations of criminal statutes "do not preclude a recovery unless there is a proximate, causal connection between the violation of the statute and the injury complained of." *Id.* at 124); Hoadley v. International Paper Co., 47 A. 169 (Vt. 1899) (fact that plaintiff was working on Sunday in violation of statute did not prohibit recovery from negligent employer where that fact was not proximate cause of injury); Illinois Cent. R.R. v. Messina, 72 So. 779 (Miss. 1916) (fact that plaintiff was illegally riding without paying fare by permission of the engineer did not bar negligence action against railroad where such free transportation was an incidental condition of, and not a contributing cause to, plaintiff's injury); Johnson v. Boston & M.R.R., 143 A. 516 (N.H. 1928) (fact that plaintiff operated car without license did not bar negligence recovery unless it was causally related to injury); Sutton v. Town of Wauwatosa, 29 Wis. 21 (1871) (plaintiff driving cattle to market on Sunday in violation of statute allowed to recover from maintainer of defective bridge); Baker v. City of Portland, 4 A. 274 (Me. 1870) (plaintiff who violated speeding ordinance not barred from recovery where speed at time of accident did not proximately cause accident); Baldwin v. Barney, 12 R.I. 392

a much fairer approach.[167]

Invocation of the *ex turpi causa* defense in tort cases is rare in America today, but the occasional modern American case giving credence to the defense tends to stress proximate cause as a prerequisite to the defense.[168]

(1879) (illegal Sunday traveler allowed to recover from reckless driver); Connolly v. Knickerbocker Ice Co., 21 N.E. 101 (N.Y. 1889) (infant plaintiff riding unlawfully on trolley platform allowed to recover); Platz v. City of Cohoes, 89 N.Y. 220 (1882) (illegal Sunday traveler allowed to recover); Cohen v. Manuel, 39 A. 1030 (Me. 1898) (unlicensed peddler of goods not barred from recovering from innkeeper for loss of goods while he stayed at inn); Kansas City v. Orr, 61 P. 397 (Kan. 1900) (fact that decedent was working on Sunday in violation of statute did not bar wrongful death action because violation was not proximate cause of the injury).

Most courts also rejected fairly early on the Massachusetts trespass theory alluded to earlier, *supra* note 164. *See generally* Sears v. Bernardo, 115 A. 647 (R.I. 1922) (disregard of one-way sign is evidence of negligence but does not render violator an outlaw); Moore v. Hart, 188 S.W. 861, 863 (Ky. 1916) (Massachusetts "outlaw" rule is a "cruel and almost savage doctrine" and deprives violator "of all consideration dictated by the plainest principles of humanity"); Rapee v. Beacon Hotel Corp., 56 N.E.2d 548 (N.Y. 1944) (plaintiff who fell down elevator shaft in hotel while registered under a false name as a married person with woman who was only his fiancee held a trespasser, but not an outlaw disentitled to recover).

167. *See generally* Magdalen G. H. Flexner, Comment, *Torts: Negligence: Illegal or Improper Purpose as Affecting Status*, 31 CORNELL L.Q. 89 (1945).

168. *E.g.*, Janusis v. Long, 188 N.E. 228 (Mass. 1933) (alien illegally in country not barred for that reason from recovering in negligence from defendant for injuries arising out of auto accident); Meador v. Hotel Grover, 9 So. 2d 782 (Miss. 1942) (fact that plaintiff's decedent was killed by defendant hotel's negligent operation of elevator while visiting hotel with prostitute did not bar recovery because injury was not suffered as proximate result of committing illegal act); Curry v. Vesely, 348 P.2d 490 (N.M. 1960) (plaintiff, who apparently had abandoned earlier decision to participate in gang fight but was injured in a car wreck on his way to check on his brother's safety, was allowed to sue driver of the other car who had participated in the rumble); Havis v. Iacovetto, 250 P.2d 128 (Colo. 1952) (passenger for hire allowed to sue negligent driver even though accident occurred as plaintiff returned from illegal gambling expedition to Utah because gambling was not a contributing cause to the accident); Johnson v. Thompson, 143 S.E.2d 51 (Ga. Ct. App. 1965) (fact that plaintiff patron of drive-in movie theater was injured as he walked to snack bar to pick up an illegal bingo prize did not bar recovery absent causal relation between illegal act and injuries sustained); Manning v. Noa, 76 N.W.2d 75 (Mich. 1956) (plaintiff injured when leaving church after playing illegal bingo game not barred from recovery because injury was not the proximate result of her committing an illegal act); Bagre v. Daggett Chocolate Co., 13 A.2d 757 (Conn. 1940) (plaintiff who broke off tooth when biting into a piece of candy made by defendant not barred from recovery by fact that he won the candy in an illicit bingo game because there was no causal relation between the illegality and the injury); Martinez v. Rein, 146 So. 787 (La. Ct. App. 1933) (plaintiff's violation of city ordinance by placing scale on sidewalk—where it was struck by car in accident caused by defendant's negligence—did not bar recovery because violation was not a contributing cause of accident).

2. *Public Policy*

The second major strain of American tort cases applying the *ex turpi causa* doctrine is primarily confined to the jurisdiction of Virginia. Although similar decisions are occasionally found in other jurisdictions, Virginia has produced most of the recent court decisions applying a broad public policy approach to *ex turpi causa*, reflecting a strong commitment to the principal that a court should not aid a plaintiff who has acted illicitly. Thus, a wrongful death action was rejected because the decedent had committed suicide;[169] a wife who contracted venereal disease from her husband was denied recovery because the transmission happened during an illicit act of intercourse occurring before they were married;[170] and a wrongful death action against a negligent abortionist was barred because decedent knew the abortion was illegal.[171]

Virginia courts stress that a plaintiff's illegal act constitutes not merely contributory negligence or assumption of risk, but totally bars recovery. The reason—explained in the case of *Zysk v. Zysk* involving the transmission of venereal disease—is simply that "courts will not assist the participant in an illegal act who seeks to profit from the act's commission."[172]

3. *Modern American Rule*

Although occasional American cases outside Virginia still apply *ex turpi causa* to dismiss tort claims, the doctrine is seldom invoked today. Prosser and Keeton accurately note that:

> [W]ith few exceptions, the courts have long discarded the doctrine that any violator of a statute is an outlaw with no rights against anyone, and have recognized that, except in so far as the violator must resort to an illegal contract or an illegal status as the basis of the defendant's duty to him, one who violates a criminal statute is not deprived of all protection against the torts of others. Thus the Sunday driver or the unlicensed operator of an unlicensed car, although he is a criminal, can recover for his injuries if in other respects he is exercising proper care.

169. Hill v. Nicodemus, 755 F. Supp. 692 (W.D. Va. 1991), *aff'd*, 979 F.2d 987 (4th Cir. 1992).

170. Zysk v. Zysk, 404 S.E.2d 72 (Va. 1990).

171. Miller v. Bennett, 56 S.E.2d 217 (Va. 1949).

172. *Zysk*, 404 S.E.2d at 722; *see also* Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982) (state trooper fired after adultery charge held not protected by civil rights law, 42 U.S.C. § 1983, because of his participation in the immoral act).

The accepted rule now is that a breach of statute by the plaintiff is to stand on the same footing as a violation by the defendant.[173]

Thus, in America the general rule is that a plaintiff's violation of a criminal statute may constitute contributory negligence[174] or assumption of risk, but it generally does not completely bar a plaintiff's recovery on *ex turpi causa* grounds. Except for the occasional Virginia case applying a public policy approach, or the occasional New York case applying a public policy view coupled with the more traditional proximate cause requirement,[175] few U.S. tort claims today are barred by the *ex turpi causa* defense.

This is consistent with the *Restatement (Second) of Torts*, which provides: "One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime . . . ."[176]

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173. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 232 (5th ed. 1984) [hereinafter PROSSER & KEETON] (citations omitted) (emphasis added).

174. It may even constitute contributory negligence *per se* if the statute violated was enacted for the protection of others, including defendant. *E.g.*, Watts v. Montgomery Traction Co., 57 So. 471, 472 (Ala. 1912).

175. *E.g.*, Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984), discussed *infra* notes 232-38 and accompanying text.

176. RESTATEMENT (SECOND) OF TORTS § 889 (1977). The Restatement divides the potential scenarios for application of the rule into several categories:

First is the case of intentional harms by third persons. The Restatement provides this illustration: "A strikes B, who, unknown to A, has criminal possession of narcotics with intent to sell them. A is subject to liability to B."

Second is the case of negligent harms by third persons. The Restatement provides this illustration: "A negligently collides with and harms B, who is carrying contraband goods. A is subject to liability to B."

Third is the case of intentional harm to the person by a conspirator. The Restatement hypothesizes an example of one robber shooting another in a dispute over the spoils of a robbery. The shooting victim would have a cause of action for the physical injury, but no claim for the other's refusal to divide the spoils.

Fourth is the case of taking land or chattels from the illegal possession of another. Generally speaking, it is not a defense for A who stole a bike from B, that B had stolen it from its true owner. However, the Restatement suggests that a court may, as a matter of public policy, refrain from aiding B in such a claim until an attempt is made to contact the true owner and afford her an opportunity to intervene. The Restatement gives this illustration: "A has illegal possession of drugs that can be kept only for medicinal purposes. B seizes A's drugs. B is subject to liability to A." This result would be different if the chattel involved were not capable of legal use.

Fifth is the case of liability of a bailee to a bailor for goods illegally bailed. In such cases, bailment for an illegal purpose does not necessarily bar recovery by the bailor against the bailee for negligent harm to the bailed goods. However, if the return of the

Little notice was taken of the gradual disappearance of the *ex turpi causa* defense in American tort cases, because it did not affect the outcome of most cases. As the defense disappeared, the doctrines of contributory negligence and assumption of risk still served as complete defenses to recovery. Therefore, in most cases, abandonment of the defense neither aided plaintiffs nor harmed defendants.

However, contributory negligence has been gradually replaced by comparative negligence in the vast majority of American jurisdictions.[177] Today, a plaintiff's recovery may be reduced, but generally is not barred, by a plaintiff's simple carelessness, product misuse, or even knowing assumption of risk. Today, plaintiffs in personal injury cases are often recovering some or most of their damages in cases where their wrongdoing would have constituted a complete bar to recovery under previous interpretations of the *ex turpi causa* doctrine. Now that proportionate liability has replaced the total defenses that previously existed due to contributory negligence and assumption of risk, the gradual disappearance of the *ex turpi causa* defense in the United States takes on a new significance. It is surprising that the doctrine's revival in other western common-law jurisdictions has not been noted by American advocates and judges.

IV. A CRITIQUE OF COMMON-LAW JURISDICTION APPROACHES TO THE EX TURPI CAUSA DEFENSE

An initial step in determining whether the United States should revive the *ex turpi causa* defense in tort cases involves an analysis of the theoretical approaches to application of the defense that have been developed over time. A valid doctrine should have a strong theoretical underpinning and an articulated rationale that allows for clarity and consistency of application. Have the courts in other nations that have revived *ex turpi causa* formulated these necessary elements? This part will attempt to answer this query.

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chattel would aid in the commission of a crime ("as when a retail dealer who has received narcotics refuses to return them to the wholesaler . . . who intends to use them for illicit purposes"), a court will deny recovery.

Sixth is the case of the trespassing plaintiff. Here the Restatement borrows the duty concept of cases like *Smith v. Jenkins*, *see supra* notes 86-98 and accompanying text, stating that "a malicious mischief maker who is hurt by a defective condition of the premises that he is seeking to harm is denied recovery because the owner of the premises owes no duty of care with respect to him." *Id.*

177. *See infra* notes 336-38 and accompanying text.

The earlier survey of selected common-law jurisdictions demonstrates that there are four primary approaches to application of the *ex turpi causa* defense in tort actions.[178]

First, there is the legislative intent doctrine explicated in Australia's *Henwood* case.[179]

Second, Australia also produced the duty rule centered on the notion that co-venturers in crime owe each other no duty, in part because it would be impossible for the court to establish a standard of care in such cases. This rule arises from *Smith*, as refined in *Jackson*.[180]

Third is the public policy approach embodied in Australia's *Godbolt* case, in Canada's *Tallow* case, in England's "conscience test," and in Virginia's *Zysk* case.[181]

Fourth is America's causation approach, which transformed the Massachusetts rule's concurrent condition requirement into a proximate causation requirement.[182]

A. The Legislative Intent Test

As noted earlier, two members of the *Henwood* court concluded that depriving decedent (who had stuck his head out a window of the tram in order to vomit) of recovery because he had violated a safety rule was "[p]robably the last thing intended by the framers. . . ."[183]

This quotation highlights one of the most intractable problems with the legislative intent approach. Almost inevitably, in passing criminal legislation the legislature will not have considered the impact the law should have upon a private cause of action brought by one of its violators. This will be true whether the law involved is a minor safety regulation as in *Henwood*, or a major felony statute, as in *McCummings*. Indeed, the problem is amplified by the fact that, as in *Henwood*, the

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178. In establishing this categorization, it is not to be supposed that there is no overlap or interaction among the theories. The earlier description of these approaches clearly demonstrates that these categorizations often highlight a difference of emphasis only.

179. *See supra* notes 76-81 and accompanying text.

180. *See supra* notes 86-99 and accompanying text.

181. *See supra* notes 82-85 and accompanying text (*Godbolt*), notes 122-24 and accompanying text (*Tallow*), notes 109-20 and accompanying text ("conscience test"), and notes 170-72 and accompanying text (*Zysk*).

182. *See supra* notes 158-68 and accompanying text.

183. Henwood v. Municipal Tramways Trust, 60 C.L.R. 438 (1938) (Austl.).

factual circumstances which result in invocation of the *ex turpi causa* doctrine often tend toward the bizarre and unforeseen.

Inevitably, the legislative intent approach leaves courts groping in the dark, attempting to derive a conclusion as to legislative intent with absolutely no solid evidence upon which to base that conclusion. It is one thing for courts to do their best to exercise policy judgments when such is required. It is less satisfactory for courts to exercise policy judgments under the guise of applying a legislative intent that cannot be satisfactorily determined.[184] Naturally, the vagaries of statutory interpretation under such circumstances have led to inconsistent conclusions as to the meaning of specific statutes.[185] *Ex turpi causa* is a court-developed doctrine; its application is not satisfactorily determined by resort to imaginary legislative intent.[186]

Additionally, many cases do not involve violations of statutes, but simple violations of morals contrary to public policy as construed by the courts. Legislative intent cannot possibly be of assistance in such cases.

In short, the legislative intent approach is appropriate only in the exceedingly rare case where legislative intent clearly establishes that the legislature in passing a statute meant not only to regulate or criminalize conduct but also to deprive violators of their right to recover for injuries inflicted by others. In the remaining cases, the legislative intent approach is ineffectual if not disingenuous.

The main opinion in *Tallow*, written by Judge Clement, appropriately rejected the legislative intent approach of *Henwood* as "put[ting] an entirely different footing under the rule"[187] by shifting the focus from public policy analysis regarding the antisocial character of the plaintiff's

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184. This criticism has also been lodged regarding invocation of the illegality defense in contract law. John Shand, *Unblinkering the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144, 149 (1972) ("The reality of the situation is that the legislator has probably never applied his mind to the problem of whether the contract or right should be enforceable.").

185. *Compare* Monk v. Monk, 32 B.C.L.R.2d 240 (1989) (Family Compensation Act provisions do not render inappropriate the application of *ex turpi causa* defense arising from acts of deceased) *with* Funk v. Clapp, 35 B.C.L.R.2d 222 (C.A. 1986) (*ex turpi causa* defense should not use illegal acts of deceased to bar recovery to his family under Family Compensation Act).

186. Judges Dixon and McTiernan framed the key issue in a manner that restricts the *ex turpi causa* defense: "It appears to us that in every case the question must be whether it is part of the purpose of the law against which the plaintiff has offended to disentitle a person doing the prohibited act from complaining of the other party's neglect or default, without which his own act would not have resulted in injury." *Henwood*, 60 C.L.R. at 460. Because the legislature will almost never have considered the matter, courts will be unable to conclude that disabling the plaintiff from recovery was part of the legislative purpose. However, the presumption could just as easily have been framed oppositely, in a pro-defendant posture.

187. Tallow v. Tailfeathers, 44 D.L.R.3d 55, 64 (Alta. 1973).

behavior to the technical matter of statutory interpretation. This ignores the importance of turpitude that is the *sine qua non* of the doctrine.

Judge Clement further noted that "[t]o parse a section of the *Criminal Code* dealing with, say, theft or criminal negligence or driving while intoxicated, to determine whether it adds to or subtracts from the civil rights of a wrongdoer would be an unusual occupation."[188] It would also be a dangerous occupation. Such speculation can serve only to undermine the certainty of the law.[189]

B. The Duty Approach

1. Part One: Existence of Duty

As noted earlier, in *Smith*, an Australian court refused to allow one criminal co-venturer to recover from another for injuries negligently inflicted during the course of their criminal escapade, denying that the latter could owe a duty to the former under such circumstances. This approach was refined in *Jackson*, where the court reasoned that a duty is not owed because it would be impossible in the context of safecrackers blowing up a safe or bank robbers executing a getaway for the court to establish a standard of care.

Several drawbacks to the duty approach are apparent. First, it may be observed that although the *Smith* duty test gives some guidance in cases where defendant is charged with negligence, it is not helpful in cases where plaintiffs are pursuing other theories. Second, as Professor Weinrib asks, "If the focus of the defence is the act of illegality on the part of the plaintiff, of what relevance can it be that the defendant rather than a third party is an accomplice in the illegality or indeed that there is any accomplice at all?"[190] Third, the courts have not clarified what

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188. *Id.* at 65.

189. Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1914) ("[T]his sort of speculation as to unexpressed legislative intent is a dangerous business permissible only within narrow limits; and the tendency to overindulge it is responsible for much of the confusion in the law.").

190. Ernest J. Weinrib, *Illegality as a Tort Defence*, 26 U. TORONTO L.J. 28, 34 (1976). Professor Ford agrees, arguing that the principle of "legal inseverability" for purposes of responsibility for the acts of several persons joined together in commission of a wrong adverted to by Judge Kitto in *Smith*, "is a principle for the purposes of *criminal*, not civil responsibility. It is surely inappropriate to argue matters of civil liability on the basis of a rule designed for other purposes." Ford, *supra* note 95, at 39.

level of cooperation constitutes the sort of joint criminal activity that will lead to application of the doctrine. Must plaintiff's level of involvement be identical to defendant's for there to be no duty owed? What if plaintiff is not as involved as defendant in the crime, but her actions could be viewed as aiding and abetting? What if her actions do not constitute aiding and abetting, but nonetheless exhibit some involvement in the criminal act? No court applying the duty test has answered these questions.[191]

Fourth, while the duty approach plausibly applies where defendant is a co-conspirator in crime, it obviously has no application in other scenarios where the *ex turpi causa* defense is raised.[192] Apparently, it would not even be available to defendants in cases such as *McCummings*. In fact, the test produces two anomalies: (a) it allows defendant to profit from his own wrong in order to prevent plaintiff from profiting from hers, and (b) it puts innocent third parties at greater risk of liability than wrongdoing criminals. Regarding the first anomaly, a Canadian judge has noted:

> [C]onfining the barring of recovery to cases where the plaintiff and the defendant were engaged in a joint criminal act produces a paradoxical result. Assume that the plaintiff is injured by the defendant's negligence while the plaintiff is carrying out a criminal enterprise. If the defendant is also engaged in the criminal enterprise, the defendant will escape liability. But if the defendant is not involved in the criminal enterprise at all, he will be liable. *The net result of a principle intended to prevent a plaintiff from profiting from his own wrong would be to permit a defendant to profit from his own wrong.*[193]

This passage also highlights the second anomaly—that the *ex turpi causa* defense is available to criminals in situations where it would not protect innocent third parties. For example, the accident in *Smith* occurred when the car, driven by plaintiff's cohort in crime, went off the road and hit a tree. But assume instead that the accident had been partially caused by the careless driver of another vehicle. Under the duty approach enunciated in *Smith*, the co-conspirator defendant has an *ex turpi causa* defense that is not available to the non-criminal driver of the other car. Because he was not jointly engaged in a criminal venture with plaintiff, the driver of the other car is deprived of an absolute

191. *See generally* Bruce MacDougall, Ex Turpi Causa*: Should A Defence Arise from a Base Cause?*, 55 SASK. L. REV. 1, 25 (1991).

192. Indeed, some courts have explicitly limited the defense to cases of joint criminal activity. *E.g.*, Teece v. Honeybourn, 54 D.L.R.3d 549 (B.C. 1975).

193. Betts v. Sandersons Estate, 31 B.C.L.R.2d 1, 6 (1988) (Lambert, J.) (emphasis added).

defense.[194] "Justice hardly seems to be served by a rule which penalizes a defendant for his innocence but not for his guilt."[195]

Similarly, justice is not served by a rule which seems to provide at least a vague incentive for defendant to involve herself in plaintiff's illegal activity so as to create the conditions for application of the *ex turpi causa* defense.[196]

Furthermore, the duty approach confuses what should be two distinct concepts—the plaintiff's duty not to violate the law[197] and the defendant's duty of care (in a negligence case) or duty not to injure (in an intentional tort case).[198]

Additionally, despite protestations to the contrary by the very courts rendering the decisions, the denial of a duty renders the plaintiff, in

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194. Judge Kitto supplied this illustration:

> If, to take a strong example, the respondent in the present case had been an escaped convict travelling in the car in order to elude lawful pursuit but the appellant had been driving him in all innocence, the appellant would, I should think, have owed the respondent the same duty of care as he would have owed an ordinary passenger.

Smith v. Jenkins, 119 C.L.R. 397, 403 (1969) (Austl.).

195. W.J. Ford, *Tort and Illegality: The* Ex Turpi Causa *Defence in Negligence Law (Part Two)*, 11 MELB. U. L. REV. 164, 176 (1977).

196. *See* JOHN G. FLEMING, THE LAW OF TORTS 278 (7th ed. 1987). Fleming explains:

> There is really no reason in logic or policy for a different result where the plaintiff is involved in a joint illegal enterprise with the defendant: the plaintiff does not appear more culpable than if he had acted alone, and offering immunity to the defendant would be apt to encourage rather than deter the enterprise.

Id.; *see also* MacDougall, *supra* note 191, at 28. MacDougall states:

> If the law is willing to make the plaintiff an outlaw vis-à-vis a co-participant in illegality, then why not vis-à-vis anyone else? If, on the other hand, the innocent defendant is not allowed to take advantage of the defence, then should it not be refused to a "guilty" defendant? It is not a purpose of the law to encourage others to participate in wrongful acts in order to allow them to escape civil liability.

Id.

197. Professor MacDougall asks: "Why should it matter that they were involved jointly? If the court wishes to express its disapproval of the plaintiff's activity then only her activity should be of relevance to the court." MacDougall, *supra* note 191, at 28.

198. GLANVILLE WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 334 (1951). Williams notes:

> The duty not to smuggle is logically distinct from the duty to warn invitees of traps, just as the duty not to operate a car without a licence is distinct from the duty not to drive a car negligently; breach of the one should not be a defence to an action for breach of the other.

Id.

effect, *caput lupinum* in violation of so many basic principles of tort law.[199]

Finally, and perhaps most importantly, the duty test is so malleable in the hands of judges that it tends to be extremely result-oriented in application. After all, even proponents of the duty theory recognize that "there is no a priori reason in law why a duty cannot subsist between criminals or wrongdoers."[200] Adding a new layer of considerations in determining whether a duty exists "provides no new insight into the fundamental question of when the courts should be entitled to deny recovery in tort to a plaintiff on the ground of the plaintiff's immoral or illegal conduct,"[201] and further complicates an already uncertain area of the law. As Prosser has stated:

> These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law . . . is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question.[202]

Although Prosser was discussing American law, the "duty" concept is no clearer in Australia or England where this test is popular.[203] Indeed, English author P.S. Atiyah finds the same difficulties with the concept, deeming the "duty" question "an unnecessary abstraction which adds nothing to the substance of the law . . . [being] simply coextensive with the boundaries of liability once negligence in fact and damage in fact have been shown."[204]

This malleability has been manifest in *ex turpi causa* cases. Professor MacDougall argues that this "result orientitis" of the duty approach is nearly unavoidable because courts will be much more reluctant to impose the harsh conclusion that no duty exists in cases where plaintiff's personal injuries are severe than in cases where plaintiff's personal injuries are minor.[205] The difficulty with this approach, of course, is that neither plaintiff nor defendant know before the accident giving rise

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199. MacDougall, *supra* note 191, at 4.

200. Hall v. Hebert, [1993] 2 S.C.R. 159, 180 (Can.) (McLachlin, J.).

201. *Id.* at 181.

202. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

203. The most recent major case decided in England regarding scope of duty is an accountants' liability case, *Caparo v. Dickman*, [1990] 2 W.L.R. 358 (H.L.). Unfortunately, courts in other common-law nations are having a devil of a time determining exactly what *Caparo* meant, leading to substantial confusion. *See* Robyn Martin, *Professional Liability—What Price Caparo Now?*, 9 PROF. NEGL. 119 (1993).

204. PATRICK S. ATIYAH, ACCIDENTS, COMPENSATION, AND THE LAW 47 (1970).

205. MacDougall, *supra* note 191, at 18 ("It is, I think, correct that the doctrine ought not to be applied if manifest injustice would result—that must always be true of principles developed within the common law.") (quoting Judge Taylor in Mack v. Enns, 30 B.C.L.R. 337, 346 (1981)).

to suit how severe the injuries will be or, consequently, whether the courts will find a duty to exist.[206] Such an unprincipled and unpredictable approach is clearly deficient.

2. *Part Two: Determining Standard of Care*

The *Smith* rule was refined, of course, by *Jackson*, but the latter's approach—which provides that no duty exists in situations where one coventurer in crime injures another because it is supposedly impossible for the courts to establish a standard of care—also has its flaws. Assume that Driver D and Passenger P are jointly engaged in transporting illegal drugs. Both desire that D will drive carefully so as not to attract undue police attention. Under *Jackson*, D owes a duty to P and will be liable for an accident *unless*, the moment before the agreement, a police siren was flipped on and a chase began. The distinction is a thin one.

As noted above, *Smith* purportedly rejected application of the *ex turpi causa* defense, focusing solely on the duty issue.[207] However, as also noted above, this was merely a semantic ruse—the case was indistinguishable in reasoning, rationale, and result from others applying the *ex turpi causa* defense. On the one hand, unlike *Smith*, the *Jackson* approach arguably moves the duty theory away from the *ex turpi causa* defense in that the degree of moral turpitude of the parties is irrelevant. The only issue is whether a duty of care can be established. Most courts and commentators (and accurately so) view the *Jackson* approach as just another approach to the *ex turpi causa* defense,[208] but to the extent that it purports not to be, it loses all theoretical focus.[209]

Notwithstanding the reasoning of *Jackson* and its progeny, it is, in fact, possible to establish a standard of care for the setting of a dynamite charge by one of two safecrackers. That standard of care would be very similar to that owed by one construction worker to another. It is also possible to set a standard of care for the driver of a getaway car in a bank robbery. That standard of care would be very similar to that owed

206. MacDougall, *supra* note 191, at 18-20.
207. *See supra* notes 86-99 and accompanying text.
208. *E.g.*, Pitts v. Hunt, [1990] 3 W.L.R. 542, 552 (Beldam, L.J.), 558 (Balcombe, L.J.), 566 (Dillon, L.J.) (Eng.).
209. *See* Hall v. Hebert, [1993] 2 S.C.R. 159, 183-86 (Can.) (McLachlin, J.) (explaining why, to the minimal extent *ex turpi causa* should play a role in tort litigation, it should be as a defense, not as an element of plaintiff's cause of action).

by the driver of a car rushing to a hospital in a medical emergency. It is possible to set a standard of care for the driver of an automobile, even when he and the passenger have been drinking together all day. It is certainly possible to establish a duty of care in a case regarding the performance of a driver, even though, as in *Jackson*, the driver has no license.

Although *McCummings* was not a joint-wrongdoer case, it demonstrates that a standard of care can be determined in such a situation. The shooting officer was constrained by both a U.S. Supreme Court decision making it a constitutional violation to shoot an unarmed fleeing suspect who poses no danger to the officer or to the public,[210] and by New York police guidelines providing that guns should only be used as defensive weapons and cannot be used to stop an escaping felon "unless there is probable cause to believe a felon will use deadly force."[211]

In short, *Jackson* is dead wrong in concluding that no standard of care can be established in such cases. The judges are simply saying that in certain cases they *do not wish* to establish a standard of care.[212] This will be the case in situations where the parties are jointly involved in crimes or other acts of moral turpitude—which is precisely the element that the *Jackson* court purports to exclude from its analysis.

Because of two deficiencies the *Jackson* decision results in an intolerable lack of guidance. First, the decision does not make it clear whether the courts *cannot* establish a duty of care (which is never true) or are simply choosing not to establish a duty of care. Second, if the latter is the case, the decision gives precious little guidance as to what types of conduct will cause the court to choose not to establish a duty. To the extent that the duty approach requires courts to establish guidelines in order to determine when they will and when they will not choose to establish standards of care, the duty approach simply collapses and is replaced by the public policy approach discussed in the next part. For it is only those public policy factors which can provide the needed guidelines.

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210. Tennessee v. Garner, 471 U.S. 1, 9 (1985).

211. *See* Richard Cohen, *A Mugging of Taxpayers*, PLAIN DEALER (CLEVELAND), Dec. 5, 1993, at D3. There was very substantial evidence supporting the jury's finding that neither of these criteria were met in the *McCummings* case. *Id.*

212. *See* Williams, *supra* note 111, at 750-51.

C. *The Public Policy Approach*

At least four different common-law countries have developed a public policy approach to application of the *ex turpi causa* defense. Each has its limitations.

1. *Australia: Godbolt*

To the extent that *Godbolt* is viewed as turning on public policy considerations, two major problems come immediately to mind. First, there are objections to the specific public policy advanced in this case (encouragement of crime) and others (insult to the integrity of the judicial system, punishment of wrongdoers, etc.). *Godbolt's* view that crime would be encouraged by allowance of recovery is facially incredible. No person embarks on a criminal venture hoping that he or she will be injured in the course of that venture and thereby enabled to recover from a co-conspirator in a subsequent civil action.[213]

Second, there is a valid objection generally to the use of public policy as the basis for deciding whether to apply the *ex turpi causa* defense. In the hands of a result-oriented judge, unlimited numbers of public policy arguments can be conjured up to justify application or rejection of the illegality defense. In the *Godbolt* case itself, Judge Manning's opinion, though concurring in the result, pointed out some of the perils of a public policy approach. Judge Manning cited Lord Atkin in *Fender v. St. John-Mildmay*,[214] for the notion that "from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in the field of public policy,"[215] and quoted Judge Cave's statement in *In re Mirams*,[216] that "judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."[217]

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213. For a more detailed discussion of this deterrence rationale, *see infra* part V.A.2.
214. 1938 App. Cas. 1, 10 (appeal taken from Eng.).
215. Godbolt v. Fittock, 1963 N.S.W. St. R. at 617, 630 (Austl.).
216. [1891] 1 Q.B. 594.
217. *Id.* at 595. In conclusion, Judge Manning cautioned:

> The application of the rules of public policy to circumstances such as this provide almost as much difficulty as controlling the "unruly horse" which the policy itself has been said to resemble. Accordingly I do not feel that it is

On the other hand, to the extent that *Godbolt* is viewed as turning on the directness of a connection between a criminal enterprise and an injury, *regardless of causation*, it is subject to criticism on two counts. It runs completely contrary to modern trends in tort law in that (a) it absolutely defeats plaintiff's claim rather than allowing for some apportionment under a comparative fault doctrine,[218] and (b) provides an inadequate tool (to substitute for causation) for use in delimiting the scope of the *ex turpi causa* defense's application.[219]

2. *England: Pitts*

English cases often apply the "public conscience" test. How does one determine which sorts of illegality give rise to an affront to the public conscience by indirectly assisting or encouraging the plaintiff in his criminal activity? The facts in *Pitts* were not fertile soil for application of the public conscience test.[220] But even had they been, the public conscience test[221] is clearly a variant of the public policy approach of

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necessary or desirable to attempt to lay down any rule of general application. 1963 N.S.W. St. R. at 630.

218. There is no doubt that western jurisprudence strongly favors on fairness grounds the proportional liability of a comparative negligence or comparative responsibility system over a harsh all-or-nothing contributory negligence defense. Harry Kalven, Jr., *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 897, 899 n.14 (1968) (noting "apparent[] worldwide consensus" in favor of comparative negligence).

219. Weinrib, *supra* note 190, at 36-38.

220. *See* Pitts v. Hunt, [1990] 1 Q.B. 24 (Dillon, L.J.). Plaintiff Pitts was not, after all, asking the court to assist him directly or indirectly to commit a crime or to keep the proceeds of one. Williams, *supra* note 111, at 751.

221. The "public conscience" test is also one of two primary approaches used by English courts when *ex turpi causa* is raised as a defense in *contract* cases. *See, e.g.*, Euro-diam Ltd. v. Bathurst, [1990] 1 Q.B. 1; Geismar v. Sun Alliance and London Ins., [1978] 1 Q.B. 383 (no recovery under property insurance policy for property stolen from insured who had illegally imported the property without paying proper duty); Beresford v. Royal Ins. Co. Ltd., [1938] App. Cas. 586 (appeal taken from Eng.) (no recovery under life insurance policy by personal representative of insured who had committed suicide). The other approach refuses recovery on *ex turpi causa* grounds where it is necessary for plaintiff to prove or plead an illegal contract in order to recover. *See* Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] 1 K.B. 65. *See generally* Tan, *supra* note 45, at 523. Naturally, this rule would also bar recovery in tort cases. Saunders v. Edwards, [1987] 1 W.L.R. 1116, 1132 (C.A.) (Nicholls, L.J.).

In one recent case, the Court of Appeals found for plaintiff using the public conscience test, and the House of Lords affirmed on grounds that plaintiff did not need to assert the contract in order to state her claim. *See* Paul Magrath, *Law Report: Illegality No Bar to Property Claim*, INDEPENDENT, July 6, 1993, at 13 (reporting on *Tinsley v. Milligan*, in which one of two joint beneficial owners of a house who had agreed to put the property in the name of the other so as to facilitate fraudulent claim to housing benefits by former was allowed to impress trust upon property for half its value).

Godbolt,[222] and suffers many of the same infirmities discussed above, including vagueness.[223]

For example, Lord Justice Beldam barred recovery in *Pitts* because "[t]he public conscience is ever increasingly being focused not only on those who commit the offence [of driving while intoxicated] but, in the words of recent publicity, those who ask the driver to drink and drive,"[224] but adamantly refused to draw any sort of line to give guidance as to what sorts of offenses would be serious enough to arouse the public conscience to bar recovery and those which would not.[225] Absent such guidance, public policy is worse than an unruly horse; it is an imaginary one.

3. *Canada: Tallow*

The public policy approach, subject to the criticisms mentioned above, has its own particular problems, as constructed in *Tallow*. The court described the division of legislative power in Canada placing criminal law within the federal sphere and then noted the distinction between offenses *malum in se* ("evil in itself") and those *malum prohibitum* ("wrong because it is prohibited").[226] Judge Clement then equated federal offenses with *mala in se* and provincial offenses with *mala prohibita*, concluding that the former involved sufficient turpitude to justify invocation of the *ex turpi causa* defense, while the latter did not.[227] Plaintiff's recovery was barred because of plaintiff's participation with defendant driver in theft and unlawful use of the car.

This rather neat solution has been criticized[228] (a) as ignoring the fact that the equation of morality and criminality has been expressly

222. The public policy approach has also been characterized as turning on the proximity (not causal connection) of the illegality to the matters of which plaintiff is complaining. Pitts, 1 Q.B. at 51.

223. For example, Lord Justice Dillon stated in *Pitts* that he found the public conscience test "very difficult to apply, since the public conscience may well be affected by factors of an emotional nature." *Id.* at 56.

224. *Id.* at 46.

225. *Id.*

226. Tallow v. Tailfeathers, 44 D.L.R.3d 55, 65 (Alta. 1973).

227. *Id.*

228. *See* Weinrib, *supra* note 190, at 32-33.

disclaimed in Canadian constitutional law,[229] and (b) because many federal criminal offenses in Canada are of a strictly regulatory nature.[230] Acts do not become *malum in se* simply because a federal legislature has seen fit to outlaw them. Thus, like their Australian and English brethren, judges in Canada clearly have not found a satisfactory basis upon which to distinguish those illegal and immoral acts which should motivate a court to deny tort recovery by invocation of *ex turpi causa* from those which should not.

4. United States: Zysk

Like common law courts elsewhere, the Virginia courts, the primary proponents of the public policy approach to *ex turpi causa* in the United States, have not clarified the boundaries of their rationale. The victimless crime of fornication between two consenting adults apparently is a sufficiently immoral act to require the courts to withhold remedy.[231] The crime of speeding, which endangers third parties much more significantly, presumably is not so immoral. But where is the line being drawn, and why? Is it between felonies and misdemeanors? Between crimes *malum prohibitum* and those *malum in se*? Between acts that are merely immoral and acts that have been criminalized? Virginia does not explicate.

This problem has been highlighted in New York. New York, perhaps more than any American jurisdiction other than Virginia, has produced a fair number of recent decisions applying the *ex turpi causa* defense in tort cases.[232] In *Barker v. Kallash*,[233] for example, a fifteen-year-old plaintiff was barred from negligence recovery because his injury occurred while he was making an illegal pipe bomb which exploded.

229. *See* Proprietary Articles Trade Ass'n v. Attorney Gen. Can., 1931 App. Cas. 310, 324 (Lord Atkin) ("Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality. . . .").

230. For example, Weinrib asks: "Can it be seriously asserted, for instance, that the act of mixing sulphur dioxide into sausages in the proportion of forty-six one-hundredths of a part of sulphur dioxide to two thousand parts of meat is intrinsically wrong and against conscience even in the absence of injury?" Weinrib, *supra* note 190, at 33.

231. Zysk v. Zysk, 387 S.E.2d 466 (Va. 1990).

232. *E.g.*, Braunstein v. Jason Tarantella, Inc., 450 N.Y.S.2d 862 (1982) (barring producers of pornographic movie from bringing negligence action against distributors because plaintiffs would have to rely on their own illegal act to establish their claim); Hines v. Sullivan, 431 N.Y.S.2d 868 (Fam. Ct. 1980) (denying plaintiff father's attempt to obtain an order of filiation to enable him to seek custody of child because child was conceived through act of illegal intercourse between 16-year-old plaintiff and 14-year-old mother).

233. 468 N.E.2d 39 (N.Y. 1984).

The case was particularly weak anyway because plaintiff was suing an eight-year-old who had allegedly sold to third parties the firecrackers used as the source of gunpowder for the bomb. The court invoked the *ex turpi causa* defense, holding that plaintiff should not profit from his own wrong.[234]

Interestingly, Judge Jasen's concurring opinion stressed that violation of a criminal statute should preclude a plaintiff's suit only when (1) plaintiff's own criminal conduct was a contributing proximate cause, and (2) "that conduct can fairly be considered so egregious an offense that permitting recovery would be inimical to the public interest."[235] Thus, the New York approach seems to conflate the majority proximate cause test with Virginia's public policy approach.

The key question in the public policy approach is this: How "egregious" must the plaintiff's conduct be to disqualify plaintiff from recovery? Like Virginia, New York has trouble drawing satisfactory lines. In *Barker*, plaintiff argued that he was only fifteen years old and that this was just a case of several youngsters playing with fireworks shortly before the Fourth of July.[236] Thus, plaintiff argued, his conduct was not so egregious that it should bar recovery. The court ruled that making a bomb was serious business that should not be minimized.[237] In attempting to establish a general rule, the court drew a distinction between statutes that merely *regulate* a certain activity and statutes that *prohibit* that activity: Violation of the former would not bar plaintiff's recovery; violation of the latter would.[238]

Using this standard as a guideline poses several problems. First, this standard suffers from many of the deficiencies cited earlier regarding the legislative intent standard of the *Henwood* case in Australia.[239] Most importantly, the legislature rarely makes known its intent to permit or deny civil recovery when it enacts criminal legislation. Second, it is not always clear when the legislature intends merely to regulate an activity

234. *Id.* at 41 (citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) and Carr v. Hoy, 139 N.E.2d 531 (N.Y. 1957)).

235. *Id.* at 44.

236. *Id.* at 42. Plaintiff also argued that barring his recovery under these circumstances was inconsistent with the legislature's earlier abolition of contributory negligence as a total bar to recovery. *Id.* at 43. The dissenting opinion agreed. *Id.* at 48-49 (Simons, J., dissenting).

237. *Id.* at 40-41.

238. *Id.* at 41.

239. *See supra* notes 183-89 and accompanying text.

or to prohibit it. Legislatures often attempt to "regulate out of existence" activities that they find odious.[240] Third, this standard is irrelevant for those cases in which *ex turpi causa* is raised as a defense where plaintiff's conduct is allegedly immoral, but is not necessarily in violation of any particular statute. There are many such categories of cases. The strongest moralistic tones arise from cases involving illicit sexual intercourse which may or may not violate specific criminal enactments, such as *Hegarty v. Shine.*[241]

Added together, these factors essentially mean that in most cases the judges will decide on an ad hoc, subjective basis whether they think the particular conduct in a case is sufficiently egregious to merit application of the *ex turpi causa* defense. As the dissenting judge noted in *Barker*: "A plaintiff's right to maintain an action . . . should not rest on a Judge's subjective view of whether the conduct is serious or egregious: Judges will differ in making such an evaluation. Indeed the Judges of this court disagreed on the 'seriousness' of the plaintiff's conduct . . . ."[242] Such a state of affairs has led to seriously inconsistent judgments in New York[243] and elsewhere.[244]

Thus, each permutation of the public policy approach has its limitations. Each one illustrates what an "unruly horse" the doctrine of public policy truly is. The arbitrariness in application of the principle must be a concern. As Ronald Dworkin has noted:

> A principle like "No man may profit from his own wrong" . . . states a reason that argues in one direction, but does not necessitate a particular decision . . . . There may be principles or policies arguing in the other direction—a policy securing title, for example, or a principle limiting punishment to what the legislature has stipulated.[245]

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240. *See* Sen. Daniel P. Moynihan, *Guns Don't Kill People. Bullets Do.*, N.Y. TIMES, Dec. 12, 1993, at E15 (suggesting that ammunition be subjected to a tax so high as to effectively tax it out of existence).

241. 14 Cox Crim. Cas. 145 (Ir. C.A. 1878) (denying recovery for transmission of a loathsome disease because plaintiff female had committed "immoral acts").

242. 468 N.E.2d at 47 (Simons, J., dissenting).

243. Consider, for example, Alice D. v. William M., 450 N.Y.S.2d 350 (Civ. Ct. 1982), where plaintiff violated a New York statute *prohibiting* (not regulating) adultery, yet was allowed to recover from defendant co-adulterer the costs of her abortion. Though the statute contained a clear prohibition, the court held that it was rarely enforced and to give it effect in this case would create an injustice. *Id.* at 355.

244. *See* John Irvine, Annotation to *Mongovius v. Marchand*, 44 C.C.L.T. 18, 20 (B.C. 1988). Irvine explains:

> It seems that the *ex turpi* case is running a somewhat maverick course through the law of torts at present, with the unhappy result that like cases may yield unlike results, depending on whether this defence is pleaded and if so, whether it recommends itself to the Judge. Its scope is unnervingly vague.

Id.

245. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967).

Perhaps more importantly, none of the approaches satisfactorily answers what has been called the "well-nigh insoluble question as to which offences would attract the defence and which would not."[246] No court has developed a satisfactory method of combining public policy factors to develop any sort of clear guideline for deciding which types of wrongdoing can or cannot be subject to the *ex turpi causa* doctrine,[247] as a reading of the aforementioned cases clearly illustrates. When a judge pronounces that a worker's violation of a safety regulation designed for his own protection must receive the same treatment as a violation of a felony provision of the criminal code,[248] things are seriously amiss.

No court has determined how to draw the line between the situations of Bernard McCummings and Rodney King. Every U.S. citizen, seemingly, is outraged at the courts for allowing Bernard McCummings to recover from the New York Transit Authority. On the other hand, most U.S. citizens would be outraged if Rodney King were not allowed to recover from the Los Angeles Police Department.[249] Nothing in *ex turpi causa* jurisprudence gives helpful guidance to distinguish between these two cases. That the latter was videotaped seems the most likely explanation for the difference in public reaction.

This deficiency is terribly significant because the public policy approach, in essence, still functionally addresses the question of which plaintiffs are guilty of conduct so odious that they should be denied any

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246. Debattista, *supra* note 105, at 16; *see also* Tom Hervey, Note, *Caveat Criminalis*, 97 LAW Q. REV. 537, 540 (1981). Hervey asks:

> But where will the line be drawn? Surely not between statutory crimes and common law crimes or arrestable and non-arrestable offences. Should the Criminal Injuries Board classification of "crime of violence" be adopted, with or without an extension to attempts to avoid apprehension for other offences? Should the difficult distinction between *mala in se* and *mala prohibita* be called into play? Or should we merely trust the courts to know the right kind of crime when they see it?

Id.

247. MacDougall, *supra* note 191, at 21.

248. Progress & Properties Ltd. v. Craft, 135 C.L.R. 651, 659 (1976) (Austl.) (Barwick, C.J., dissenting).

249. The *McCummings* defendants asked the U.S. Supreme Court to make an exception to the rule that it is unconstitutional to shoot unarmed fleeing suspects. That exception would allow use of deadly force against one who had committed an act of "serious physical violence." *See Justice Gets a Good Mugging*, L.A. TIMES, Dec. 5, 1993, at M4. By denying certiorari, the Court declined to draw such a distinction.

redress in court for injuries that would otherwise be compensable. If they are not termed *caput lupinum*, such plaintiffs are nonetheless treated as such. A very clear and strongly defensible standard should be available to draw such lines, yet none exists. To the extent that the legislature has not chosen to deprive a criminal wrongdoer of civil remedies (and, as we have seen, legislatures almost never actively choose to do so), courts should not be eager to substitute their own judicial activism.

D. *Proximate Cause*

On a theoretical plane, the proximate cause approach has its own deficiencies. Even assuming the existence of proximate causation, how do we draw the line between which illicit acts will be viewed as necessary to invoke the defense and which will simply constitute comparative fault? The proximate cause test itself provides no answer and does not attempt to. It relies, as we saw in *Barker*, upon one of the variations of the public policy test, all of which are inadequate to the task.

Furthermore, the very usage of the term "proximate cause" reminds us of the parallels between treating plaintiff's illegal acts as comparative negligence or assumption of risk (which in modern law will not generally completely bar recovery) and treating those acts as giving rise to the *ex turpi causa* defense (which will totally bar recovery).[250] The test provides no justification for undermining the policies of comparative fault.

Furthermore, the proximate causation approach lacks clarity in application.[251] In *Smith*, Judge Windeyer criticized the approach.[252] Judge Windeyer stated:

> [T]his formulation by which the critical question is whether the unlawful act has a causal connexion with the harm suffered and "proximately contributed" to it is not to my mind satisfactory. The question gets bogged down in phrases about causal relations, "proximate cause", "causa causans", "causa sine qua non", "novus actus". (It is perhaps worth interpolating that the word "causa" has here a meaning which, obviously, is quite different from "causa" in the phrase "turpis causa".)[253]

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250. *See generally* Weinrib, *supra* note 190, at 36.
251. *See generally* Ford, *supra* note 95, at 42-44.
252. 119 C.L.R. 397, 420 (1969) (Austl.).
253. *Id.*; *see also* FRIDMAN, *supra* note 130, at 288 ("It would seem that the utility of *any* doctrine of causation, however formulated for the purpose of resolving this problem, is very much in doubt.").

The accuracy of Windeyer's criticism is borne out by a survey of the case results, which yields inconsistent decisions on similar fact patterns.[254]

A useful doctrine must be based on a clearly justified theoretical foundation and must be embodied in a set of clear rules capable of producing consistent results. But the discussion in this part clearly demonstrates that there is no satisfactory approach yet developed to applying the doctrine of *ex turpi causa* in tort cases. The defense has been allowed for more than 100 years, yet the law in the area remains intractably murky.[255] The fact that no satisfactory philosophical rationale or practical elements for application of the defense yet exist strongly mitigates in favor of the view that this defense must be used sparingly, if at all.

V. GENERAL EVALUATION OF THE EX TURPI CAUSA DEFENSE

As noted in the preceding part, each specific approach to applying the *ex turpi causa* defense to tort cases that has been developed by the courts is seriously flawed. Those containing broader applications of the defense seem to have more problems than those with more constricted applications, but all are problematic at best.

This part steps back from the specific flaws of the various theoretical approaches to applying the doctrine in order to examine its fundamental rationale on a more general plane. First, this part will examine the various rationales supporting the doctrine in order to determine whether they are truly advanced when the *ex turpi causa* defense is applied to

254. MacDougall, *supra* note 191, at 29.

255. *See* STEPHEN M. D. TODD, THE LAW OF TORTS IN NEW ZEALAND 845 (1991) (*ex turpi causa* is a defense "of uncertain scope"); KLAR, *supra* note 10, at 333 ("[W]hy *ex turpi causa* is applied [in Canada] is not generally agreed upon . . . [so] the question of how and when it is to be applied suffers from the same confusion."); HEUSTON & BUCKLEY, *supra* note 10, at 325 (*ex turpi causa* is an "obscure, yet intriguing" defense in England); C.D. BAKER, TORT 568 (4th ed. 1986) ("This is a rather obscure corner of the law."); Neville H. Crago, *The Defence of Illegality in Negligence Actions*, 4 MELB. U. L. REV. 534, 534 (1964) (the role of the *ex turpi causa* defense "has long perplexed courts both in Commonwealth countries and in the United States of America"); MacDougall, *supra* note 191, at 37 ("There can be said to be no uniform, coherent learning developed by the courts on *ex turpi causa*."); Williams, *supra* note 111, at 749 ("[T]he case law enshrines a wide variety of approaches, as well as some contradiction and confusion . . . .").

tort cases. Second, this part will examine various disadvantages and drawbacks created when the defense is applied to tort cases.

A. Rationale for the Ex Turpi Causa Defense

The courts have pronounced four major rationales supporting their invocation of the *ex turpi causa* defense in tort cases. First, denial of recovery prevents plaintiffs from profiting from their own wrongs. Second, denying recovery deters crime. Third, the civil law is a proper avenue for punishing crime. Fourth, the illegality defense preserves judicial integrity. These rationales will be evaluated in turn.

1. Denial of Recovery Prevents Plaintiffs From Profiting from Their Own Wrongs

The law often allows people to profit, quite legally, from their wrongs.[256] Nonetheless, it is clear that the courts are not, and should not be, eager to allow plaintiffs to profit from criminal wrongdoing. Thus, for example, the law does not allow A to murder B for purposes of speeding up an inheritance A is to gain under the provisions of B's will[257] or a recovery A is to gain as beneficiary of B's life insurance policy.[258] "Son-of-Sam" laws are another example of this innate impulse.[259]

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256. As Dworkin points out:

> We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession—if I trespass on your land long enough, some day I will gain a right to cross your land whenever I please. There are many less dramatic examples. If a man leaves one job, breaking a contract, to take a much higher paying job, he may have to pay damages to his first employer, but he is usually entitled to keep his new salary. If a man jumps bail and crosses state lines to make a brilliant investment in another state, he may be sent back to jail, but he will keep his profits.

Dworkin, *supra* note 245, at 25-26.

257. *E.g.*, Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) (deciding that a plaintiff who speeded up inheritance by murdering grandfather was not entitled to take under will); Lundy v. Lundy, 24 S.C.R. 650 (1894) (Can.) (similar).

258. *E.g.*, Metropolitan Life Ins. Co. v. Wenckus, 244 A.2d 424 (Me. 1968) (holding that a wife who murdered her husband was not entitled to recover as primary beneficiary of life insurance contract). *See generally* William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65 (1969).

259. *See, e.g.*, Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493, 522 (1992) ("The impulse behind these [Son of Sam] laws—the desire of the community that hateful criminals not profit from selling their stories—is a very real one."); Jon A. Soderberg, Comment, *Son of Sam Laws: A Victim of the First Amendment?*, 49 WASH. & LEE L. REV. 629, 630 (1992) ("[P]ublic

This principle is correct and does, in fact, give rise to certain proper applications of the *ex turpi causa* tort defense. First, tort damage recoveries should not include lost wages or other income derived from illegal activities. For example, if a person who makes a living as an arsonist is injured in a car wreck, whether or not on the way to the site of a contemplated arson, *and* claims as damages the income he lost by being hospitalized and therefore unable to set fires for profit, recovery of such wages should be denied. Similarly, Bernard McCummings should not be allowed to recover for lost income derived from mugging. To allow such recoveries would allow plaintiffs to profit from wrongdoing. The courts are in general agreement on this point.[260]

Second, consider *Gamble v. Randolph*.[261] Plaintiff was in an auto accident while operating his car in violation of New York's "no fault" law which required each motorist to have personal injury insurance. Because plaintiff was not an "insured motorist" under the law, he claimed that he should have been allowed to sue defendant for his non-serious injuries—a remedy not available to an insured motorist. The court properly dismissed plaintiff's suit, thereby preventing plaintiff from putting himself in a better position than those who complied with the law.[262]

Third, *ex turpi causa* could properly prevent plaintiffs who act illegally from recovering *punitive* damages. For example, in the famous

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dismay over notorious criminals commercially exploiting their criminal behavior by selling their crime stories has prompted Congress and many state legislatures to enact so-called 'Son of Sam' laws.").

Note that while the Supreme Court struck down the only version of a "Son of Sam" law it has evaluated, in Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991), it did so on First Amendment grounds while holding that the state does have an "undisputed compelling interest" in preventing criminals from profiting from their crimes. *Id.* at 510. Thus, the Supreme Court implicitly made a point this Article seeks to emphasize—there are many situations where other values will require courts to overcome their reluctance to allow "wrongdoers" to "profit."

260. *E.g.*, McNichols v. J. R. Simplot Co., 262 P.2d 1012 (Idaho 1953) (refusing recovery of damages for profits lost by plaintiff caused by defendant's nuisance where plaintiff's business was illegal); Desmet v. Sublett, 225 P.2d 141 (N.M. 1950) (awarding plaintiff possession of truck in replevin action but not damages for time he was deprived of its possession because he was planning on profiting from unlicensed hauling); Harper v. Grasser, 150 P. 1175 (Wash. 1915) (holding that defendant had superior right to fish under license, but was not entitled to damages on counterclaim because he planned to fish using illegal drag seine).

261. 398 N.Y.S.2d 109 (Civ. Ct. 1977).

262. *Id.* at 110.

"spring-gun" case of *Katko v. Briney*,[263] plaintiff, while trespassing in an abandoned house, was injured by a booby-trap left there by defendant. When plaintiff opened the door, his action pulled a string which discharged a shotgun pointed at the door. The court allowed recovery of compensatory damages and also allowed the jury to tack on $10,000 in punitive damages. The punitive damages were a form of "profit" to plaintiff, and allowing their recovery improperly rewarded plaintiff.[264]

Beyond these limited exceptions, however, the *ex turpi causa* defense does not properly serve the enunciated principle.[265] For example, the *compensatory* damages awarded plaintiff in *Katko* were proper. In most of the *ex turpi causa* cases discussed earlier in this Article, plaintiffs were not attempting to profit from their illegal activity. They were merely attempting to obtain compensation for injuries they sustained because of the tortious actions of defendants. If this distinction (between compensating a plaintiff for injuries on the one hand, and rewarding a plaintiff's illegality on the other) is recognized and observed, rarely will invocation of the *ex turpi causa* defense truly advance the pronounced public policy of refusing to allow plaintiffs to profit from their own wrongs.[266]

Many jurisdictions recognize this important distinction in the contract law setting. Thus, plaintiffs who attempt to realize a profit by enforcing an illegal contract will almost always fail while, if they are able to recast their claim as one for restitution as a means of avoiding a loss, they will

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263. 183 N.W.2d 657 (Iowa 1971).

264. If it is felt that punitive damages are necessary in such cases to punish and deter the defendant, some provision should be made for paying them into the public treasury rather than to plaintiff. There is precedent for such action. *See, e.g.*, ILL. ANN. STAT. ch. 735, act 5, § 2-1207 (Smith-Hurd 1992) (granting judge discretion to allocate a portion of a punitive damage award to state Department of Rehabilitation).

265. As Judge Lambert noted in *Betts v. Sanderson Estate*:

> If it were applied strictly in the law of tort it would prevent an award of punitive or aggravated damages, but would extend no further. An award of purely compensatory damages cannot be considered to be permitting a wrongdoer to profit from his or her crime. So an extension of the principle into the purely compensatory aspects of the law of tort represents not just an extended application of the principle, but a modification of the principle itself. That modification has only a very tenuous hold on the law of tort, if it has any place there at all.

Betts v. Sanderson Estate, 31 B.C.L.R.2d 1, 8 (1988).

266. *See* Dale Gibson, Comment, *Torts—Illegality of Plaintiff's Conduct as a Defence*, 47 CANADIAN B. REV. 89, 96 (1969) ("The *ex turpi causa* defence is appropriate . . . only where the plaintiff is trying to *profit* by his illegality, not where he is simply claiming compensation for a wrong done to him while engaged in illegal conduct.").

often succeed.[267] Similarly, if an illegal contract is fully executed, a plaintiff may sometimes recover from defendant moneys received by defendant if plaintiff can plead the cause without resort to the contract.[268]

Tort law should also recognize this distinction, especially because most such cases involve physical injuries in which the plaintiff is simply trying to be made whole in his or her physical person.[269] Consider, for example, the plaintiff in *Zysk.* She was merely attempting to recover compensation for a grievous physical injury done to her—infliction of a sexually transmitted disease. No "profit" in any reasonable sense of that word was involved. Only the court's recondite reasoning could lead to the same result as the infamous and oft-condemned decision in *Hegarty.*[270]

We naturally have less sympathy for the "millionaire mugger," Bernard McCummings. But the $4.3 million verdict he received, though a lot of money, is not out of line with other verdicts aimed at *compen-*

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267. *See, e.g.*, JAEGER & WILLISTON, *supra* note 29, at 46-47 ("[E]ven an equal participant in the illegality, if public policy demands it, is often allowed relief by way of restitution or rescission, though not on the contract." (citation omitted)); John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons For and Against Allowing Restitution*, 25 TEX. L. REV. 31, 33 (1946) (noting that "courts have sometimes allowed recovery" in restitution for benefits obtained under illegal contracts); George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347, 375 (1961) ("Specific restoration or payment of the reasonable value of consideration given are not regarded as enforcement. . . .").

Such cases are part of a body of several exceptions that have developed to the general rule at common law which ignores the distinction between attempting to enforce an illegal contract and merely seeking restitutional recovery. *See* Narragansett Indian Tribe v. Ribo, Inc., 686 F. Supp. 48 (D.R.I. 1988) (stating general rule). This general rule has been heavily criticized. *See* John D. McCamus, *Restitutionary Recovery of Benefits Conferred Under Contracts in Conflict with Statutory Policy—the New Golden Rule*, 25 OSGOODE HALL L.J. 787, 796 (1987). McCamus states:

> [E]ven where policy considerations suggest that unperformed aspects of the [illegal] agreement should be held unenforceable and/or that it is appropriate to deprive the parties of any of the profits they may have secured from the agreement, it may still be sound policy to allow recovery of the value of benefits conferred thus far in a restitutionary claim where refusal to do so would yield unnecessarily harsh or otherwise inappropriate results in the circumstances of the particular case.

Id.

268. *E.g.*, McMullen v. Huffman, 174 U.S. 639, 655 (1899).

269. Weinrib, *supra* note 190, at 41.

270. 14 Cox Crim. Cas. 145 (Ir. C.A. 1878) (denying recovery for transmission of venereal disease to woman who engaged in illicit sexual intercourse).

sating persons who were similarly injured by the wrongful acts of others.[271]

Consider also the situation where the lawsuit is brought by the wrongdoer's survivors. If the wrongdoer was killed by the negligence, for example, of a co-conspirator or a third party, one cannot say that allowing recovery by his or her survivors profits the wrongdoer in any way.[272]

In short, where a plaintiff truly will not profit from wrongdoing if granted recovery by a court, there is no logical reason for a court to withhold recovery on the ground of illegality. In such a context, the court's refusal to aid a wrongdoer "sounds more like an epithet than a reason."[273]

2. *Denial of Recovery Deters Crime*

It is unrealistic to believe that allowing recovery to a civil plaintiff in the illegality context would encourage crime or that denial of recovery would discourage it, yet this is a commonly cited rationale for invocation of the *ex turpi causa* defense. For example, American cases have denied recovery to women who were butchered in negligently performed illicit abortions on grounds that permitting recovery would encourage married

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271. For example, in the same issue of the *National Law Journal* that contained criticism of the *McCummings* verdict, two comparable verdicts handed down by New York City juries were reported: a $6.3 million verdict for two New York City Transit Authority workers who suffered lung damage from fumes issued by cleaning fluid they were using, and a $4.5 million verdict for a man who suffered epileptic seizures after a piece of plaster and brick fell on his head while he was sitting on a toilet in his apartment. *See* Margaret C. Fisk, *Verdict/Settlement Watch*, NAT'L L.J., Dec. 20, 1993, at 7.

Critics of the *McCummings* judgment can take some satisfaction in the fact that a 14-year-old girl who claims that McCummings is her father is seeking $1,000,000 in child support from him, and another lawyer who once represented him is seeking $700,000. Anthony Scaduto, *Award Stands in Subway Mugging*, NEWSDAY, Nov. 30, 1993, at 16.

272. This point has been made regarding the illegality defense in the area of contract law. Shand, *supra* note 184, at 160 ("In what way could it be said that the deceased [who had committed suicide] would derive benefit from his crime if the right [of his beneficiaries to recover under an insurance policy] was upheld?").

Fortunately, some courts adopting the *ex turpi causa* defense in tort cases recognize this distinction and refuse to apply it in this setting. For example, one court explained:

> The defence of ex turpi causa would also fail in the present case because the act has been committed by the deceased, and not by [his widow] the plaintiff. The doctrine is intended to prevent a wrongdoer from benefitting from his own illegal or immoral act. In the present case, it is not the deceased or his estate which could benefit from the action brought pursuant to the Family Compensation Act, but rather his widow and children. They have committed no immoral or illegal act. . . .

Funk v. Clapp, 35 B.C.L.R.2d 222, 232 (1988) (Seaton, J.A.).

273. Primeau v. Granfield, 180 F. 847, 852 (C.C.S.D.N.Y. 1910).

women to have abortions for the profit that might accrue from malpractice recoveries[274] and would encourage unmarried women to become seductresses.[275]

Such reasoning seems as unrealistic[276] as it is cruel. Do women truly choose to go to bed with men thinking: "I hope I'll become pregnant so that I can have a back-alley abortion and recover big bucks if the abortionist butchers me?" Do individuals really decide to rob banks in the hope that they will be injured in a high speed chase so that they can recover damages from the insurance company of the getaway driver?[277] Did Bernard McCummings mug a poor old man in the New York subway system hoping that he would have his spinal cord severed by a transit authority cop's bullet and thereby become a "mugger millionaire"? Such thinking borders on the delusional.

Just as allowing recovery in such cases does not encourage crime, denying recovery in such cases does not realistically discourage crime. For example, no criminal refrains from stealing a car due to the fear that if while riding in it he is injured in a collision he will be unable to recover a monetary judgment from a co-conspirator or negligent third party. As Judge Starke noted in *Jenkins v. Smith*,[278] criminals, "like honest citizens, when undertaking a journey in an automobile, confidently expect that they will arrive at their destination safe and sound."[279]

It has even been suggested that application of the *ex turpi causa* defense might *encourage* crime by eliminating the restraining influence

274. *E.g.*, Sayadoff v. Warda, 125 Cal. App. 2d 626, 631, 271 P.2d 140, 143 (1954).

275. *E.g.*, Barton v. Bee Line, Inc., 265 N.Y.S. 284, 285 (1933). In an equally ridiculous line of reasoning applied in a *contract* case, a court held that a plaintiff, as executor, could not recover money the testator lost at cards due to defendants' fraudulent acts. The executor argued that he should be allowed to recover on behalf of the innocent heirs, even though the testator himself, if still alive, would not be allowed to recover. The court concluded that it could see "no authority for the distinction, and that it would be an encouragement to gaming if a man might kill himself, and thereby give his executor a remedy." Babcock v. Thomson, 20 Mass. (3 Pick.) 446, 449 (1826).

276. Hervey, *supra* note 246, at 539 ("[T]he idea that a potential criminal would be deterred from his crime by the prospect of difficulty in a future civil action seems wildly unrealistic.").

277. John G. Fleming, *Notes of Cases: Insurance for the Criminal*, 34 MOD. L. REV. 176, 178 (1971) ("[I]t is really bizarre to credit liability insurance with the psychological potential for stimulating crime or other intentional injury.").

278. [1969] V.R. 267, *rev'd*, 119 C.L.R. 397 (1969) (Austl.).

279. *Id.* at 275.

that potential civil liability might have for the reckless criminal.[280] This argument is not particularly convincing. However, it does lead us toward the critical questions.

In the case of joint wrongdoers, where the injury arises directly out of the criminal wrongdoing, the key question is which approach would better deter criminal activity: (a) barring plaintiff's recovery, thereby encouraging plaintiff to obey the law, or (b) allowing plaintiff's recovery, thereby encouraging defendant to obey the law? This, unfortunately, will turn out to be a very fact-specific determination hampering our ability to draw general conclusions. Consider the following scenarios, but keep in mind that by the time the *ex turpi causa* defense is applied, the criminal law with its attendant punishments has already failed as a deterrent,[281] so there is little reason to believe that *ex turpi causa* will succeed.

The personal and economic pressures that would lead a woman to seek an illegal back-alley abortion in the face of legal, religious, and societal condemnation would probably not be significantly affected by a policy barring recovery from a negligent performer of such abortions. Logically, a performer of such abortions often has a profit motive and would more likely be deterred by a threat of liability than a pregnant woman would be by the threat that damages would be withheld.

Consider the transmission of herpes case. What factors motivate two romantically involved but unmarried persons to have sexual intercourse? It is unlikely that, as they lie in the backseat of the '57 Chevy, monetary factors are at the top of their list of considerations regarding what to do next. It is unlikely that either the presence or absence of the *ex turpi causa* doctrine has much influence, especially because the parties are unlikely to know about it. If they do not know about it, it cannot affect their judgment. If they do know about it, the transmittee certainly cannot be induced to engage in the illicit intercourse by a doctrine allowing recovery, because recovery is limited to compensatory damages. The transmitter, on the other hand, if he or she has some reason to know

280. Crago, *supra* note 255, at 548.

281. Given that the evidence indicates that neither the death penalty nor mandatory life sentences appears to deter crime, it seems fanciful to believe that denial of an after-the-fact civil remedy will do so. *See, e.g.*, David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 KAN. L. REV. 443, 455 (1989) ("In sum, the empirical evidence supports the view that the death penalty was not a marginal deterrent even when executions took place with some frequency, and it is certainly not a marginal deterrent as presently employed."); Edward Felsenthal, *Life Terms Aren't Viewed as Big Deterrent*, WALL ST. J., Nov. 11, 1993, at B2 (reporting that evidence indicates that mandatory life sentences for habitual criminals are not reducing the crime rate, and quoting Peter Arnella, U.C.L.A. law professor, who says "[t]he deterrent value of the criminal law has always been grossly exaggerated").

of the infection but has carelessly failed to confirm the situation,[282] is facing a significant economic loss which might deter careless or intentional disease-spreading conduct.

Most cases that we can imagine make it clear that (a) the absence of the *ex turpi causa* defense does not encourage plaintiffs to break the law because the most plaintiffs can expect, if allowed to recover, is mere compensation for injuries sustained,[283] and (b) in certain situations the threat of liability to defendants created by the absence of an *ex turpi causa* defense might encourage defendants to obey the law. Admittedly, this borders on rank speculation.[284]

Consider the case where only plaintiff violated the law. The *Henwood* case is a good example. If the threat of serious bodily injury to plaintiff that arose from sticking his head out a tram window in order to vomit was not sufficient to induce him to comply with the tram rules, it is unlikely that the existence of an *ex turpi causa* defense (of which plaintiff is likely unaware) would induce him to do so. The tram company, on the other hand, often makes studied comparisons of risks of liability versus investment in safety devices, warning signs, etc. If preventing such accidents is our main goal (and in this case it seems to

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282. Of course, if in a given case the plaintiff claims negligence and the defendant made no conscious decision regarding a course of action (for example, plaintiff claims to have been infected by defendant with herpes, alleging not that defendant had any inkling that he had herpes but only that given his high number of sexual partners in recent years he was negligent in not having himself tested), it is unlikely that an *ex turpi causa* doctrine could have any impact one way or the other.

283. It is arguable, or at least conceivable, that allowing an *ex turpi causa* defense will encourage criminal or reckless activity by the *defendant.* As Kevin Williams has argued: "It is even possible that a driver might be positively encouraged [to break the law] if he understood that as against his complicit passenger he would, somewhat paradoxically, be relieved entirely of responsibility for the civil law consequence of his reckless driving." Williams, *supra* note 111, at 751.

284. Because so many cases involve traffic accidents arising out of joint criminal ventures, the fabulous movie "Thelma and Louise" comes to mind. Assume that instead of being happily committed to accelerating into the Grand Canyon at movie's end, Thelma was heard loudly protesting. That would effectively eliminate any *volenti* defense, but because of the extended nature of the criminal venture, an *ex turpi causa* defense, as applied in many common-law jurisdictions, would still shield Louise's estate from any lawsuit by Thelma's estate. Would availability of the *ex turpi causa* defense make it more likely or less likely that Louise would drive into the Grand Canyon over Thelma's vehement protests? It seems that it would be less likely, indicating that recognition of the *ex turpi causa* defense in this joint criminal context would encourage, not discourage, crime and negligence. The speculative nature of this conclusion is obvious, however.

be a main goal both of the safety ordinance and of the applicable tort law), it seems that rejecting the *ex turpi causa* defense and allowing recovery is the path most likely to succeed.[285] This is especially so because given the relative positions of plaintiff and defendant, defendant is often more likely to have knowledge of the rule and therefore is more likely to be affected by it.

Consider the *Bosworth* Sunday traveler case. Assuming that it is safe to do so, plaintiff travels over defendant's negligently maintained bridge heading from home to work on a Sunday in violation of a statute requiring that any Sunday travel be to or from church. If plaintiff does not fall through the bridge on Sunday, he or she will likely do so on Monday. Therefore, the existence of an *ex turpi causa* defense (even if plaintiff knows about it) is not likely to have any deterrent impact. Defendant is more likely to know of the state of the law and therefore be deterred by the absence of an *ex turpi causa* defense, although the deterrent impact is likely to be minimal because there are six chances out of seven that the defense will not be available.

What about the speeding plaintiff case? Plaintiff is exceeding the speed limit when she smacks into defendant who just ran a red light. Plaintiff might be induced to pay more careful attention to the speed limit if she knows of the existence of an *ex turpi causa* defense. Defendant might be induced to pay more careful attention to stop signs if he knows that by carelessly causing an accident he will be liable, at least partially, to all persons he hits, not just those who were not exceeding the speed limit. To the extent that either party is simply not thinking, suffering the type of momentary mental lapses that are inevitable in human behavior, the existence or nonexistence of an *ex turpi causa* defense would seem to have no impact in terms of encouraging legal and/or careful behavior.

All in all, the questions surrounding the deterrent impact of the *ex turpi causa* defense in tort cases cannot be answered with certainty. The issue is sufficiently clouded that no reasonable claim that *ex turpi causa* will deter criminal action by plaintiffs can be credibly made. Nor can a strong claim be made that elimination of *ex turpi causa* will deter criminal or even negligent action by defendants. Indeed, given the description of the law given above, it is easy to agree with Professor MacDougall that "[t]he application of *ex turpi causa* is currently so unpredictable that it can have little deterrent effect on a person who is

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285. Generally speaking, it is more feasible to use the law to affect the economic decisions of corporate defendants such as the tram company than it is to attempt to encourage more careful (or more lawful) behavior by consumers, drivers, or employees. *See generally* Prentice & Roszkowski, *supra* note 6, at 274-300.

willing to gamble on an illegal enterprise."[286] Therefore, this major justification for the existence of an *ex turpi causa* defense fails. It has even less validity in the body of tort law than in the body of contract law, where it has already been greatly criticized.[287] Therefore, attention must turn away from the deterrence function to other considerations shaping tort law (such as the compensation function) which should accordingly be given more weight.[288]

3. *Tort Law Should Be Used to Punish Crime*

Certainly tort law should not be at loggerheads with criminal law. Therefore, the *ex turpi causa* defense is properly applied where it prevents neutralization of criminal sanctions.

For example, in *Mettes v. Quinn*,[289] the court properly refused to allow plaintiff to sue her former attorney while claiming, in essence, that defendant's negligent advice had allowed a fraud perpetrated by plaintiff to be discovered, depriving her of the benefit of the fraud.[290] To have allowed recovery would have completely offset the criminal sanctions attached to the fraud.

In a famous English case, *Colburn v. Patmore*,[291] plaintiff publisher, who had been convicted and fined for publishing a criminal libel, sued the editor who had published the material without plaintiff's knowledge. Plaintiff sought to force the editor to pay plaintiff the amount of the criminal fine plaintiff had been forced to pay because of the editor's acts. However, to allow recovery in such a case would stultify the effect of the criminal law, and recovery was properly denied.

A more recent case making the same point is *Braunstein v. Jason Tarantella, Inc.*,[292] in which producers of an obscene film, "Fulfilling Young Cups," sued distributors of the film, *inter alia*, for negligence in

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286. MacDougall, *supra* note 191, at 37.

287. Shand, *supra* note 184, at 154 ("[Deterrence of criminal activity] is the function of the criminal law . . . [but] it is no part of the law of contract, any more than of the law of tort."); Harold C. Havinghurst, *Book Review*, 61 YALE L.J. 1138, 1145 (1952) (suggesting that refusal to enforce illegal contracts rarely has a substantial impact in deterring illegal conduct).

288. *See* discussion *infra* notes 326-31 and accompanying text.

289. 411 N.E.2d 549 (Ill. App. Ct. 1980).

290. *Id.* at 551.

291. 149 Eng. Rep. 999 (Ex. 1834).

292. 450 N.Y.S.2d 862 (1982).

choosing to show the film in a New York county which subjected the producers to criminal prosecution, and for fraud in misrepresenting the number of places where such a film could be legally shown. The court properly denied recovery, because a judgment of damages "would, in essence, permit the producer to recover the fine it paid upon its conviction,"[293] again offsetting the duly imposed criminal sanction.

Unfortunately, the *ex turpi causa* defense in tort cases is more often used not to preserve valid criminal sanctions, but to add civil punishments to those criminal sanctions provided by the legislature. This "double punishment" improperly places valid civil tort policy considerations in a subservient position to criminal law policies that are only tangentially relevant. Professor Weinrib has argued that:

> [T]he refusal to allow a civil remedy entails the enshrining of the criminal law policies as dominant and indeed exclusive. This in itself may not be desirable. In the situation presented in *Tallow v. Tailfeathers*, for instance, the activity involved . . . is regulated by a vast nexus of legal arrangements. The task is shared by [Canadian] federal criminal law, provincial penal legislation, administrative prerequisites such as licensing, tort law, the contract of insurance, and legislative modifications that extend the scope of insurance as a device for distributing losses. This panoply of legal mechanisms serves an appropriately wide variety of social aims. It is designed to prevent the evil of physical injury, to visit a sanction on a perpetrator or potential perpetrator of the evil, and to mitigate the effects of the evil when it materializes by compensating the victim. By denying recovery in the *Tallow* situation a court gives a wide berth to the policies of prevention and punishment at the expense of stultifying the policy of compensation.[294]

Another major objection is that using denial of civil recovery as a sanction against wrongdoing plaintiffs amounts to a form of double jeopardy by adding a punishment for the offense that was not contemplated by the legislature. This additional sanction is imposed without the procedural safeguards attendant to the process of criminal sentencing.[295]

The additional sanction has the further disadvantageous feature of being unduly fortuitous, not falling on all wrongdoers equally. For

293. *Id.* at 866.
294. Weinrib, *supra* note 190, at 43-44.
295. One of these important safeguards relates to burden of proof. In America, naturally, the burden of proof in criminal cases is generally the "beyond a reasonable doubt" standard, whereas in civil cases it is the lower "preponderance of the evidence" standard. In Betts v. Sanderson Estate, 53 D.L.R.4th 675 (1988) (Can.), Judge Lambert observed that a key factual issue in the case—who was driving the car at the time of the accident— could never have been established beyond a reasonable doubt because one of the main participants in the incident was killed and the other suffered amnesia. Yet, were *ex turpi causa* applied, plaintiff (on her counterclaim) might be punished by denial of her civil recovery on the basis of speculative evidence that could never have led to criminal punishment. *Id.* at 685-86.

example, in *Tallow*, a case involving a wrecked car and a group of joy-riding boys, one wrongdoer was killed. Others suffered various injuries of differing severity. All committed the same offense, were guilty of the same moral turpitude, and would have been subjected to the same range of criminal penalties, but because recovery in civil suit was denied on *ex turpi causa* grounds, they sustained vastly differing penalties.[296] Those injured the most severely were punished the most by being barred from compensation via a civil suit.

Severity is another consideration. The "double punishment" criticism has long been made against the illegality defense in the realm of contract law.[297] The objection is much stronger in the area of tort law where the loss that the court refuses to compensate is likely to involve severe personal injury rather than mere economic dislocation. The criminal penalty for an offense might be a few months of imprisonment, or perhaps just a small monetary fine. This might be the maximum penalty imposed by the legislature. But life in a wheelchair, completely uncompensated by monetary damages from the negligent driver, could be an additional, completely disproportionate sentence added by a court applying the *ex turpi causa* defense.[298] The plaintiff in *Pitts*, for example, was effectively fined *L*40,000 for the offense of aiding and abetting his friend's reckless driving of a motorcycle.[299] Bernard McCummings, if recovery was denied on *ex turpi causa* grounds, would suffer a functional $4.3 million civil fine (and life in a wheelchair) in addition to the thirty-two months in jail that he served as a consequence of his unarmed mugging of another. Upon what principled basis is this harsh additional sanction imposed?[300]

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296. Weinrib, *supra* note 190, at 45.

297. *E.g.*, St. John Shipping Corp. v. Joseph Rank, Ltd., [1957] 1 Q.B. 267, 292 (Devlin, J.). The court stated:

> The Act of 1932 imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a serious thing if the operation could be performed twice—once by the criminal law and then again by the civil. It would be curious, too, if in a case in which the magistrates had thought fit to impose only a nominal fine, their decision could, in effect, be overridden in a civil action.

Id.

298. Weinrib, *supra* note 190, at 45.

299. For a similar offense, the plaintiff in Ashton v. Turner, [1981] 1 Q.B. 137, was effectively fined L70,000 in addition to the criminal punishment already imposed.

300. F.A. TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 487 (1985) ("[W]hile deterrence of breach by means . . . of a fine may be desirable, the unpredict-

The punishment obviously bears no necessary relation to the degree of plaintiff's moral turpitude in the particular case, which may be slight.[301] Worse still, in the cases of joint wrongdoing the defendant is equally at fault, yet is rewarded by the law with immunity from liability for his or her negligence (or perhaps intentional tort).[302]

Furthermore, if a person is killed in an accident while engaged in a criminal enterprise, and the *ex turpi causa* defense is used to deny recovery to his or her heirs, this defense casts a burden on the survivors which amounts to vicarious liability for criminal acts.[303] This is completely contrary to most of our basic notions of criminal responsibility.[304]

There is obviously a long history of interrelationship of criminal and tort law.[305] The two bodies of law have common roots and did not diverge until fairly late in the game.[306] And while there is certainly an important role for the concepts of punishment and deterrence in tort law, the modern trend is to deemphasize tort law's criminal and punitive function in deference to its civil and compensatory purposes.[307] As noted earlier, the punitive function of tort law should not be made paramount at the expense of the compensatory function. Any broad use of the *ex turpi causa* defense commits this sin.[308]

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able and usually much more serious sanction of the denial of a civil remedy may seem an unnecessary and unduly harsh penalty.").

301. *See* St. John Shipping Corp., 1 Q.B. at 288-89 ("It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression.").

302. As noted above, similar criticisms have been made in the area of contract law, where the defendant is often allowed to keep the fruits of an illegal contract at plaintiff's expense, even though defendant was equally at fault. It has been noted that judicial refusal to assist either party to an illegal contract, in light of the "remarkable growth of regulation in the modern era" has led to "absurd results" that confer "windfall benefits" on lucky defendants "for which no sensible justification can be offered." McCamus, *supra* note 267, at 788-89; *see also* Wade, *supra* note 267, at 36.

Fortunately, some courts have acted on this criticism. *E.g.*, Johnson v. Johnson, 192 Cal. App. 3d 551, 237 Cal. Rptr. 644 (1987) (deciding that the rule that illegal contracts will not be enforced should not be applied where the transaction has been completed, no moral turpitude was involved, and to apply the illegality rule would permit defendant to be unjustly enriched).

303. Some courts have recognized this distinction and have acted to preserve the rights of widows and orphans accordingly. *E.g.*, Bigcharles v. Merkel, [1973] 1 W.W.R. 324 (B.C.).

304. Crago, *supra* note 255, at 547-48.

305. *See generally* Gary, *supra* note 12, at 1622 ("[T]he protection of society through the punishment and deterrence of antisocial behavior is an accepted function of the tort law.").

306. *See generally* WEX S. MALONE, ESSAYS ON TORTS 1-10 (1986); GEORGE C. CHRISTIE, CASES AND MATERIALS ON THE LAW OF TORTS 1-7 (1983).

307. Gary, *supra* note 12, at 1621.

308. *See* discussion of the compensatory function of tort law *infra* part V.B.1.a.

The criminal justice system is, one hopes, a well-conceived approach to the problems of deterrence and criminal sanction. That system supposedly metes out punishment in proportion to moral dereliction by the defendant and the societal interest to be protected. To allow the *ex turpi causa* defense to add punishments willy-nilly, unconnected to either plaintiff's moral failings[309] or to society's vital interests, would undermine rather than advance the interests of the criminal justice system,[310] and cause other dislocations as well.[311]

4. *The Illegality Defense Preserves Judicial Integrity*

The final major argument lodged in favor of broad application of the *ex turpi causa* defense in tort cases is that the integrity of the judicial process is defiled if the courts must entertain testimony by criminals and perhaps grant judgments to them.[312]

No doubt courts should not be accomplices to criminals, assisting them in their criminal designs. As noted above, courts should not enable criminals to *profit* from their crimes. Such actions would truly sully the courts' reputation. However, this defiling of a court's image does not arise if the court does not allow a plaintiff to profit from crime, but only *compensates* him or her for injuries wrongfully sustained at the hands of others. Assuming a suit by one criminal conspirator against another for negligent injuries sustained in the course of a getaway, one may ask: Is the court's image as a bastion of justice more damaged by awarding plaintiff damages truly caused by defendant's acts than by awarding defendant (who is guilty of the same criminal conduct and additional

309. Weinrib calls this an "indiscriminate lashing out at the offender." Weinrib, *supra* note 190, at 46.

310. Even in contract cases, "[a] court may conclude that the [criminal] sanction explicitly provided by the legislature is adequate to further the statute's underlying policy, without the additional sanction of unenforceability." FARNSWORTH, *supra* note 17, at 348 (citing Town Planning & Eng'r Assocs. v. Amesbury Specialty Co., 342 N.E.2d 706, 711 (Mass. 1976) (Kaplan, J.) ("Our cases warn against the sentimental fallacy of piling on sanctions unthinkingly once an illegality is found.")).

311. For example, if discouraging crime were given as much prominence in other areas of the law as it is in tort law by the *ex turpi causa* defense, we might hold all property liability policies void because, it has been argued, insurance against loss from theft promotes these crimes because it weakens the incentive of insureds to take adequate security measures. *See generally* M.P. Furmston, *The Analysis of Illegal Contracts*, 16 TORONTO L.J. 267, 272 (1965).

312. Crago, *supra* note 255, at 551.

negligent conduct) immunity from the injuries caused by the latter's misdeeds? There is no reason to think so.[313]

Some courts invoke the *ex turpi causa* defense stressing the impropriety of a court's entertaining evidence about criminal misdeeds. The integrity of the judicial system is scarcely breached when a court is forced to hear such testimony. In America this occurs all the time, often on the television evening news or perhaps a court channel on cable TV. No judge sits on the bench very long before running into a Bernard McCummings. As Judge Owen noted in *Smith*:

> [I]t has been suggested, as a reason for the denial of a remedy in some exceptional cases to a participant in crime, that the courts might properly refuse to entertain an action, where evidence would be required of a kind which would endanger the dignity of judicial proceedings and tend to bring the courts into public disrepute. But courts are required constantly to hear evidence of criminal conduct no matter how vile and degrading it may be. The reception of evidence of that kind need not be regarded as an affront to the dignity of the court. . . . I do not think that the essential reason for a rule by which the courts refuse to recognize a right of action in some cases of criminality is a shrinking by the court from the seamy facts of life or a scrupulous regard for its dignity or reputation.[314]

Courts often have to hear vile and degrading evidence regarding a *defendant's* misconduct. They will, on occasion, hear evidence regarding vile and degrading conduct by the plaintiff that bore no direct relationship to the plaintiff's injuries or to the wrong committed. In neither of these situations will the court feel bound to exclude the evidence because of its shocking nature. Therefore, it cannot be too great a shock to a court's system to hear similar evidence regarding a plaintiff's misconduct that may bear on the plaintiff's tort-caused injuries.[315] The court simply must keep in mind that the fundamental

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313. TRINDADE & CANE, *supra* note 300, at 212 ("[I]t does no credit to the law that an intentional tortfeasor is able to rely upon the illegal nature of the transaction with the victim to escape liability for his own intentional and tortious conduct.").

314. Smith v. Jenkins, 119 C.L.R. 397, 431-32 (1970) (Austl.).

315. This same argument has been persuasively made in the context of court reluctance to enforce illegal contracts:

> Any turpitude involved in a suit arising from an illegal contract is no worse than that disclosed in the sordid cases which the criminal courts entertain daily without feelings of wounded dignity or pollution and without covering their eyes in holy horror at the display of human iniquity. Civil courts, too—even those sitting as "courts of conscience" in equity—do not reject a plaintiff whose suit requires a demonstration of the defendant's fraudulent, immoral or unlawful acts; but on the contrary they weigh such acts with great care in determining the appropriate relief, and without speaking of contamination or public scandal. . . . The truth is that in its usual statement this argument has an unrealistic, other-world flavor, as if it came from the medieval monks who isolated themselves from the world, rather than from judges accustomed to dealing with the daily affairs of men good and bad.

question being asked is whether the loss sustained by plaintiff should, under all the circumstances, be shifted to defendant.[316] Judicial fastidiousness is no reason to deny compensation if the other prerequisites to legal recovery are present.[317]

No doubt, if they had their druthers, attorneys would always represent only the purest of the pure and judges would hand out damage awards only to church-going mothers of four, injured on their way to an evening class in Bible study. But we must realize that the legal profession has had some of its finest moments in representing the dregs of society. Clarence Darrow, famed "Attorney for the Damned," whose clients were often far from saints, shines brightly as a model for aspiring attorneys.[318] And, one could easily argue, our Supreme Court's decisions that most embody the advancement of western civilization have involved protecting the rights of the Clarence Earl Gideons,[319] Dollree Mapps,[320] Danny Escobedos,[321] and Ernesto Mirandas[322] of the world.[323]

Wade, *supra* note 267, at 43-44.

316. Thayer, *supra* note 189, at 340.

317. Shand, *supra* note 184, at 152 ("Our system of justice is not a beautiful garden ornament but is (or should be) a piece of machinery for social engineering which may occasionally require its operators to put on overalls and get their hands dirty.").

318. *See* ARTHUR WEINBERG & LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 10 (1980) (quoting letter from William Kunstler stating that Darrow "established the ideal of the fighting brave lawyer who will go to the limits of his endurance, skill and courage for a client"); KEVIN TIERNEY, DARROW: A BIOGRAPHY 439 (1979) ("[Darrow] carved his own niche in history, a voice for the inarticulate, the oppressed, the poor. . . . [H]is robust independence left an example for later generations to admire.").

319. Gideon v. Wainwright, 372 U.S. 335 (1963) (protecting an accused's right to counsel).

320. Mapp v. Ohio, 367 U.S. 643 (1961) (protecting an accused's right to protection from unreasonable searches and seizures).

321. Escobedo v. Illinois, 378 U.S. 478 (1964) (protecting an accused's privilege against self-incrimination).

322. Miranda v. Arizona, 384 U.S. 436 (1966) (creating the now infamous "Miranda Rights").

323. *See* ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 88 (1968) ("If Winston Churchill was right in saying that 'the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law,' then the activism of the Warren Court has enabled our civilization to give a vastly better account of itself."); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956) ("The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.").

Simply put, the moral characteristics of the parties before a court have little or no relevance to that court's capacity to do justice or injustice.[324] And awarding compensation to a wrongdoing victim of another's torts does not signal judicial approval of the wrongdoing any more than does a court's decision to overturn a criminal conviction on technical statutory or constitutional grounds. It merely signals that in our system of justice there are often other values to be served.[325]

B. *Reasons for Virtually Eliminating the Ex Turpi Causa Defense in Tort Cases.*

The previous part's discussion shows that there is no persuasive reason for courts to recognize a broad-based *ex turpi causa* defense in tort cases. Such a defense does not prevent plaintiffs from profiting from their wrongs; it prevents them from being compensated for wrongs done to them. Nor can it be shown that the defense deters crime, serves as a proper complement to the criminal law, or preserves judicial integrity.

As noted in the earlier discussion, however, there is a very limited role for the *ex turpi causa* defense in tort litigation. The purpose of this part is two-fold. First, it explains the primary positive arguments for the virtual elimination of the *ex turpi causa* defense in tort cases. Second, it explains and justifies the argument for a real, but very limited, role in tort law for the *ex turpi causa* defense.

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324. *See* Shand, *supra* note 184, at 152. Shand states:

> It is not the function of the judge to be shocked, far less to seek out public outrage where none may exist or where it may be prejudiced or ill-informed. Indeed, it is in those very situations which are [the] most shocking that public policy may demand positive intervention and where a denial of relief may simply perpetuate the undesirable manifestations of an illegal contract.

Id.

325. In the *McCummings* case, those other values include a public desire to restrain police officers from the use of undue force. Police brutality is still a major problem in this nation, as the Rodney King videotape graphically demonstrates. *See* Leslie Gevirtz, *Police Brutality Costs Millions of Dollars, Shatters Lives*, REUTERS, Oct. 31, 1991, *available in* LEXIS, Nexus Library, News File.

The Supreme Court spelled out the constitutional values also at stake when it ruled in Tennessee v. Garner, 471 U.S. 1 (1985), that a Tennessee statute authorizing the use of deadly force against an unarmed, nondangerous fleeing felony suspect was unconstitutional. The Court explained: "The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* at 9.

1. Positive Arguments Supporting the Near Elimination of the Ex Turpi Causa Defense in Tort Cases

As noted above, the major arguments raised over the years in support of a broad *ex turpi causa* defense in tort cases have little validity. Furthermore, invocation of this defense severely undermines two important aspects of tort law—the compensation function and the fairness value.

a. The Compensation Function of Tort Law

Perhaps the most important objective of the common law of torts is the compensation of injured plaintiffs.[326] As Professor Wright noted many years ago:

> Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford *compensation* for injuries sustained as the result of the conduct of another.[327]

Any invocation of the *ex turpi causa* defense in tort cases occurring outside the very limited circumstances outlined later in this part significantly undermines this compensation goal. Application of the *ex turpi causa* defense almost always subordinates compensation, perhaps the fundamental purpose of tort law,[328] to goals of lesser importance such as criminal deterrence, support for criminal law, and the image of the judicial system.[329]

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326. *See* ALLEN M. LINDEN, CANADIAN TORT LAW 3 (4th ed. 1988) ("First and foremost, tort law is a compensator."); ROBERT E. KEETON, VENTURING TO DO JUSTICE 147 (1969) ("The primary objective of Anglo-American tort law is fair and just compensation for losses.").

327. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944) (emphasis added).

328. PROSSER & KEETON, *supra* note 173, at 5-6 ("[Tort law] is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests generally. . . .").

329. In his dissenting opinion in Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984), Judge Simons criticized application of the *ex turpi causa* defense as

Indeed, the compensatory function of tort law is virtually ignored in all the judicial pronouncements regarding the defense. Courts using the "public policy" approach to *ex turpi causa*, for example, virtually never mention the public policies supporting compensation of persons injured by the torts of others. Worse still, courts allowing the *ex turpi causa* defense are more likely to leave injured plaintiffs uncompensated and thus with no choice but to resort to welfare or the dole for support.[330] This is an aspect of public policy not sufficiently considered in such cases.[331]

b. The Fairness Concept

Given that an essential component of tort law is compensation, doctrines which totally block compensation based on transgressions (negligent and/or illegal) by plaintiffs work against the compensation goal and, just as importantly, are unfair. Perhaps the most irresistible trend in tort law in recent years has been to sweep away such doctrines. Thus, both courts and legislatures have fashioned schemes that *apportion* liability based on fault.

Contributory Negligence. Consider the contributory negligence doctrine, which, like *ex turpi causa*, reflects the courts' essential reluctance to assist persons who themselves are at fault.[332] Of course,

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> a return to the old "admonitory" theory of tort liability, the idea that a defendant was liable to the plaintiff because of his blameworthiness or fault. The rationale of that theory, in its pristine form, was that because the conduct of the defendant may have fallen short of criminal activity the injured party should be given satisfaction, and the wrongdoer "punished", by a civil remedy of damages in tort. Because this admonitory or punitive function was paramount, a plaintiff who was also guilty of blameworthy conduct was similarly punished by being denied relief. Both parties being at fault, the courts refused to measure their wrong and let the losses lay where they fell. The rigors of such a rule soon became apparent and the law moved towards a compensatory theory of tort law which led to the principle of comparative liability set forth as early as the turn of the century in statutes such as the first Federal Employees Liability Act, followed by the Jones Act, the Merchant Marine Act and eventually the comparative negligence statutes enacted in several States . . . .

Id. at 48 (Simons, J., dissenting).

330. *See* Jackson v. Harrison, 138 C.L.R. 438, 464-65 (1978) (Austl.) (Murphy, J.).

331. *See, e.g.*, Williams, *supra* note 111, at 751 ("[W]here defendants (or their insurers) are able to pay some compensation, the public interest is not advanced by excusing them and leaving the plaintiff reliant on social security or charitable support."); Cecil A. Wright, Editorial Note to Danluk v. Birkner, [1946] 3 D.L.R. 172, 173 ("Participation in crime should not compel an injured man to seek redress from public funds rather than from a wrongdoer.").

332. *See* Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 258 (1908) ("[Contributory negligence] debars from recovery, even from an admittedly

the contributory negligence doctrine originally prevented any recovery by a plaintiff whose negligence contributed in any significant fashion to his or her own injuries. The unfairness of the doctrine was well known. As Prosser noted:

> The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's quite extreme. The injured person is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss, and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all. Nor is it any answer to say that the contributory negligence rule promotes caution by making the plaintiff responsible for his own safety. It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences.[333]

The contributory negligence doctrine was so harsh in application that judges were constrained to create exceptions to its operation,[334] and juries often disregarded it in practice.[335] An "increasing social awareness of [the] harsh 'all or nothing' consequences"[336] of contributory negligence caused most western common-law jurisdictions to adopt some form of comparative negligence or comparative fault so that a minor indiscretion by plaintiff no longer requires plaintiff to bear an entire loss

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negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm.").

333. PROSSER & KEETON, *supra* note 173, at 468-69.

334. Among those judicially created modifications to the contributory negligence defense were rules that plaintiff was not barred from recovery by his or her own negligence if: (a) defendant had the "last clear chance" to avoid the accident, (b) defendant was guilty of wanton and willful misconduct, (c) defendant was subject to strict liability under the doctrine of Rylands v. Fletcher, 3 L.R.-H.L. 330 (1868), and (d) defendant had violated a statute clearly designed to protect plaintiff. *See generally* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882-84 (W. Va. 1979) (explaining the various judicial modifications to the theory of contributory negligence).

335. *See* Donald Wittman, *The Price of Negligence Under Differing Liability Rules*, 29 J.L. & ECON. 151, 162 (1986).

336. Daly v. General Motors Corp., 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978); *see also* Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882 (W. Va. 1979) ("[O]ur system of jurisprudence, while based on concepts of justice and fair play, contains an anomaly in which the slightest negligence of a plaintiff precludes any recovery and thereby excuses the defendant from the consequences of all of his negligence, however great it may be.").

caused largely by defendant.[337] Thus, comparative negligence or comparative fault principles clearly improve the fairness of the tort system.[338]

Assumption of Risk. Assumption of risk, known in other common-law nations as *volenti non fit injuria*,[339] was formerly a total bar to a plaintiff's recovery. This was unfair because it absolved a careless (or intentionally wrongdoing) defendant of any liability whatsoever even though defendant may have contributed substantially to plaintiff's injury. Such immunity for defendant was inconsistent with the basic policies of risk distribution underlying tort law.[340]

Because of the harshness and unfairness of the original *volenti* doctrine, the trend in most western jurisdictions today is to *compare* plaintiff misconduct in the form of assumption of risk with defendant's fault, resulting in only a proportionate reduction in plaintiff's recovery.[341] Like comparative fault, and unlike *ex turpi causa*, the assumption of risk defense's provision for proportionate allocation of loss produces a fairer result than an absolute bar to recovery.

Contribution. Contribution among tortfeasors is also an area of the law that illustrates the continuing evolution toward fairer policies embodied in proportionate allocation of loss. Originally, courts refused

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337. These provisions take several forms, of course. Several jurisdictions have adopted "pure" comparative negligence. Most allow plaintiff to achieve a partial recovery so long as plaintiff's fault is either (a) less than, or (b) not greater than defendant's. *See generally* William A. Vainisi, *Merging Comparative Fault with Strict Liability Actions in North Dakota: In Search of a New Day*, 61 N.D. L. REV. 7 app. at 27-29 (1985) (defining the varying degrees of comparative negligence and illustrating the states which use each form, as well as the corresponding case law and statutory authority); John H. Leskera, Comment, *Change from "Pure" Comparative Negligence to "Modified" Comparative Negligence —Will It Alleviate the Insurance Crisis?*, 32 ST. LOUIS U. L.J. 753 app. at 773-76 (1988) (illustrating which states apply pure comparative negligence, modified comparative negligence, and contributory negligence as a complete defense, and citing the relevant primary authority in those states).

338. *See* Jordan H. Leibman & Anne S. Kelly, *Accountants' Liability to Third Parties for Negligent Misrepresentation: The Search for a New Limiting Principle*, 30 AM. BUS. L.J. 345, 387 (1992) ("A comparative fault regime would appear to meet tort law's fairness and deterrence objectives more effectively than one in which contributory negligence is a complete defense.").

339. Literally, "one is not legally injured if he has consented to the act complained of or was willing that it should occur." BALLENTINE'S LAW DICTIONARY 1349 (3d ed. 1969).

340. Victor E. Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 176 (1974) (addressing the products liability area).

341. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 732, 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978); Coney v. J. L.G. Indus., 454 N.E.2d 197, 200 (Ill. 1983). *See generally* Robert L. Walsh, Note, *Assumption of Risk Merges with Comparative Negligence*, 31 LOY. L. REV. 401 (1985) (discussing several American cases taking this point of view).

to grant contribution to a tortfeasor on the same grounds that they invoked the *ex turpi causa* defense.[342] Most particularly, courts reasoned that by denying contribution they were preventing a wrongdoer from profiting from his wrongs and they were protecting the judiciary's honor by refusing to lend their aid to a wrongdoer.[343] Indeed, some authorities trace the origins of the common law's no-contribution rule to the *Highwayman's Case*, which is also a foundation case for the illegality defense.[344]

This reasoning is terribly outmoded.[345] With the exception of occasional nooks and crannies, a regime allowing contribution has

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342. Daniel Waltz, Note, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?*, 74 CAL. L. REV. 1057, 1061 (1986) (explaining that the rule against contribution among joint tortfeasors "echoed the Latin maxim *ex turpi causa non oritur actio*").

343. *See* Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 132 (1932) ("[T]he rule refusing contribution between joint tortfeasors is rooted in this same unwillingness of courts to aid persons whose conduct has not measured up to legal standards [as was demonstrated in the famous *ex turpi causa* case arising out of a charivari, Gilmore v. Fuller, 65 N.E. 84 (Ill. 1902)]."); *see also* Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 442 (Ill. 1977), *modified*, 374 N.E.2d 444 (Ill.), *cert. denied sub nom.*, Hinckley Plastic, Inc v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978) (rejecting this rationale as no longer persuasive).

344. *See supra* notes 24-25 and accompanying text. After noting that the court fined the solicitors and beheaded both plaintiff and defendant, Prosser commented on the *Highwayman's Case*: "In short, contribution was not allowed." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1112 n.23 (1941). *See generally*, Guy M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947).

However, most authorities trace the common law's old no-contribution rule to Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). *See, e.g.*, Theodore W. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 176 (1898) (noting that *Merryweather* is usually cited as the leading case for the proposition that "[a]s between conscious, willful, malicious, or intentional joint wrongdoers, or tort-feasors who are *in pari delicto*, neither the law or equity will intervene to adjust the damage by enforcing contribution"); Note, *Contribution and Indemnity Among Joint Wrongdoers*, 32 COLUM. L. REV. 94, 94 (1932) ("*Merryweather v. Nixan* is generally accepted as the origin of the doctrine that contribution will not be enforced among joint wrongdoers. . . .").

Merryweather itself has been criticized as a misapplication of the principle of *ex turpi causa non oritur actio*, further emphasizing the intertwining of the outmoded no-contribution rule with the *ex turpi causa* defense. *See* J. Fischer Williams, *The Rule in Merryweather v. Nixan*, 17 LAW Q. REV. 293, 301 (1901).

345. *See generally* Francis H. Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L. REV. 552, 559 (1957) (rejecting notion that wrongdoers must always be denied a judicial forum).

replaced the old no-contribution regime in most western nations.[346] The reason for this evolution in the law has been clear: "The lack of contribution is quintessentially unfair."[347] This was recognized by the Supreme Court which has concluded that equitable considerations require that damage liability be assessed according to proportional fault whenever possible.[348] Granting contribution does *not* allow wrongdoers to profit, but simply allows them to mitigate a loss,[349] a lesson that should be applied when the *ex turpi causa* defense is raised in tort cases.

The *ex turpi causa* defense is inconsistent with the trend toward proportional liability, and tends to emasculate its fairness goal.[350] In

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346. *See* Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1183 (1988) ("In England and almost all other countries, joint and several liability with contribution has long been the rule.").

347. Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 238 (1980); *see also* John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1062 (1991) ("[T]here can be no justice in a wrongdoer escaping liability for the wrong caused by his or her fault."); M. Patricia Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 IOWA L. REV. 533, 541 (1981) ("[F]undamental fairness requires that the financial loss caused by joint wrongdoers be apportioned among them."); Martin Turck, *Contribution Between Tortfeasors in American and German Law—A Comparative Study*, 41 TUL. L. REV. 1, 10 (1966) ("Justice involves the principle of equality, which is violated if, when several parties are involved in the same fault, one alone bears the total loss."); Leflar, *supra* note 343, at 141 (stating that refusal to grant contribution creates "obvious injustice").

348. United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) ("[W]orldwide experience has taught that that goal [of just and equitable allocation of damages] can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible."). As *Reliable Transfer* indicates, the Supreme Court has, for similar fairness reasons, often advanced regimes of comparative fault and contribution. *E.g.*, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111 (1974) (adopting contribution in admiralty cases on grounds that "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution").

Although many courts are reluctant to allow contribution to intentional wrongdoers, there is no reason not to do so if they are seeking recovery from others who are equally at fault. Langmore & Prentice, *supra* note 347, at 1068 ("[I]t is fair to allow intentional wrongdoers to seek contribution from other intentional wrongdoers because their claim for compensation arises not from the wrong done to the plaintiff, but from the righting of that wrong.").

349. B. Franklin MacPherson, Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U. L. REV. 203, 213 (1975) ("The right to contribution is not created by the tort, but by satisfaction of the judgment, which repairs the harm done by the tort. Hence, the contribution action is based not on a wrong, but upon its compensation—an act which cannot be said to soil the hands of the performer.").

350. *See, e.g.*, Gibson, *supra* note 266, at 91 (*ex turpi causa* defense inconsistent with trend away from contributory negligence and consent defenses); Thayer, *supra* note 189, at 341-42 (reinforcement of absolute effect of contributory negligence defense's "discrimination against the plaintiff [by *ex turpi causa*] would come oddly at

the joint wrongdoer context, like the common-law no-contribution rule, it leaves the total loss upon just one of two wrongdoers.[351]

In short, there has been a generally irresistible tide in western common and statutory law away from the harsh regimes of contributory negligence, *volenti*, and no-contribution.[352] Just like the *ex turpi causa* defense, all three doctrines were originally based upon the courts' reluctance to assist wrongdoers. All three doctrines have been greatly restricted or even eliminated in order to enhance the equity and justice of western law.

To revive *ex turpi causa* as an absolute defense is, in the words of Professor Weinrib, "retrograde."[353] It allows judges to reach harsh results that are inconsistent with both the modern comparative fault and assumption of risk defenses, thereby undermining the purposes of the more modern approaches,[354] many of which are based on legislative enactment. Indeed, "[O]ne is left with the feeling that contributory negligence apportionment provides a far safer tool for doing substantial justice on a case-to-case basis, and produces results more likely to appeal to 'fair-minded and right thinking people' than this stark and retributive defence of illegality."[355]

2. *The Limited Role of Ex Turpi Causa*

Earlier discussions noted a few very limited situations in which the defense of *ex turpi causa* is properly applied in tort cases. Essentially, there are three such situations. First, *ex turpi causa* should serve as a

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a time when the defense itself is crumbling at many points under attacks both legislative and judicial"); Note, *The Plaintiff's Breach of Statutory Duty as a Bar in an Action of Tort*, 39 HARV. L. REV. 1088, 1090 (1926) (*ex turpi causa's* "continued advocacy seems particularly unfortunate at a time when the rigor of the defence of contributory negligence is being gradually relaxed").

351. Williams, *supra* note 111, at 752 (*ex turpi causa* allows defendants "to turn the flank of contributory negligence and side-step the statutory prohibition against *volenti*").

352. *See* Jordan H. Liebman, *Comparative Contribution and Intentional Torts: A Remaining Roadblock to Damages Apportionment*, 30 AM. BUS. L.J. 677, 677 (1993) ("The trend to apportion damages among parties in tort litigation has proceeded inexorably, yet cautiously, in the United States.").

353. Weinrib, *supra* note 190, at 37.

354. MacDougall, *supra* note 191, at 38, 41.

355. John Levine, *Annotation*, in Mongovius v. Marchand, 44 C.C.L.T. 18 (B.C. 1988), *quoted in* Pierre Legrand Jr., *La dynamique de l'impunité: autour de la défense d'*ex turpi causa *en* common law *des delits civils*, 36 MCGILL L.J. 609, 629 (1991).

defense if the legislature has made it clear that a law it has enacted is to disable violators from civil recovery.[356] Second, plaintiffs should not profit from their wrongdoing by (a) recovering as damages lost wages or earnings from illegal enterprises, (b) recovering punitive damages over and above compensatory damages,[357] or (c) somehow placing themselves in a position superior to that of law abiders.[358] Third, plaintiffs should not be allowed to receive compensation in tort for criminal fines or other punishments the law has imposed upon them,[359] or to recover money or property properly seized by the law enforcement authorities,[360] thereby stultifying the criminal law.[361]

The rationale for this very limited role for the *ex turpi causa* defense in tort law has been best explained by Judge McLachlin in his thoughtful opinion in *Hall v. Herbert*. Although he expressed some sympathy for the view expressed by Judge Cory that the defense should be totally eliminated, he stated:

> My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. *The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.*[362]

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356. *See supra* part IV.A (explaining that this will be a very rare occurrence).

357. Even this rule arguably punishes plaintiff in some cases. Denial of punitive damages, it has been pointed out, may leave plaintiff undercompensated given that one-third of the compensatory damages will likely go to plaintiff's lawyer. Fleming, *supra* note 277, at 179 n.21.

358. *See supra* notes 263-64 and accompanying text.

359. *See supra* notes 261-62 and accompanying text; *see also* Blain v. The Doctor's Co., 222 Cal. App. 3d 1065, 272 Cal. Rptr. 250 (1990) (denying recovery to a doctor who lied at deposition in civil case to his ultimate detriment from insurance defense counsel who allegedly advised him to do so); Feld & Sons v. Pechner, 458 A.2d 545 (Pa. Super. Ct. 1983) (denying recovery to plaintiffs convicted of federal perjury and other crimes from counsel who allegedly urged them to commit the offenses); Kirkland v. Mannis, 639 P.2d 671 (Or. Ct. App. 1982) (denying recovery to plaintiff perjurer from attorney who allegedly cooperated in the perjurious tale).

360. *See supra* notes 147-49 and accompanying text (discussing a New Zealand case that erroneously allowed such a recovery).

361. In a roughly analogous situation, some courts have held that savings and loan officials accused of wrongdoing should not be allowed to raise in their defense the contributory negligence of government regulators in failing to detect and report the wrongdoing. *See, e.g.*, *In re* Sunrise Sec. Litig., 818 F. Supp. 840-41 (E.D. Pa. 1993) (holding that an auditor defendant was not allowed to raise FDIC's careless regulation as part of a comparative negligence defense).

362. Hall v. Herbert, [1993] 2 S.C.R. 159, 169 (emphasis added). After surveying a number of cases, Judge McLachlin also concluded that the best explanation for their

This is certainly not a new idea in the law. Many years ago an American court noted that "[t]he law is not properly chargeable with the absurdity of implying an obligation to do that which it forbids."[363] Similarly, the law is not properly chargeable with the absurdity of allowing a plaintiff to profit from acts which it forbids or allowing a plaintiff to avoid a punishment which the law prescribes.

After examining several examples consistent with the rules described above, Judge McLachlin submitted that the "fundamental rationale for the defence of *ex turpi causa* . . . [is] based on the need to maintain *internal consistency* in the law, in the interest of promoting the integrity of the justice system."[364]

Thus, the instincts of the courts applying the public policy approach have been correct all along. Civil tort plaintiffs should not actually profit from wrongdoing. The criminal law should not be neutralized. Unfortunately, the courts have painted with too broad a brush. In all of its various manifestations—duty rule, public policy approach, proximate cause rule, etc.—the *ex turpi causa* defense has generally been applied much too broadly. If the doctrine is to do more good than harm in the tort context, it must be strictly limited (indeed, nearly eliminated) as discussed in this part.

VI. CONCLUSION

Holmes once said that law is "the witness and external deposit of our moral life. Its history is the history of the moral development of the

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holdings was not simply a desire to prevent plaintiffs from profiting from their wrongdoing:

> A more satisfactory explanation for these cases, I would venture, is that to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which—contract, tort, the criminal law—must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web." We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.

Id. at 176 (quoting Weinrib, *supra* note 190, at 42).

363. Edison Elec. Co. v. City of Pasadena, 178 F. 425, 431 (9th Cir. 1910).

364. *Hall*, 2 S.C.R. at 178 (emphasis added).

race."[365] Tort law, particularly, has a strong moral component.[366] Nothing should be done to undermine Holmes's description or to lend the judicial system's support to advance wrongdoing. However, "[m]oral indignation must not be mistaken for public policy."[367] For that reason, the answer to the question posed in the title of this Article is "no." The obscure equitable doctrine *ex turpi causa non oritur actio* should not be used in a misguided attempt to blunt the litigation crisis in the United States or in other western common-law nations.

Though contract law and tort law each have a strong moral component, moral standards are just one of several public policy considerations that go into shaping both bodies of law.[368] The law—and tort law especially—does not distribute compensation based on who is a good person and who is not.[369] The *ex turpi causa* defense blurs the lines between our gut hesitation to aid a wrongdoer and the more important public policies underlying tort law, allowing the former to exert undue influence.[370] The doctrine leads the courts to focus improperly upon

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365. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897); *see also* A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 37 (1953) (noting that "morality has played a particularly important part in the development of the common law").

366. *See* SIMON F. LEE, LAW AND MORALS 18 (1986) ("Behind the technical law of tort . . . are competing moral principles. . . ."); Ernest J. Weinrib, *Thinking About Tort Law*, 26 VAL. U. L. REV. 717, 717 (1992) (explaining the "moral ground" needed to link a plaintiff and defendant in order to create liability). Professor Weinrib correctly observes that tort law has an intrinsic moral component that renders simple economic analysis of tort law inadequate. *See* Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 404 (1989).

367. Jenkins v. Smith, [1969] V.R. 267, 276 (Starke, J.). Holmes himself also said that "[m]oral predilections must not be allowed to influence our minds in settling legal distinctions." O. W. HOLMES, JR. THE COMMON LAW 148 (1881).

368. *See* Shand, *supra* note 184, at 147 ("[T]he moralistic concept of contract law, as opposed to utilitarian or pragmatic justifications for enforcing bargains, is open to dispute.").

369. F.C. Cronkite, *Effect of the Violation of a Statute by the Plaintiff in a Tort Action*, 7 CAN. B. REV. 67, 83 (1929) ("When a defendant comes into court and argues that he should not make good the damage he has caused, and gives as his sole reason that the plaintiff is also a bad man, he is making the oldest retort of the human mind when charged with evil.").

370. CHRISTOPHER F. MOONEY, S.J., PUBLIC VIRTUE at xi (1986) ("Morality and public policy may be related. . . . But the two are also clearly distinct, since not every ethical value promotes the common good.").

An obvious example of the distinction between moral obligation and legal obligation lies in the "Good Samaritan" doctrine, holding that there is no legal obligation to emulate the hero of the famous Biblical parable. *Luke* 10:30-37. *See also* Robert A. Prentice, *Expanding the Duty to Rescue*, 19 SUFFOLK U. L. REV. 15 (1985) (arguing, primarily on public policy grounds, for a limitation on the Good Samaritan doctrine). *See generally* FOWLER V. HARPER ET AL., THE LAW OF TORTS 1 (2d ed. 1986) ("A sharp distinction was recognized between the obligations of the common law and those of ethics or humanitarianism.").

the punctilios of the plaintiff rather than the public policy factors that should underlie a reasoned assignment of legal responsibility.[371]

The problem is particularly acute in cases where the plaintiff's illegality involves a simple breach of a regulatory statute,[372] and cases in which there is no illegality at all, but simply a breach of moral standards.[373] Cases where *ex turpi causa* allows an immoral defendant to escape an otherwise applicable legal duty are also especially troublesome.

Even in the contract area where the illegality doctrine was born and developed, it has vexed the judiciary,[374] and its application has been the subject of frequent criticism by legal commentators both in the United States and abroad.[375] Indeed, New Zealand has gone so far as

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In criminal law also, the emphasis on morality can inappropriately overwhelm other public policy factors. In drafting the Model Penal Code, the American Law Institute noted this fact, stating: "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except to the morality of the actor. Such matters are best left to religious, educational and other social influences." MODEL PENAL CODE § 207.1 (Tentative Draft No. 4, 1955).

371. Weinrib, *supra* note 190, at 37 ("Thus in *Godbolt* the fact that the litigants happened to be engaged in the theft of cattle when the defendant negligently drove his truck off the road and injured the plaintiff seems more pertinent to an assessment of the plaintiff's character than to the ascription of responsibility to the defendant for his careless act.").

372. In a contract case, such a consideration led Lord Devlin to note that the illegality defense "cares not at all for the element of deliberation or the gravity of the infraction, and does not adjust the penalty to the profits unjustifiably earned." St. John Shipping Corp. v. Joseph Rank, Ltd., [1957] 1 Q.B. 267, 281. The same criticism may be made of most approaches to the illegality defense in tort cases. It seems particularly important that the injured plaintiff not be rendered a wolf's head (or, perhaps, a Zoe Baird) for a minor, technical violation of regulatory standards.

373. Hubert W. Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 ROCKY MTN. L. REV. 233, 271 (1942) ("Why should a breach of morals destroy a legal right of action when it will not confer one?").

374. Andrew Beck, *Illegality and the Courts' Discretion: The New Zealand Illegal Contracts Act in Action*, 13 N.Z. U. L. REV. 389, 389 (1989) ("Illegal contracts have always provided something of a headache to the judiciary . . . ."); R.A. Buckley, *Illegality in Contract and Conceptual Reasoning*, 12 ANGLO-AM. L. REV. 280, 281 (1983) ("[T]his branch of the law [has produced] an unusually high proportion of cases in which the judicial reasoning seems both questionable and difficult to follow."); Strong, *supra* note 267, at 347 ("The illegality of contracts constitutes a vast, confusing and rather mysterious area of the law.").

375. *See generally* Brian Coote, *Another Look at* Bowmakers v. Barnet Instruments, 35 MOD. L. REV. 38, 38 (1972) ("The common law on illegal contracts is Draconian . . . in all conscience. . . ."); Shand, *supra* note 184, at 167 ("The frequently expressed dissatisfaction of the judges with the consequences of applying the present

to replace the common-law doctrine with a new statutory scheme.[376] If courts have developed a wariness about the illegality defense even in contract cases,[377] how much greater must the problems be when it is transplanted to the relatively foreign soil of tort law?[378]

Whether the context be tort law, contract law, or criminal law, judges must not be overly fastidious, fearing that they will muss their robes if they must hear unsavory evidence or consider the claims of unwholesome individuals. Justice, not an elevated sense of judicial propriety, must be the guiding star.

None of the cases discussed in part II of this Article[379]—not even that of Bernard McCummings—should be dismissed on *ex turpi causa* grounds. Use of the *ex turpi causa* defense beyond the limited parameters outlined in this Article serves no good purpose; rather, it undermines the compensatory and fairness features of our tort law system.

Notwithstanding all the foregoing discussion, the *McCummings* verdict, mentioned in the introductory quotations, still grates at a visceral level. This grating may not go away when it is remembered that of all the scenarios discussed in part II as possibly giving rise to an *ex turpi causa* defense, the *McCummings* case involved, by a wide margin, the most serious form of plaintiff misconduct. The answer to this visceral irritation is two simple words: Rodney King. Carelessly applied, as it often is in other western common-law jurisdictions, the *ex turpi causa* defense would likely have barred any suit brought by Rodney King against the Los Angeles Police Department for injuries sustained during

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illegality rules is ample indication of their desire to be freed from them."); Hazel Carty, *Illegal Contracts of Employment, Void or Contractually Unenforceable?*, NEW L.J., Aug. 20, 1981, at 871; K. Gillance & A.N. Khan, *Effect of Illegality in Contract of Employment*, SOLIC. J., March 27, 1981, at 212, 213.

376. *See generally* Brian Coote, *Validation Under the Illegal Contracts Act*, 15 N.Z. U. L. REV. 80 (1992).

377. Royal Bank of Can. v. Grobman, 18 O.R.2d 636, 651-52 (1977) (Krever, J.) ("[M]odern judicial thinking has developed in a way that has considerably refined the knee-jerk reflexive reaction to a plea of illegality.").

378. As MacDougall explains:

> *Ex turpi causa non oritur actio* works in contract law because the plaintiff has consented to what he or she (presumably) knows is an illegal arrangement. The court cannot be used to enforce what the plaintiff expected to derive from an illegal arrangement. In tort cases, the situation is different. The plaintiff, presumably, is punished by the criminal or other law for the wrong he or she has committed and is deprived of all other profits that he or she might have expected from the wrongful act. To say that the plaintiff must also bear the burden of uncontemplated damages for which he or she is not "at fault" is insupportable.

MacDougall, *supra* note 191, at 38.

379. *See supra* notes 57-74 and accompanying text.

the notorious video-taped beating. Rodney King has not lived his life as a model citizen, but his alleged criminal acts on the night in question (and those occurring before and since) do not disentitle him from the protection of the law. Nor should they neutralize the other public policy factors that might mitigate in favor of a judgment against the police in his case. If what appears on the videotape to have happened actually did happen, the jury's $3.8 million verdict in favor of Mr. King was certainly justifiable.[380] There may be a principled method of distinguishing between the Rodney King and Bernard McCummings cases, but the *ex turpi causa* doctrine cannot provide it.[381] Both are excessive-use-of-force cases and entitlement to recovery should turn on factual determinations unaffected by the *ex turpi causa* defense.

Legislatures and courts should not revive the *ex turpi causa* defense in tort cases. They should not hastily undermine the compensatory function of tort law in order to effectuate some perceived need to reduce the amount of existing tort litigation.

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380. *King Jury May Be Key to Appeal*, DALLAS MORNING NEWS, June 3, 1994, at 8A.

381. Up to this point, I have not directly defended the *McCummings* verdict. However, the verdict is definitely defensible. There was substantial evidence that the shooting officer, Officer Rodriguez, who had several earlier incidents of questionable use of his firearm, (a) did not see the mugging take place, (b) shot the unarmed McCummings as McCummings was running away and posing no threat to Rodriguez or others, (c) did so in clear violation of guidelines imposed by his employer in accordance with Supreme Court mandate, and (d) lied about his actions on the witness stand (his testimony was contradicted by the testimony of McCummings, of the mugging victim, of his fellow officers, and by the available physical evidence—unless it is possible for a person to run down a flight of stairs after having his spinal cord severed in the mid-chest area). *See generally* McCummings v. New York City Transit Auth., 580 N.Y.S.2d 931 (1992), *aff'd*, 613 N.E.2d 559 (N.Y. 1992), *cert. denied*, 114 S. Ct. 548 (1993).

The recovery by McCummings from the tortfeasor has the advantage of providing him with funds needed to compensate his victim who sued him for damages. William Murphy, *Mugging Victim Wins Court Order*, NEWSDAY, Dec. 24, 1993, at 24. It will also pay his attorney's fees from his criminal defense.