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INTRODUCTION

It is nothing new to say that criminals are responsible for the crimes they commit. Yet given the continued epidemic (albeit declining) number of crimes committed in the United States each year,[1] there is an increased focus on the responsibility of actors other than the criminals themselves—for example, gun manufacturers that supply weapons; police departments that fail to enforce laws; and businesses that spend money protecting valued merchandise but not customers.[2] In the civil context, both courts and legislatures have initiated efforts to broaden civil responsibility to crime victims. In the legislature, state and federal governments have enacted legislation expanding such liability.[3] In the courts, a growing roster of cases alleges defendants' negligence in failing to use reasonable care to protect

1 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2000 STATISTICAL TABLES, 2002 NCJ 188290, *Table 26: Personal Crimes* (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus00.pdf (last visited Nov. 18, 2002) (estimating that 5,815,540 incidents of completed, attempted or threatened crimes of violence took place in the United States in 2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1999 NCJ 18493 (2001) (reporting that 6,723,930 crimes of completed, attempted or threatened violence took place in the United States in 1999); Jeremy Travis, *Foreword* to *Symposium: Why Is Crime Decreasing?*, 88 J. CRIM. L. & CRIMINOLOGY 1173, 1173 (1998) ("Violent crime rates are at their lowest levels since the early 1970s.").

2 *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998) (involving a suit against 911 operator for misclassifying a domestic violence call at a lower priority than training manual guidelines would have accorded the call); Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2000) (involving a suit against manufacturer of semi-automatic weapons for negligent manufacture and marketing of weapon used in a shooting at an office building); McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891 (Tenn. 1996) (involving a suit against Wal-Mart and shopping center for failure to police their parking lot despite company data that crimes against patrons could be reduced by such patrols).

3 *See, e.g.*, 42 U.S.C. § 13981 (2000) (creating federal civil law remedies for women victimized by violence, held unconstitutional in part by *United States v. Morrison*, 529 U.S. 598 (2000), on the ground that the Commerce Clause did not provide Congress with authority to enact civil remedy provision); MINN. STAT. ANN. § 611A.79 (West 2001) (holding parents or guardians liable for civil damages stemming from their children's "bias offenses" unless the parent or guardian "made reasonable efforts to exercise control over the minor's behavior").

against intentional torts.[4] A significant body of scholarship supports this trend.[5]

But while courts, legislatures, and scholars are contemplating expanded obligations to victims of intentional torts, there is little discussion (or perhaps even recognition) of a legal change that could quietly negate these efforts. For the first time in history, a significant number of state courts and legislatures are permitting liability to be apportioned between some types of intentional and negligent fault.[6]

This doctrinal turn is not simply one more change in the constantly shifting landscape of state tort law. Nor is apportionment a mere procedural issue of secondary importance. Instead, apportionment of intentional and negligent fault is an issue of critical significance.[7] Including intentional torts in apportionment systems may effectively repeal the very defendant duties that states intend to create.

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4 Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 445–50 (1999) (examining growing legal liability of individuals and enterprises that set the stage for injuries by third parties); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 649 (1992) (stating that "during recent years there have been several areas in which liability has expanded," including "liability for inadequate security against crime").

5 *See, e.g.*, Rachana Bhowmik et al., *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns*, 4 J. HEALTH CARE L. & POL'Y 42, 43 (2000) (arguing that gun makers "owe a duty to use reasonable care in distributing guns and can be held liable for negligently distributing them"); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2209 (2000) (advocating "a broadly collectivist notion of cause and responsibility" in the negligent security context as well as other contexts).

6 *See, e.g.*, Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 632 N.W.2d 407, 418 (N.D. 2001) (holding that the trial court did not err when it determined that the jury must compare the fault of a negligent tortfeasor—the YMCA that did not revoke a person's membership for throwing a weight and threatening another member, with the fault of an intentional tortfeasor—a member who subsequently shot the other YMCA member he had threatened). Of course, a certain comparison is implicit even in previous rules not to compare intentional and negligent torts. *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868–72 (1996) (noting a deep change in tort law compensation from "all-or-nothing to splitting," but also noting that a comparison of fault and non-fault is implicit under all-or-nothing rules); *see also* Leonard Charles Schwartz, *The Myth of Nonapportionment Between a Plaintiff and a Defendant Under Traditional Tort Law and Its Significance for Modern Comparative Fault*, 11 U. ARK. LITTLE ROCK L. REV. 493, 503 (1989) (tracing apportionment by causation of loss rather than blameworthiness under traditional tort law).

7 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. a (2000) ("Comparative responsibility has a potential impact on almost all areas of tort law.").

The case of *Brandon v. County of Richardson*[8] is illustrative. Teena Brandon ("Brandon") presented herself to others as a man.[9] After a county sheriff made public comments about Brandon's gender and called her an "it," Brandon was brutally raped and beaten by two men who threatened to kill her. Brandon promptly reported the rape to the Richardson County Sheriff's Department.[10] The sheriff conducted a series of long and emotionally abusive interviews with Brandon, but made no effort to arrest the rapists or otherwise protect Brandon. Within the week, the same men who had raped Brandon murdered her.[11]

While the murderers were prosecuted in the criminal courts, Brandon's mother filed a civil suit against the County for its negligent failure to make reasonable efforts (or any efforts) to protect her daughter.[12] In a landmark ruling, the Nebraska Supreme Court held that the County had a duty to protect Brandon once she had reported the rape to the Sheriff's Department and had agreed to aid in the prosecution of the attackers.[13]

The case was then tried in the lower court. The court concluded that the County was negligent.[14] However, the Court apportioned damages among all of the parties—the County, the murderers and the plaintiff.[15] In the apportionment process, the court assigned liability for eighty-five percent of the plaintiff's $80,000 non-economic damage award to the murderers. After a one-percent reduction for the plain-

8 624 N.W.2d 604 (Neb. 2000) (*Brandon II*).

9 *Id.* at 611. This case description uses female pronouns because they were used in the Nebraska Supreme Court's opinion. The fluidity of Brandon's gender identity reveals the problematic aspects of categorization. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 60 (1995) (criticizing legal and social requirements that compel a person to comply with rigid gender norms); *see also* Katherine M. Franke, *What Does a White Woman Look Like? Racing and Erasing in Law*, 74 TEX. L. REV. 1231, 1232–34 (1996) (addressing the perils inherent in legally determining racial identity).

10 *Brandon*, 624 N.W.2d at 610–11 (*Brandon II*).

11 *Id.* at 611–14. The underlying facts of this case form the basis for the award-winning movie, BOYS DON'T CRY (Fox Searchlight Pictures 1999).

12 Brandon v. County of Richardson, 566 N.W.2d 776 (Neb. 1997) (*Brandon I*).

13 *Id.* at 780 ("We conclude that Brandon has stated facts sufficient to qualify for an exception to the no-duty rule because the victim witnessed a crime and agreed to aid the police. A special relationship was created when the victim went to law enforcement officials and offered to testify and aid in the prosecution.").

14 *Brandon*, 624 N.W.2d at 618 (*Brandon II*).

15 *Id.*

tiff's unspecified negligence, the court entered judgment against the County for $17,360.97.[16]

On rehearing, the Nebraska Supreme Court reversed the district court's allocation of damages on the ground that Nebraska's comparative negligence law did not permit apportionment between negligent and intentional tortfeasor defendants.[17] Had the Nebraska Supreme Court reached a different conclusion, the County would have been liable to Brandon's estate for only a small percentage of the adjudicated damages that stemmed from its actionable negligence.

This Article examines cases like *Brandon v. County of Richardson* in which state courts must decide whether to compare defendants' intentional and negligent torts for purposes of apportionment.[18] Though just a decade ago courts rarely questioned the established rules that prevented such comparisons,[19] questions about comparison of defendants' intentional and negligent torts have now emerged on state court dockets in nearly half of the states in this country.[20] The num-

16 That calculation takes into account the $6223.20 of economic damages awarded by the court that had not been apportioned. *Id.* The court's 1% reduction for plaintiff's alleged fault was subsequently overturned. *Id.* at 629. For a discussion of problems that stem from blaming rape victims for rape, even in lawsuits against third-parties rather than rapists, see Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999).

17 *Brandon*, 624 N.W.2d at 629 (*Brandon II*).

18 As discussed more fully in Part I, despite broad rhetoric about comparison of "intentional and negligent fault," court holdings rarely permit comparison of intentional and negligent fault between a plaintiff and a defendant. As such, this Article primarily addresses comparison of defendants' intentional and negligent fault. At times courts permit comparison of intentional and negligent fault between parties that are not formally designated as defendants in the litigation. *See, e.g.*, Rosner v. Denim and Diamonds, Inc., 937 P.2d 353 (Ariz. Ct. App. 1996) (involving a suit brought by bar patron against bar for negligent failure to adequately train employees to handle altercation in which the bar's negligence was compared with the fault of the unknown nonparty attacker); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, at 151–57 (2000) (assembling a state-by-state list of jurisdictions that include nonparties in assignment of comparative responsibility shares). In this Article, the term "defendants" generally includes nonparties when state law authorizes them to stand in the place of named defendants.

19 DAN B. DOBBS, THE LAW OF TORTS 1090 (2000) (noting the "traditional view" of courts in refusing to compare defendants' intentional and negligent torts).

20 State courts that have recently examined the question of whether to compare by percentages one defendant's intentional fault with another defendant's negligence include: Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Dakota, Tennessee, Utah, Washington, and Wyoming. *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998); Ortega v. Pajaro Valley Unified Sch. Dist., 64 Cal. App. 4th 1023 (1998); Slack v. Farmers Ins. Exch., 5 P.3d

ber of jurisdictions considering these questions is likely to continue to grow.[21]

This Article reviews the current state controversy about whether to include intentional torts within comparative apportionment systems.[22] The Article contends that the states' perceived need for intentional-negligent fault comparison stems from a number of mistaken beliefs about the dictates of causation and fairness. When these misperceptions are set aside, states can directly examine the effects of comparison, which are often undesirable, or if desired, are better achieved by direct substantive rules.

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280 (Colo. 2000); Bhinder v. Sun Co., 717 A.2d 202 (Conn. 1998), *superseded by statute as noted in* Lufi v. Islami, No. CV980334075S, 2001 WL 808394, at *2 (Conn. Super. Ct. June 19, 2001); Palafrugell Holdings Inc. v. Cassel, No. 3D99-1596, 2001 WL 20824 (Fla. Dist. Ct. App. Jan. 10, 2001); Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644 (Haw. 1998); Rausch v. Pocatello Lumber Co., 14 P.3d 1074 (Idaho Ct. App. 2000); Paragon Family Rest. v. Bartolini, 769 N.E.2d 609 (Ind. Ct. App. 2002); Wood v. Groh, 7 P.3d 1163 (Kan. 2000); Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. Ct. App. 1999); Flood v. Southland Corp., 616 N.E.2d 1068 (Mass. 1993); Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131 (Miss. Ct. App. 1999); *Brandon*, 624 N.W.2d at 604 (*Brandon II*); Martin v. Prime Hospitality Corp., 785 A.2d 16 (N.J. Super. Ct. App. Div. 2001); Barth v. Coleman, 878 P.2d 319 (N.M. 1994); Chianese v. Meier, 98 N.Y.2d 270 (2002); Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 632 N.W.2d 407 (N.D. 2001); Turner v. Jordan, 957 S.W.2d 815 (Tenn. 1997); Field v. Boyer Co., 952 P.2d 1078 (Utah 1998); Welch v. Southland Corp., 952 P.2d 162 (Wash. 1998); Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079 (Wyo. 2000).

21 In some states, comparative fault acts recently have been amended, but state appellate or supreme courts have not yet addressed issues regarding comparison of defendants' intentional and negligent fault in their decisions. *See, e.g.*, ALASKA STAT. § 09.17.900 (Michie 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001–.017 (Vernon 1997). In other states, local commentators have urged courts to consider intentional/negligent fault comparisons in light of existing comparative fault acts and the lead of other jurisdictions' interpretations. *See, e.g.*, Paul S. Swedlund, *Negligent Hiring and Apportionment of Fault Between Negligent and Intentional Tortfeasors: A Consideration of Two Unanswered Questions in South Dakota Tort Law*, 41 S.D. L. REV. 45, 47–48 (1996) (noting that a case that raised the issue of intentional-negligent comparisons in South Dakota was settled before trial and suggesting that South Dakota reconsider that issue in future cases). Perhaps a symbol of the emerging trend, when the Connecticut Supreme Court reviewed the intentional-negligent fault comparison issue, the three most senior Justices opposed comparisons, while the four newest members of the court supported it. *See* Thomas Scheffey, *Lawmakers Unmake* Bhinder, CONN. L. TRIB., May 24, 1999, at 1.

22 *See* Michael Green & William Charles Powers, Jr., *Apportionment of Liability*, 10 KAN J. L. & PUB. POL'Y 30, 32 (2000) (noting that "[o]ne controversial issue" in comparative apportionment systems "is including intentional torts").

Part I examines how courts arrived at present questions about comparison of intentional and negligent fault, and attempts to explain state court answers to these questions on their own terms—to address what courts say about the choices they make.

Part II shifts the dialogue away from courts' reasoning toward the effects of court comparison of defendants' intentional and negligent fault. Comparison of defendants' intentional and negligent fault can decrease negligent defendants' liability to plaintiffs in cases involving intentional harm—the driving force behind such comparisons.[23] But such comparison can also create a number of other unintended effects, such as diminishing intentional tortfeasors' responsibility to both plaintiffs and other negligent defendants. The actual impact of comparing defendants' intentional and negligent fault depends on the interplay of a number of complementary rules, particularly rules regarding the joint and several liability of intentional and negligent tortfeasors, and the joinder of nonparty and sometimes unknown defendants.

Part III then examines the rationales for comparing defendants' intentional and negligent fault in light of the effects of those comparisons. Although courts place much emphasis on issues of causation and coherence, those issues are ultimately unhelpful in resolving the question of whether to include intentional torts in comparative apportionment systems. Courts' use of percentages assigned in the apportionment process to reflect a true share of the harm that each party caused reflects a misunderstanding of the meaning of apportionment percentages. Moreover, coherence problems remain both in systems that compare intentional and negligent fault and those that do not. This Part concludes that rather than focusing on issues of causation or coherence, courts should consider the interrelationship of apportionment with other substantive tort law objectives.

In light of this evaluation, Part IV provides guidance for courts and legislatures navigating the complex terrain of intentional and negligent fault comparisons. Both the National Commissioners on Uniform State Laws' *Uniform Apportionment of Tort Responsibility Act* and the American Law Institute's *Restatement (Third) of Torts: Apportionment of Liability* have systematically examined a number of intentional-negligent tort apportionment questions and provide approaches that are preferable to current approaches taken in many of the states that

23 *See, e.g.*, *Slack*, 5 P.3d at 288 (reducing compensatory damages owed by insurer that negligently required plaintiff policyholder to see a doctor who had previously been accused of sexual assault and who subsequently sexually assaulted the plaintiff, on the basis that the jury apportioned 60% of the fault to the doctor).

compare intentional and negligent fault.[24] The *Restatement* approach, which includes intentional fault in some comparisons but creates a number of ameliorative doctrines, may be particularly helpful to courts that work within statutorily mandated comparative apportionment systems, but nevertheless seek to minimize some of the harshest effects of intentional-negligent tort comparisons.[25] However, the National Commissioners' approach, which excludes intentional fault from default comparisons and reallocates uncollectible shares, creates a fairer and more internally consistent system than would several of the permissible *Restatement* tracks.

And yet, the best approach to this issue may not involve apportionment at all, but rather direct substantive consideration of parties' legal responsibilities. This Article suggests that jurisdictions should not compare intentional and negligent fault, but should instead directly confront and resolve the concerns that animate calls for comparison—particularly concerns about excessive negligent tortfeasor liability, the blurring of boundaries between intentional and negligent fault, and the coherence of comparative fault regimes.

Ironically, looking at intentional and negligent fault comparisons in this end game of tort reform—a setting in which comparisons can abundantly achieve the liability-limiting objectives of legislatures—may actually undermine support for tort reform statutes. When states examine the problems with apportionment and several liability statutes in the context of intentional/negligent fault comparisons, they may not only decide to bar comparison of intentional and negligent fault, but may also decide to rethink and revise their tort reform statutes in other contexts as well.[26]

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24 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (2000); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT, at 2–7 (Final Draft 2002) (on file with author).

25 *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (creating joint and several liability for tortfeasors who are liable because of their "failure to protect the [plaintiff] from the specific risk of an intentional tort").

26 *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572h(o) (West 2002) (excluding, with limited exceptions, apportionment "between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute" following the Connecticut Supreme Court's decision in *Bhinder v. Sun Co.*, 717 A.2d 202 (Conn. 1998), which had permitted comparison of intentional and negligent fault in the defendant-defendant context).

I. AT THE COURTHOUSE: IN THE STATES

Many courts have taken steps away from the traditional rules that have routinely barred intentional-negligent fault comparison. This Part briefly traces the origin of the intentional-negligent fault comparison question and then examines the fault lines along which states are currently divided.

A. Background

The rule that intentional and negligent fault are not explicitly compared has been firmly established in American jurisprudence.[27] Noncomparison rules have been incorporated as the norm in major tort authorities including the *Restatement (Second) of Torts*, the Uniform Comparative Fault Act, and leading treatises.[28]

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27 This rule has at least five constituent parts: (1) that a negligent tortfeasor defendant cannot assert another defendant's intentional tort as a way to diminish his liability to the plaintiff; (2) that an intentional tortfeasor defendant cannot assert another defendant's negligence as a way to diminish his liability to the plaintiff; (3) that an intentional tortfeasor defendant cannot assert another defendant's negligence to diminish his liability for indemnity or contribution; (4) that an intentional tortfeasor defendant cannot assert the plaintiff's contributory negligence as a defense to his intentional tort; and (5) that a plaintiff guilty of intentional fault cannot recover from a negligent defendant. In certain jurisdictions these rules may apply to wrongdoers not named as parties to the action. *See infra* note 28.

28 *See* RESTATEMENT (SECOND) OF TORTS § 875 (1977) ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."); *id.* § 481 ("The plaintiff's contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person."); *id.* § 886A(3) ("There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm."); UNIF. COMPARATIVE FAULT ACT § 1 cmt., 12 U.L.A. 123, 128 (1977) ("The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them."); DOBBS, *supra* note 19, at 517–18, 1090 ("[M]ost courts . . . have carried these rules over to the regime of contributory negligence, holding or assuming that the plaintiff's comparative fault cannot be used to reduce the liability of an intentional tortfeasor."); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 293 (2d ed. 1986) (stating that "'if the consequences of which the plaintiff complains were intended by the defendant, contributory negligence is out of the case'" (quoting GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 198 (1951))); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 476 (5th ed. 1984) ("Certain categories of joint tortfeasors traditionally have been precluded from obtaining contribution and continue to be so even after the adoption of comparative negligence: those guilty of intentional misconduct, willful and wanton negligence, and those liable for punitive damages." (footnotes omitted)).

Nevertheless, with tort reform a sea change had begun. As part of tort reform agendas in the late 1980s, many states, usually via state legislatures, restricted tort remedies, for example, limiting joint and several liability and curtailing strict products liability by including "strict" products claims within comparative fault regimes.[29] While statutes that compared parties' negligent acts were often termed comparative negligence or comparative fault statutes, statutes that included causes of action beyond negligence, like strict liability, began to be referred to as comparative apportionment or comparative responsibility systems.[30]

As comparative fault statutes were amended or interpreted to include non-fault claims such as strict liability, the comparative endeavor began to change. If negligence could be compared to strict liability despite the lack of an equivalent "fault" denominator, why not compare strict liability, negligence, and recklessness as well?[31] Although some courts refused to incorporate recklessness, gross negligence, and willful and wanton conduct into various aspects of comparison schemes,[32] other states did include such conduct.[33] With

29 *See, e.g.*, Brief of American Law Professors in Support of Respondent at 20–24, Norfolk & Western Railway Co. v. Freeman Ayers, 122 S. Ct. 1434 (2002) (No. 01-963) (stating that "[t]he shifts away from pure joint and several liability almost all occurred as a result of legislative action during the 1980s and early 1990s," and listing the sixteen states that have adopted pure proportionate several liability as well as the many states that have adopted several liability in particular circumstances); William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility, and the Proposed* Restatement (Third) of Torts, 47 OKLA. L. REV. 201, 234 (1994) (noting that courts have applied comparative apportionment to strict products liability claims as a result of the tort reform movement of the 1980s).

30 *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. b (2000) ("This Restatement applies to all claims to recover compensation for death, personal injury, or physical damage to tangible property, including intentional torts, negligence, strict liability, nuisance, breach of warranty, misrepresentation, or any other theory of liability.").

31 *See* Jim Hasenfus, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399, 404–17 (1982) (discussing early state cases considering whether to include recklessness in comparative fault systems); William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts*, 37 OKLA. L. REV. 641, 641–43 (1984) (asking whether, in light of expansion of comparative responsibility in strict product liability context, the "genie" of comparative responsibility would be released from its bottle).

32 *See, e.g.*, Zeroulias v. Hamilton Am. Legion Assocs., 705 N.E.2d 1164, 1166 (Mass. App. 1999) (dram shop defendant could not reduce liability based on comparison with drunk driver's fault because state comparative negligence statute does not include "willful, wanton, or reckless conduct"); Hampton Tree Farms, Inc. v. Jewett, 974 P.2d 738, 746 (Or. Ct. App. 1999) (stating that "from the text of the statute and

the decisions of some courts to include recklessness in comparative systems, the further question—whether intentional fault might be added to the comparison mix—was not far behind.[34]

Negligent defendants' economic incentives to expand comparison ensured that the negligent-intentional fault comparison question would be raised.[35] With the combination of several liability and the inclusion of the fault of nonparties (and sometimes even unknown or immune nonparties),[36] negligent tortfeasor defendants could reap significant financial benefits from their ability to compare negligence with other forms of fault, such as intentional torts. For example, absent joint and several liability, an apartment complex owner that could split its liability for negligent security with a murderer's fault for an intentional homicide might conceivably eliminate its entire responsibility to compensate the victim's estate.[37]

Accordingly, questions about comparison of intentional and negligent torts were driven by defendant interests and fairness arguments. Specifically, in light of a perceived lack of need for an equivalent fault denominator for comparisons, tort reform's liability limiting objectives, and defendants' financial incentives to compare intentional and negligent fault, questions about comparison of intentional and negli-

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the cases that construe it, comparative fault does not apply to a plaintiff's recovery when a defendant is liable because of willful misconduct").

33 *See, e.g.*, Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079, 1084 (Wyo. 2000) (comparing one defendant's recklessness with another defendant's negligence); Poole v. City of Rolling Meadows, 656 N.E.2d 768, 771 (Ill. 1995) (reversing an earlier ruling and holding that "a plaintiff's contributory negligence may be compared to a defendant's willful and wanton misconduct, if that willful and wanton misconduct was committed recklessly, rather than intentionally").

34 *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449, 452 (Ariz. 1998) (considering whether to include intentional torts in comparative fault system in light of "recent cases [that] have permitted a comparison of reckless, willful, or wanton conduct with negligent conduct"); Blazovic v. Andrich, 590 A.2d 222, 227–28 (N.J. 1991) (noting that in New Jersey comparative fault had been applied to strict liability and willful and wanton conduct, and then considering whether comparative negligence should be extended to include intentional torts).

35 *See* Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654–55 (1990) (asserting that the new tort reform, unlike the old, "is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system").

36 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, at 151–59 (2000) (listing jurisdictions that have adopted several liability and that include nonparty fault). *See, e.g.*, DaFonte v. Up-Right, Inc., 828 P.2d 140, 146 (Cal. 1992) (holding that the proper fault comparison is between "all fault responsible for the plaintiff's injuries," not merely that of the defendants named in the lawsuit (emphasis omitted)).

37 *See* Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644, 649–50 (Haw. 1998).

gent fault have been raised with increasing frequency over the last decade.

B. Current Questions and the Importance of Context

Courts in at least twenty-two states have recently faced questions about comparison of defendants' intentional and negligent fault.[38] State legislatures have faced similar questions.[39] Moreover, a number of state courts have examined comparison of intentional and negligent fault between plaintiffs and defendants.[40] That so many state courts are now seriously grappling with questions related to intentional/negligent fault comparisons is striking because only a decade ago courts had rarely questioned the justice and efficacy of the firmly established rules that prevented such comparisons.[41]

Now that courts are actively considering intentional/negligent fault comparisons, they often view the question of whether to permit comparison of intentional and negligent fault as a simple yes or no question—a court either compares these varieties of fault or it does not. Yet while some courts use broad language about comparing "intentional and negligent fault," the actual holdings suggest that this broad rhetoric is inapt.[42] The reality of state court holdings is far more confined and context-dependent.

With few exceptions, the cases that permit comparison of intentional and negligent fault compare the intentional and negligent fault of two defendants.[43] Even when jurisdictions compare intentional

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38 *See supra* note 20.

39 *See, e.g.*, ALASKA STAT. § 09.17.900 (Michie 1999) (enacting legislation to include intentional acts in comparative apportionment statute); 42 PA. CONS. STAT. ANN. § 7102 (West 2002) (enacting "comparative negligence" statute after considering a bill proposing "comparative responsibility").

40 *See, e.g.*, Whitlock v. Smith, 762 S.W.2d 782, 783 (Ark. 1989) (holding that in battery case the trial court "correctly refused to give the instruction on comparative fault"); Poole v. City of Rolling Meadows, 656 N.E.2d 768, 770 (Ill. 1995) (holding that a plaintiff's contributory negligence may not be compared to a defendant's intentional misconduct).

41 *See* DOBBS, *supra* note 19, at 1090 (noting the "traditional view" that courts refuse to compare one defendant's intentional harm with another's negligence).

42 *See, e.g.*, Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079, 1084 (Wyo. 2000) (permitting intentional and negligent fault of defendants to be compared and distinguishing a prior case that rejected comparisons on the ground that in the prior case "the comparison was of the conduct of only the plaintiff and the defendant driver—not the conduct of another 'actor'").

43 *Compare* Martin v. United States, 984 F.2d 1033, 1039–40 (9th Cir. 1993) (holding that defendants' intentional and negligent torts should be compared under California's comparative fault act), *with* Heiner v. Kmart Corp., 100 Cal. Rptr. 2d 854, 864 (Ct. App. 2000) (refusing to allow batterer to assert plaintiff's negligence); *compare*

and negligent fault in this context, they frequently prevent comparison in other contexts.[44] Thus, although courts and commentators often fail to differentiate between comparison of intentional and negligent fault between defendants and comparisons of intentional and negligent fault between plaintiffs and defendants,[45] the distinction is critical.[46]

Courts rarely permit intentional tortfeasor defendants, such as the murderers in the *Brandon* case, to compare their conduct with a *plaintiff's* negligence.[47] The exceptions in which such comparisons have been permitted or urged in this context primarily involve low-culpability intentional torts or high-culpability negligent torts.[48] For example, when the defendant's intentional tort did not involve an intent to harm others, as can be the case in some property torts like

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also Rausch v. Pocatello Lumber Co., 14 P.3d 1074 (Idaho Ct. App. 2000) (comparing defendants' intentional and negligent torts), *with* Fitzgerald v. Young, 670 P.2d 1324, 1326 (Idaho Ct. App. 1983) (refusing to compare defendant's intentional tort with plaintiff's negligence).

44 *See Bd. of County Comm'rs of Teton County*, 8 P.3d at 1084.

45 *See, e.g., id.* at 1084 n.2 (citing cases barring comparisons between plaintiffs and defendants as contrary to case barring comparison between defendants); *see also* Christopher M. Brown & Kirk A. Morgan, Comment, *Consideration of Intentional Torts in Fault Allocation: Disarming the Duty To Protect Against Intentional Conduct*, 2 WYO. L. REV. 483, 502 (2002) (stating that "[t]wenty-five jurisdictions have held that their comparative fault statutes do not permit the comparison of intentional and negligent conduct" but including in that tabulation a state such as Idaho, which bars an intentional tortfeasor from asserting the plaintiff's negligence but nevertheless permits comparison between intentional and negligent tortfeasor defendants).

46 Reginald R. White, III. *Comparative Responsibility Sometimes: The Louisiana Approach to Comparative Apportionment and Intentional Torts*, 70 TUL. L. REV. 1501, 1520 (1996) ("Application of comparative apportionment to a suit involving an intentional tortfeasor depends on whose fault is being compared. Plainly, different considerations are involved when comparing the fault of the intentional and negligent tortfeasor; the victim and the negligent tortfeasor; and the victim and the intentional tortfeasor.").

47 *See* Kellerman v. Zeno, 983 S.W.2d 136, 141 (Ark. Ct. App. 1998) (holding that malicious prosecution is an intentional tort and that comparative fault instruction was properly rejected on that basis despite broad wording of fault in state comparative fault statute); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1(c) (2000) ("Although some courts have held that a plaintiff's negligence may serve as a comparative defense to an intentional tort, most have not."); DOBBS, *supra* note 19, at 520 ("[F]ew cases so far seem to have reduced a personal injury defendant's liability for his own intentional wrongdoing merely because the plaintiff was guilty of contributory negligence."); Allan L. Schwartz, Annotation, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R.5TH 529, 533 (1994) ("The clearly prevailing view is that comparative negligence principles are not applicable to intentional torts.").

48 *See infra* notes 49–50 and accompanying text.

nuisance, or when the intent to harm others is harbored by a low-culpability actor like a child, a court may permit an intentional tortfeasor defendant to compare its intentional fault with a plaintiff's negligence.[49] In situations of heightened plaintiff culpability—for example, when the plaintiff, like the defendant, has committed an intentional tort—a court may also permit intentional/negligent fault comparisons.[50]

Similarly, few courts permit a *plaintiff* guilty of intentional fault to compare that fault with the defendant's negligence. So even though Brandon's estate could sue the sheriff who failed to use reasonable care to prevent the murder, ordinarily the murderers could not file a similar suit claiming that the sheriff's negligence led to their incarceration.[51] The exceptions in this context generally concern diminished

49 *See* Shields v. Cape Fox Corp., 42 P.3d 1083, 1088 (Alaska 2002) (holding that because defendant's "fault giving rise to liability for conversion could be mere negligence" it was plain error for trial court not to have provided the defendant's comparative negligence instruction"); Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 32–38 (1984) (urging plaintiff comparative fault as a defense to the intentional tort of nuisance); Gail D. Hollister, *Using Comparative Fault To Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 151–52 (1993) (urging comparisons in the case of a person who shot a dog believing it was a (presumably unprotected) wolf, a situation in which the intent to act did not include an intent to harm a legally cognizable interest); McNichols, *supra* note 31, at 644–46 (advocating some plaintiff comparative fault defenses to intentional torts and using illustrations concerning intentional torts committed by children as in *Ellis v. D'Angelo*, 253 P.2d 675 (Cal. Dist. Ct. App. 1953), and *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891)).

50 *See, e.g.*, Bonpua v. Fagan, 602 A.2d 287 (N.J. Super. Ct. App. Div. 1992) (involving a plaintiff who physically attacked the defendant during the altercation); Johnson v. City of Philadelphia, 2002 WL 31119177, at *5 (Pa. Commw. Ct. Sept. 26, 2002) (holding that if both plaintiff's and defendant's conduct was reckless, the jury could compare the parties' conduct). Some courts and commentators have suggested that provocation should be a defense to an intentional tort. *See, e.g.*, Comeau v. Lucas, 455 N.Y.S.2d 871 (App. Div. 1982); B. Scott Andrews, *Premises Liability—The Comparison of Fault Between Negligent and Intentional Actors*, 55 LA. L. REV. 1149, 1164 (1995) (suggesting that when apportioning fault between a negligent plaintiff and an intentional tortfeasor "[i]f the act is a result of provocation, comparison will be appropriate"). Most of the cases that permitted verbal provocation to serve as a defense came from Louisiana. *See, e.g.*, Jones v. Thomas, 557 So. 2d 1015 (La. Ct. App. 1990). However, Louisiana has now overruled those cases by statute. *See* LA. CIV. CODE ANN. art. 2323(c) (West 1997) ("[I]f a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.").

51 *See, e.g.*, Adkinson v. Rossi Arms, Co., 659 P.2d 1236, 1240 (Alaska 1983) (holding that a convicted killer was not allowed to sue gun manufacturer on claim that gun's defect caused its discharge which led to his prison sentence).

capacity plaintiffs who have intentionally harmed themselves rather than others. An example would be in-patient and prisoner suicide cases.[52] In addition, when the negligent tortfeasor's very duty is to protect even an intentional tortfeasor, as in civil rights cases, plaintiffs guilty of intentional fault have also been allowed to recover from negligent defendants.[53]

Because court holdings that compare intentional and negligent fault are largely confined to comparisons of that fault between intentional and negligent *defendants*, this Article focuses on the comparison of intentional and negligent fault solely within that context.

C. *Whether To Compare Defendants' Intentional and Negligent Fault by Percentages: Two Competing Views*

While most states still refuse to compare intentional and negligent fault even in the context of two tortfeasor defendants,[54] a growing minority of states has broken with precedent and permitted such comparisons. In the twenty-two states in which courts have recently reexamined rules regarding intentional-negligent fault comparison between defendants, the courts of fourteen states have determined that defendants' intentional and negligent fault should be compared

52 *See* Wyke v. Polk County Sch. Bd., 129 F.3d 560, 567–68 (11th Cir. 1997) (holding that mother of high school student who committed suicide at home after school failed to tell parent that student had attempted suicide twice at school could bring § 1983 and wrongful death claim against school board and school officials); Joseph v. State, 26 P.3d 459, 477 (Alaska 2001) ("[T]he intentionality of a prisoner's suicide does not preclude a claim that a jailer negligently failed to prevent that suicide."); Robert K. Jenner, *Overcoming Contributory and Comparative Negligence in Suicide and Self-Inflicted Harm Cases, in* 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1985, at 1993 (2000) ("Negligent health care providers should not even have access to the doctrines of contributory negligence or assumption of the risk where the psychiatric staff's duties include preventing the self-destructive act that causes the patient's death." (emphasis omitted)).

53 *See* DOBBS, *supra* note 19, at 523 n.2 (citing McCummings v. New York City Transit Auth., 613 N.E.2d 559 (N.Y. 1993) (holding that a plaintiff may recover if he is negligently injured by a police officer even though he was running away from a mugging)); *see also* Gail D. Hollister, *Tort Suits for Injuries Sustained During Illegal Abortions: The Effects of Judicial Bias*, 45 VILL. L. REV. 387, 389 (2000) (arguing that women injured during illegal abortions should be permitted to sue for injuries tortiously inflicted during the abortion).

54 *See infra* note 59 and accompanying text.

in at least some types of cases.[55] Eight of those states, on the other hand, continue to bar such comparisons.[56]

Precisely who is making decisions about comparing intentional and negligent fault in this context—courts or legislatures—can be difficult to pinpoint. The conclusions of state courts often flow, more or less naturally, from interpretations of statutory comparative-fault schemes. Both state courts that compare intentional and negligent fault and those that do not, rely extensively on interpretation of state comparative-fault acts. Consequently, differences in the wording and scope of state comparative-fault acts play an appropriately important role in the conflicting nature of state law rules in this area.[57]

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55 State courts that have recently chosen to compare some defendants' intentional fault with other defendants' negligence include: Arizona, California, Colorado, Hawaii, Idaho, Indiana, Kentucky, Louisiana, New Jersey, New Mexico, New York, North Dakota, Utah, and Wyoming. *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998); Ortega v. Pajaro Valley Unified Sch. Dist., 64 Cal. App. 4th 1023 (Ct. App.1998); Slack v. Farmers Ins. Exch., 5 P.3d 280 (Colo. 2000); Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644 (Haw. 1998); Rausch v. Pocatello Lumber Co., 14 P.3d 1074 (Idaho Ct. App. 2000); Paragon Family Rest. v. Bartolini, 769 N.E.2d 609 (Ind. Ct. App. 2002); Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. Ct. App. 1999); Martin v. Prime Hospitality Corp., 785 A.2d 16 (N.J. Super. Ct. App. Div. 2001); Barth v. Coleman, 878 P.2d 319 (N.M. 1994); Chianese v. Meier, 98 N.Y.2d 270 (2002); Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 632 N.W.2d 407 (N.D. 2001); Field v. Boyer Co., 952 P.2d 1078 (Utah 1998); Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079 (Wyo. 2000). Although some state statutes have been amended to include intentional conduct in comparative apportionment systems, state courts have not yet ruled whether those statutes also include intentional harms.

56 The states whose courts have recently determined that those states do not compare the negligent fault of one defendant with the intentional fault of another defendant are: Connecticut, Florida, Kansas, Massachusetts, Mississippi, Nebraska, Tennessee, and Washington. *See, e.g.*, Lufi v. Islami, No. CV980334075S, 2001 WL 808394, at *2 (Conn. Super. Ct. June 19, 2001); Palafrugell Holdings Inc. v. Cassel, No. 3D99-1596, 2001 WL 20824 (Fla. Dist. Ct. App. Jan. 10, 2001); Wood v. Groh, 7 P.3d 1163 (Kan. 2000); Flood v. Southland Corp., 616 N.E.2d 1068 (Mass. 1993); Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131 (Miss. Ct. App. 1999); Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001) (*Brandon II*); Turner v. Jordan, 957 S.W.2d 815 (Tenn. 1997); Welch v. Southland Corp., 952 P.2d 162 (Wash. 1998). Many other states may have chosen not to reconsider the issue because of a desire to maintain their existing bans on such comparisons.

57 *Compare* CONN. GEN. STAT. § 52-572h(o) (West Supp. 2002) ("Except as provided in subsection (b) of this section, there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct . . . ."), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (Vernon 1997) ("The trier of fact, as to each cause of action asserted, shall determine the percentage of

However, statutory differences are not the sole factor in differing judicial analyses, as statutes with similar language have been interpreted to hold contrary "plain" meanings.[58] Accordingly, this Part examines both statutory and non-statutory rationales proffered by state courts.

1. The Majority: Courts That Do Not Compare Defendants' Intentional and Negligent Torts By Percentages

Most states have not explicitly compared one defendant's intentional fault with another defendant's negligence.[59] In many states,

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responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these: (1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been joined . . . .").

58 *Compare* ARIZ. REV. STAT. ANN. § 12-2506 (West 1994) ("Fault means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product."), *as interpreted by* Hutcherson v. City of Phoenix, 961 P.2d 449, 451–53 (Ariz. 1998) (holding that the "plain meaning" of the term "fault" included intentional torts), *with* WASH. REV. CODE ANN. § 4.22.015 (West 1988) ("'Fault' includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages."), *as interpreted by* Welch v. Southland Corp., 952 P.2d 162, 164–66 (Wash. 1998) (holding that the unambiguous statutory definition of "fault" does not include intentional acts).

59 The majority—states that have not compared by percentages one defendant's intentional fault with another defendant's negligence—is a diverse group. The group includes states that have not enacted comparative fault. *See, e.g.*, Sawyer v. Comerci, 563 S.E.2d 748, 752 (Va. 2002). The group also includes states that have enacted comparative fault but have expressly decided to exclude intentional torts from comparisons. *See infra* notes 63, 71. In addition, a number of states that have not directly discussed the issue of comparison by percentages apparently exclude intentional torts from comparisons in practice. *See, e.g.*, Doe v. Wal-Mart Stores, 558 S.E.2d 663 (W. Va. 2001) (addressing store's liability to victim of parking lot abduction without any comparison of abductor and store's responsibility). Still other states have directly discussed and rejected comparison of defendants' intentional and negligent fault by percentages, but have made these rulings in special contexts. *See, e.g.*, Gomilla v. Libertas, No. 99-2436, 2000 Wis. Ct. App. LEXIS 1119, at *9 (Nov. 21, 2000) (unpublished opinion) (ruling that "comparison principles do not allow the intentional conduct of the employee to be compared with the negligent conduct of the employer");

years-old prohibitions against comparison have been retained without recent reexamination.[60] In these states, courts have provided little explanation for their continued practices—perhaps reflecting the view that challenges to the noncomparison rule are not sufficiently serious in these jurisdictions even to require extended consideration.

In at least eight states, however, courts have recently addressed and deliberately retained rules barring comparison of defendants' intentional and negligent torts.[61] Court determinations in these states have been grounded on three main rationales: the requirements of state statutes, the importance of the negligent defendant's duty, and the belief that intentional and negligent conduct are "different in kind." Dissenting opinions in states that have elected to compare defendants' intentional and negligent torts mirror and enhance these rationales.[62]

a. Reliance on State Statutes

In all of the states that have explicitly considered and rejected intentional-negligent defendant fault comparisons, state statutes played a role in court decisions. In three states—Connecticut, Florida, and Mississippi—explicit statutory language excludes "intentional" misconduct from the definition of "fault" in comparative fault systems.[63] Not surprisingly, state court decisions in these states relied

Farmers State Bank of Darwin v. Swisher, 631 N.W.2d 796, 801 (Minn. 2001) (stating that Minnesota's comparative fault act applies to negligent or reckless acts or omissions but not intentional torts and therefore disallows the defendant's proposed setoff based on the other defendant's settlement). Finally, additional states directly state that they exclude intentional torts from comparisons but have made those broad statements in cases that do not involve two tortfeasor defendants. *See, e.g.*, Johnson v. City of Philadelphia, 808 A.2d 978, 983 (Pa. Commw. Ct. 2002) (stating that "the only conduct that is statutorily authorized to be compared is *negligent* conduct," but addressing that issue in the context of a plaintiff and a defendant).

60 *See, e.g.*, Richardson v. QuickTrip Corp., 81 S.W.3d 54, 67 (Mo. Ct. App. 2002) (holding that convenience store had a duty to patron raped in ladies room without suggesting that such a duty could be compared to the rapist's fault).

61 *See supra* note 56.

62 *See, e.g.*, Slack v. Farmers Ins. Exch., 5 P.3d 280, 288–95 (Colo. 2000) (Rice, J., dissenting) (arguing that the pro-rata liability statute was not intended to allow for apportionment of liability between a negligent tortfeasor and an intentional tortfeasor).

63 *See* CONN. GEN. STAT. § 52-572h(o) (Supp. 2002) ("[T]here shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional misconduct . . . ."); FLA. STAT ANN. § 768.81(4)(b) (West 1997 & Supp. 2002) ("[Comparative fault] does not apply . . . to any action based upon an intentional tort.");

almost exclusively on statutory language,[64] whether the state legislation overruled a court's prior intentional/negligent fault comparisons, as in Connecticut,[65] or was designed to reinforce prior judicial decisions, as in Florida.[66]

However, explicit statutory language excluding intentional acts from comparison has not precluded all intentional-negligent comparison questions. In Mississippi, the state statute governing "[j]oint tortfeasors, liability, and contribution" explicitly provides that "'[f]ault' shall not include any tort which results from an act or omission committed with a specific wrongful intent."[67] And yet, one Mississippi court felt that to resolve the "hybrid case" of intentional/negligent fault comparisons, the court needed to look beyond the statutory text itself,[68] to extrinsic evidence of legislative intent such as statutory drafts and revisions,[69] and to policy considerations.[70]

When state comparative fault or apportionment statutes lack specific language concerning intentional fault, courts have examined legislative intent but generally have placed less reliance on that factor. In the five states that bar comparison of defendants' intentional and negligent fault without explicit statutory language that mentions intentional fault—Kansas, Massachusetts, Nebraska, Tennessee, and

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MISS. CODE ANN. § 85-5-7 (1999) ("'Fault' shall not include any tort which results from an act or omission committed with a specific wrongful intent.").

64 *But see* Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131, 1142 (Miss. Ct. App. 1999) (stating that the issue of comparison between defendants was open in Mississippi despite explicit statutory language excluding intentional torts).

65 In *Bhinder v. Sun Co.*, 717 A.2d 202, 204 (Conn. 1998), a wrongful death suit in which a gas station attendant who worked at a store with a history of assaults was killed by an armed robber, a narrowly divided Connecticut Supreme Court elected to permit comparison of the gas station's negligence with the robber's intentional tort. Just nine months after the decision, the Connecticut legislature retroactively amended its comparative fault statute to overrule the *Bhinder* decision by stating explicitly that "there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute." CONN. GEN. STAT. § 52-572h(o) (Supp. 2002) (providing limited exceptions).

66 In Florida, the legislature amended its comparative fault statute to preclude the application of comparative fault to "any action based upon an intentional tort." FLA. STAT ANN. § 768.81(4)(b) (West 1997 & Supp. 2002). That amendment reinforced that state's earlier court rulings. *See, e.g.*, Stellas v. Alamo Rent-A-Car, Inc., 702 So. 2d 232, 233–34 (Fla. 1997) (holding that "it was an error to permit both defendants' names to appear on the verdict form").

67 MISS. CODE ANN. § 85-5-7 (1999).

68 *Dawson*, 735 So. 2d at 1136.

69 *Id.* at 1136–41.

70 *Id.* at 1136–42.

Washington[71]—courts have primarily relied on two policy rationales: the nature and importance of the defendant's duty and the idea that intentional and negligent fault are different in kind.

b. The Defendant's Duty

The state court most widely noted for its rejection of intentional/negligent fault comparisons is the Kansas Supreme Court—one of the first courts to adopt comparative negligence[72] and one of the first courts to expressly consider and reject this aspect of comparative apportionment.[73] The Kansas Supreme Court has repeatedly refused to compare the fault of intentional and negligent tortfeasor defendants—primarily relying on the concern that comparisons would undermine the very duty of the negligent defendant. Specifically, the Kansas court maintains that when the very duty of the negligent defendant is to use reasonable care to prevent an intentional tort, it would be contrary to that obligation to allow the defendant to rest its defense on the fact that the intentional tort that it facilitated had occurred.

Under this "very duty" reasoning, a truck stop accused of negligence in failing to safeguard a bailed tractor-trailer rig was not permitted to compare its negligence with the intentional fault of the thief who had stolen and demolished the bailed vehicle because "[t]heft is clearly one of the harms against which a bailee must protect."[74] Similarly, a fast-food restaurant accused of negligence for its manager's failure to contact police or intervene while a customer was attacked on its premises could not compare its fault with the intentional attacker's because the restaurant's very duty was to use reasonable care to protect the customer from the intentional assault.[75] And a school bus transportation service and school district accused of negligence in ig-

71 *See* M. Bruenger & Co. v. Dodge City Truck Stop, Inc., 675 P.2d 864, 869 (Kan. 1984); Flood v. Southland Corp., 616 N.E.2d 1068 (Mass. 1993); Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2000) (*Brandon II*); Turner v. Jordan, 957 S.W.2d 815 (Tenn. 1997); Welch v. Southland Corp., 952 P.2d 162, 165 (Wash. 1998).

72 *See* KEETON ET AL., *supra* note 28, § 67, at 469–70.

73 *See M. Bruenger & Co.*, 675 P.2d at 869–70 (discussing Kansas's comparative negligence statute and refusing to compare negligent and intentional fault).

74 *Id.* at 869. The court reversed the judgment of the trial court, which permitted the jury to compare the truck stop's negligence with the intentional fault of the thief—the jury had allocated 50% of the responsibility to the thief, 10% to the truck stop that had left the truck unlocked with the keys in the ignition while repairing a tire, and 40% to the owners of the truck who had left the truck unlocked with the keys in the ignition before the truck was repaired. *Id.* at 867.

75 Gould v. Taco Bell, 722 P.2d 511, 514, 516–17 (Kan. 1986) (holding that Taco Bell, whose manager knew of prior attack by restaurant patron and saw patron's attack

noring a mother's concerns that her six-year-old mentally retarded daughter was being sexually abused could not compare their negligence with that of the abuser.[76] Courts are concerned that "[a] weakening of the incentives [of negligent defendants] would occur if a large part of the responsibility remained on the criminal who directly caused the harm."[77]

c. Difference in Kind

In decisions rejecting comparison of defendants' intentional and negligent torts, courts also note concerns that intentional and negligent torts are inappropriate for comparison because the two types of conduct are "different in kind."[78] As one court wrote when preventing such comparisons, "intentional torts are part of a wholly different legal realm and are inapposite to the determination of fault pursuant to [the statutory scheme]."[79]

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on plaintiff but failed to phone police, could not add attacker as a formal party in plaintiff's negligent security suit against the restaurant).

76 Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 591–93, 605 (Kan. 1991) (holding that in suit brought on behalf of a six-year-old mentally retarded girl assaulted by her school bus driver, which alleged negligence by the school bus transportation service and school district on the ground that they ignored her mother's concerns about signs of abuse, the trial court had not erred "in failing to instruct the jury to compare their fault (negligence) with [the bus driver's] fault (intentional)" because "it would be unfair to allow the intentional act of one defendant to be compared with the negligent act of a defendant whose duty it is to protect the plaintiff from the act committed by the intentional tortfeasor").

77 Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131, 1140 (Miss. Ct. App. 1999); *see also* Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 87 (Tenn. 2001) (rejecting nursing home's attempt to compare its fault with that of nurse who assaulted patient and relying in part on court's previously stated concern that "allowing comparison would reduce the negligent person's incentive to comply with the applicable duty of care and thus prevent further wrongdoing").

78 *See, e.g.*, Lee v. Coss, 39 F. Supp. 2d 170, 174 (D. Conn. 1999); Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997).

79 Welch v. Southland Corp., 952 P.2d 162, 166 (Wash. 1998) (citing Price v. Kitsap Transit, 886 P.2d 556, 560 (Wash. 1994)); *cf. Dawson*, 735 So. 2d at 1141 ("Both negligence and wilful torts are considered in the statute, but there is no bridge between them. The statute almost seems to say, to paraphrase Kipling, 'fault is fault and wilful is wilful and never the twain shall meet.'").

2. The Emerging Minority: Jurisdictions That Compare Defendants' Intentional and Negligent Fault By Percentages

In the last decade, a number of states have permitted comparison of defendants' intentional and negligent fault.[80] This minority view is significant because it is recent, appears likely to increase,[81] and has garnered support from one significant authority.[82]

Before discussing cases that compare defendants' intentional and negligent fault, it is important to note that this law is both recent and in flux. In some jurisdictions, courts have not yet reviewed state statutes that were amended to include intentional conduct.[83] In other jurisdictions, state appellate courts, but not state supreme courts, have decided that defendants' intentional and negligent fault should be compared.[84] In still other jurisdictions, state court holdings have been subsequently modified or overruled by state legislatures.[85] Consequently, the state laws themselves are still evolving.

Courts in fourteen states have recently permitted comparison of some defendants' intentional and negligent fault.[86] Courts in these fourteen states support their decisions with a number of similar rationales—deference to state legislatures, renewed concern for "fair shares" particularly in light of other rules about allocating fault, conviction that intentional and negligent torts are different only in degree, deference to juries and their ability to make comparative

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80 *See supra* note 55.

81 *See, e.g.*, Swedlund, *supra* note 21, at 45 (noting that a case that would have raised the issue of intentional-negligent comparisons in South Dakota was settled before trial and suggesting that South Dakota reconsider that issue in future cases).

82 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c (2000) (recommending comparison of some types of intentional and negligent fault, but also adopting significant ameliorative doctrines).

83 *See supra* note 21.

84 *See, e.g.*, Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643 (Ct. App. 1994); Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14 (Ct. App. 1991).

85 *See* Bhinder v. Sun Co., Inc., 717 A.2d 202 (Conn. 1998), *superceded by statute as stated in* Eskin v. Castiglia, 753 A.2d 927, 935 (Conn. 2000); Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 717–18 (La. 1994) (interpreting that state's comparative fault statute before it was revised in 1996); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1112–13 (La. Ct. App. 1999) (noting Louisiana's 1996 comparative fault statutory revisions).

86 State courts that have recently chosen to compare some defendants' intentional fault with other defendants' negligence include: Arizona, California, Colorado, Hawaii, Idaho, Indiana, Kentucky, Louisiana, New Jersey, New Mexico, New York, North Dakota, Utah, and Wyoming. *See supra* note 55.

apportionment determinations, and interest in following the lead of other state courts and authorities.

a. Reliance on State Statutes

While many courts rely on statutory interpretation, courts that permit comparison of intentional and negligent torts have been much less likely to rely exclusively on actual or perceived legislative mandates. In a few states, comparative fault statutes expressly include "intentional" conduct within their ambit.[87] In most of these states, reported opinions have not yet interpreted whether that statutory language includes not only intentional conduct but also conduct that intended harm.[88] However, in one state with such a statute, a state court included without discussion even conduct that intended harm.[89]

In states with statutes that do not explicitly address intentional torts, courts also rely on legislative intent.[90] Some courts have concluded that the "plain meaning" of the statutory term "fault" in comparative fault statutes includes intentional torts. Courts have determined that state comparative fault or responsibility statutes include intentional harms even when the statute enumerated specific categories of included "fault" that did not list intentional torts,[91] struck references to "intentional torts" found in earlier versions of the legislation,[92] contained specific language exempting "actions requiring proof of intent,"[93] or included legislative history suggesting that

87 *See, e.g.*, ALASKA STAT. § 09.17.900 (Michie 2000) ("'[F]ault' includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others . . . ."); IND. CODE ANN. § 34-6-2-45(b) (Michie 1998) (fault includes "any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others"); MICH. COMP. LAWS ANN. § 600.6304 (West 2000) (stating that "'fault' includes an act, omission, [or] conduct, including intentional conduct").

88 *See, e.g.*, ALASKA STAT. § 09.17.900; *see also* RESTATEMENT OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 1 (Tentative Draft, March 28, 2001) (distinguishing between intentional acts and intentional harms and recommending that only the latter be included as intentional torts).

89 IND. CODE ANN. § 34-6-2-45(b); Paragon Family Rest. v. Bartolini, 769 N.E.2d 609 (Ind. Ct. App. 2002).

90 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506 (West Supp. 2001), *as interpreted by* Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998).

91 *Hutcherson*, 961 P.2d at 462.

92 *See* Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079, 1083 (Wyo. 2000).

93 Chianese v. Meier, 774 N.E.2d 722, 724 (N.Y. 2002).

the legislature had never considered the possibility of comparing defendants' intentional torts.[94]

b. A Concern for "Fair Shares"

Courts that have elected to compare defendants' intentional and negligent fault have been much more likely than their counterparts to discuss policy considerations along with their statutory interpretation. The most frequently cited policy rationale in favor of intentional/negligent fault comparisons between defendants has been a concern for fairness. A number of courts apparently viewed comparison of intentional and negligent fault as more fair to plaintiffs and defendants, because they believed that such comparisons would ensure that no party would pay more than its "fair share" of the fault,[95] or for more than what it caused.[96] Within this overarching concern for fairness, courts have raised a number of distinct issues. Courts are concerned that absent intentional/negligent fault comparisons, negligent tortfeasors will be held liable for an intentional tortfeasor's fault.[97] They are also concerned that negligent defendants will pay a larger share of the judgment when their codefendants are intentional rather than negligent tortfeasors.[98] In addition, courts are concerned that

94 Slack v. Farmers Ins. Exch., 5 P.3d 280, 290 (Colo. 2000) (Rice, J., dissenting) ("[A]t no time did the committee engage in any discussion indicating that these changes [from comparative "negligence" to "fault"] might alter the scope of liability apportionment in any fashion . . . . It is difficult to believe that the conference committee intended so sweeping a change in the scope of liability apportionment without any discussion or comment to that effect.").

95 *See, e.g.*, *Hutcherson*, 961 P.2d at 452.

96 *See, e.g.*, Reichert v. Atler, 875 P.2d 379, 381 (N.M. 1994) ("[T]he basis for comparative fault is that each individual tortfeasor should be held responsible only for his or her percentage of the harm. We will not stray from that reasoning in this case." (citation omitted)); Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 632 N.W.2d 407, 416 (N.D. 2001) (stating that in comparisons, each party is "liable only for the amount of damages attributable to that party").

97 *See Reichert*, 875 P.2d at 381 (stating that the "injured party is attempting to hold a negligent tortfeasor responsible for the conduct of an intentional tortfeasor"); *Bd. of County Comm'rs of Teton County*, 8 P.3d at 1084 ("To leave an actor such as [the intentional tortfeasor] out of the apportionment calculation exposes the remaining appellants to the possibility that they will be held to answer for his misconduct.").

98 For example, the New York Court of Appeals has stated that:

> under plaintiff's reading of the statute, the right of a low-fault defendant to apportion would depend entirely on the nature of the culpability of the third-party tortfeasor. A negligent defendant could apportion liability with a negligent or reckless third-party tortfeasor, but not an intentional tortfeasor. Such a result is not only illogical but also inconsistent with the chief remedial purpose of article 16.

negligent tortfeasors will pay more than intentional tortfeasors.[99] Finally, courts are concerned that payments by negligent tortfeasors will primarily benefit intentional tortfeasors.[100]

Some courts also believe that fault shares must be apportioned "as a whole" and "at one time" in order to achieve a fair assignment of liability. Courts cite the desirability of making comparisons in a single case,[101] even when intentional and negligent fault comparisons do not preclude (or even create evidence in) suits against a second defendant stemming from the same injury.[102]

c. Rejection of the Defendant's Duty Argument

Courts that compare defendants' intentional and negligent fault often reject the argument that the comparison undercuts the negli-

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Chianese, 774 N.E.2d at 726 (citation omitted); *see also Slack*, 5 P.3d at 286 (suggesting that the legislature did not intend "to expose a negligent tortfeasor to greater liability when his conduct was coupled with that of an intentional tortfeasor, than when his conduct combined with that of another negligent tortfeasor").

99 *See, e.g.*, Weidenfeller v. Star & Garter, 2 Cal. Rptr. 2d 14, 16 (Ct. App. 1991) ("[T]he common sense notion [is] that a more culpable party should bear the financial burden caused by its intentional act."); *Slack*, 5 P.3d at 286 ("[F]ailure to apportion 'would have the incongruous effect of rendering a negligent party solely responsible for the conduct of an intentional actor, whose deviation from the standard of care is clearly greater.'" (quoting *Bhinder v. Sun Co.*, 717 A.2d 202, 210 (Conn. 1998) (overruled by statute))). That juries in some states can award most or all of the fault to the negligent rather than the intentional tortfeasor appears to undermine this argument somewhat. *See, e.g.*, Evangelatos v. Super. Ct., 753 P.2d 585, 590 (Cal. 1988) (noting that "defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff's damages if other more culpable tortfeasors were insolvent").

100 *See, e.g., Evangelatos*, 753 P.2d at 590.

101 *See Weidenfeller*, 2 Cal. Rptr. 2d at 16 (noting that the purpose of the comparative fault statute is "to prevent the unfairness of requiring a tortfeasor who is only minimally culpable *as compared to the other parties* to bear all the damages"); John Scott Hickman, Note, *Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 754–58, 762 (1995) (noting that "[a] rule requiring plaintiffs to join all possible defendants in a single action would serve the goals of efficiency, fairness, and consistency of judgments in comparative fault jurisdictions").

102 *See* ARIZ. REV. STAT. ANN. § 12-2506(B) (West Supp. 2001) ("Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.").

gent party's duty, as the legal duty itself is formally retained.[103] Those courts also state that comparisons will not reduce negligent tortfeasors' incentives to take care.[104] However, one court that chose to compare defendants' intentional and negligent fault did so despite its belief that barring comparisons "does act as an incentive to those with a duty to protect against intentional harm."[105]

d. Difference in Degree

Not only do courts that compare intentional and negligent defendant fault reject the idea that the question of comparison is a question of the defendant's duty, but they also reject the more traditional difference-in-kind distinction.[106] Courts that compare intentional and negligent torts suggest that these types of torts are not different in kind, but rather different only in degree.[107] In support of this argument, courts are particularly apt to rely on legal scholars who have "demonstrated" that differences are not in kind but in degree.[108]

e. Deference to Juries

In order to make degree comparisons, courts that embrace defendants' intentional/negligent fault comparisons often express complete confidence in and deference to jury allocations. As one court said, "We have no doubt that jurors are capable of evaluating degrees of fault . . . ."[109]

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103 *See, e.g.*, Bhinder v. Sun Co., Inc., 717 A.2d 202, 210 (Conn. 1998), *superseded as stated in* Eskin v. Castiglia, 753 A.2d 927, 935 (Conn. 2000). The court stated,

> We are also unpersuaded by the plaintiff's claim that apportionment would permit a defendant to avoid liability or diminish a defendant's incentive to exercise a standard of reasonable care in providing security for his premises. Apportionment does not affect the determination of whether the defendant is liable under a theory of negligence . . . .

Id.

104 *See id.*; Blazovic v. Andrich, 590 A.2d 222, 231 (N.J. 1991) ("Apportionment of fault between intentional and negligent parties will not eliminate the deterrent or punitive aspects of tort recovery.").

105 *See* Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079, 1084 (Wyo. 2000).

106 *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449, 452 (Ariz. 1998).

107 *See id.*

108 *See id.* (citing, for example, Dear & Zipperstein, *supra* note 49, at 5).

109 *Id.* at 453.

f. The Lead of Other Jurisdictions and Scholars

Finally, courts considering intentional/negligent fault comparisons look to their own cases concerning recklessness,[110] to other state court decisions regarding reckless and intentional torts,[111] and to a few early articles in the area.[112]

D. Ancillary Questions: Blurring the Dichotomy

While states that compare defendants' intentional and negligent fault by percentages take a seemingly opposite view from states that do not permit such comparisons, state answers to a number of ancillary questions regarding the scope and effect of intentional/negligent fault comparisons create the possibility for significant distinctions within this category of states. Consequently, even jurisdictions that share a similar position with respect to the initial issue of whether or not to compare defendants' intentional and negligent fault may produce markedly different damage assessments.

In jurisdictions that elect to permit intentional/negligent fault comparisons between defendants, courts quickly face a number of foundational questions. Do comparisons apply to all intentional and negligent defendants or just some? Are alleged tortfeasors included when they are not parties to the litigation? What about when the tortfeasor is unknown or immune from suit? Are intentional tortfeasors and/or negligent tortfeasors jointly and severally liable for a single, indivisible injury? If not, are uncollectible shares of fault reallocated between the parties or rather left to the plaintiff to bear? Can the negligent tortfeasor be assigned a greater share of liability than the intentional tortfeasor? What is the standard for jury comparisons and judicial review? If there is joint and several liability, what are the rules of contribution or indemnity between the two tortfeasors?

These questions are not simply items of secondary importance, but relate to the very purpose and effect of comparisons. Few courts that compare intentional and negligent fault have yet addressed the panoply of subsidiary questions that they will ultimately be called upon to resolve; many courts have perhaps not yet envisioned the full range of these questions.[113]

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110 *See id.*

111 *See, e.g.*, Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 281 (5th Cir. 1998) (noting the decisions of fifteen other states).

112 *See* Blazovic v. Andrich, 590 A.2d 222, 228 (N.J. 1991) (citing Dear & Zipperstein, *supra* note 49, at 5).

113 *See* Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed* Restatement (Third) of

Courts that have addressed these ancillary issues have not achieved a consensus. Few courts that permit comparisons have discussed or suggested limits on the types of intentional tortfeasors that can use them. Defendant-defendant comparisons have included intentional tortfeasor murderers,[114] burglars,[115] and rapists.[116] In addition, comparisions have applied to negligent tortfeasors who have created or enhanced the risk of an intentional tort, not just those whose negligence was separate from the intentional tort.[117]

Nevertheless, courts have accepted or suggested some limits. One potential limit is the "very duty" rule.[118] Under that rule, a negligent tortfeasor defendant cannot compare the fault of an intentional tortfeasor if the duty the negligent tortfeasor breached was to combat the risk of the intentional tort.[119] Other restrictions have been sug-

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Torts, 82 IOWA L. REV. 1293, 1294 (1997) (noting that "the strength and simplicity of the central concept of 'comparative responsibility' has often compelled law-makers to adopt sweeping change without tending to many important corollary issues," such as "how several-liability jurisdictions should handle an immune nonparty's share of responsibility for a tort").

114 *See, e.g., Hutcherson*, 961 P.2d at 449; Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644 (Haw. 1998).

115 *See* Thomas v. First Interstate Bank of Ariz., N.A., 930 P.2d 1002 (Ariz. Ct. App. 1996).

116 *See* Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 72 (La. Ct. App. 1989); Martin v. Prime Hospitality Corp., 785 A.2d 16, 24 (N.J. Super. Ct. App. Div. 2001) ("The sole fact that [the rapist] pled guilty to a crime would also not bar apportionment.").

117 *See, e.g.*, Rausch v. Pocatello Lumber Co., 14 P.3d 1074, 1082–83 (Idaho Ct. App. 2000) (rejecting argument that negligent employer "should not get the benefit of apportionment of part of the damages to [the intentional tortfeasor employee] because the foreseeability of harm caused by [the employee's] misbehavior is the very fact that makes [the employer's] conduct negligent"); *Martin*, 785 A.2d at 24 (holding that hotel's duty of care to guest "did not as a matter of law encompass an obligation to prevent the sexual assault").

118 *See Hutcherson*, 961 P.2d at 452 n.1 (noting that the "very duty" argument had not been raised before it); *see also* Brown & Morgan, *supra* note 45, at 526 (stating that if states interpret comparative fault statutes to include intentional fault, "legislatures should amend their statutory language to exclude the allocation of fault to intentional tortfeasors in duty-to-protect cases or statutorily provide that the negligent defendant be held jointly and severally liable").

119 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000). The *Restatement* provides,

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Id.

gested by individual states. Louisiana originally took the view that comparison of negligent and intentional fault could be limited based on public policy when (1) the negligent tortfeasor had a duty to prevent the intentional act of another, (2) the expense of comparison would otherwise fall on a plaintiff who was not at fault, and (3) the negligent and intentional acts were so different in kind that comparison was not possible.[120] Based on that doctrine, the Louisiana Supreme Court refused to allow a landlord alleged to have lied about its security system to diminish its liability for negligence on the basis of a rapist's intentional fault.[121] However, after a subsequent statutory amendment, the status of the Louisiana public policy exception is now unclear.[122]

Courts that compare intentional and negligent fault also make different decisions with respect to a range of other comparison-related issues. For example, although many courts that engage in comparison include nonparty defendants in apportionment calculations, courts have not reached a consistent view about the treatment of intentional tortfeasors who are unknown or insolvent.[123] For example, Louisiana law requires comparison with nonparty and even unknown tortfeasors.[124] Utah courts reject comparison with an unknown tortfeasor, but have made no statement about a known, nonparty defendant.[125] Meanwhile, Kentucky courts reject comparisons of fault with even known nonparties.[126]

Similarly, states have different rules with respect to joint and several liability. Some comparison states have statutes retaining joint and several liability for intentional tortfeasors.[127] Others abolish the joint and several liability of intentional tortfeasors except in special limited circumstances.[128] For negligent tortfeasors, while jurisdictions that

120 *See* Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719–20 (La. 1994).

121 *Id.* at 720.

122 *See* Frazier v. St. Tammany Parish Sch. Bd., 774 So. 2d 1227, 1231–32 (La. Ct. App. 2000).

123 *See* Cardi, *supra* note 113, at 1295–97.

124 LA. CIV. CODE ANN. art. 2323 (West 1997).

125 *See, e.g.*, Field v. Boyer Co., 952 P.2d 1078, 1081–82 (Utah 1998).

126 Baker v. Webb, 883 S.W.2d 898, 899–900 (Ky. Ct. App. 1994) (dismissing nonparty defendants under Kentucky statute, which limits allocation of fault to parties in the litigation). *But see* Adam v. J.B. Hunt Transport, Inc., 130 F.3d 219, 227–28 (6th Cir. 1997) (suggesting that in *Baker*, the court's discussion of nonparty defendants was dicta).

127 *See, e.g.*, HAW. REV. STAT. ANN. § 663-10.9 (]Michie 2002).

128 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506(A)(v) (West Supp. 2001) (abolishing joint and several liability unless the defendant is acting in concert or as agent of the party, which would seem to prevent joint and several liability even for many inten-

compare intentional and negligent fault generally do not retain joint and several liability,[129] some retain joint and several liability for certain classes of the harm, such as economic damages.[130]

Court holdings are also split on the question of whether juries may apportion a greater share of the responsibility to the negligent tortfeasor than to the intentional tortfeasor. One might expect that in most cases, intentional tortfeasors would be assigned greater—perhaps far greater—shares of fault. To date, however, jury verdicts in reported cases appear more randomly dispersed. Several juries have assigned negligent tortfeasors the lion's share of liability.[131] In some cases, these jury determinations have been upheld,[132] and in others they have been overruled.[133]

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tional tortfeasors); TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(b) (Vernon Supp. 2002). The Texas Code provides,

> [A] defendant who, with the specific intent to do harm to others, acts in concert with another person to engage in the conduct described in the following sections of the Penal Code shall be jointly and severally liable with such other person for the damages legally recoverable by the claimant that were proximately caused by such conduct.

Id.; *see also* James v. Bessemer Processing Co., 714 A.2d 898, 915 (N.J. 1998) (noting that New Jersey retains joint and several liability with regard to environmental tort actions and in cases in which the defendant is found responsible for 60% or more of the total damages); *infra* note 158.

129 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, at 154 (2000) (listing several liability jurisdictions).

130 *See* CAL CIV. CODE §§ 1431–1431.2 (West Supp. 2002) (retaining joint and several liability for "economic damages," but only several liability for "non-economic damages").

131 *See, e.g.*, Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15, 19 (E.D.N.Y. 1998) (examining jury decision that found reckless housing authority 60% at fault and rapist 40% at fault); Hutcherson v. City of Phoenix, 961 P.2d 449, 451–52 (Ariz. 1998) (upholding jury decision that found negligent 911 operator 75% at fault and murderer 25% at fault); Ortega v. Pajaro Valley Unified Sch. Dist., 64 Cal. App. 4th 1023, 1030 (1998) (apportioning 100% of responsibility to school district and none to the teacher who molested the student); Paragon Family Rest. v. Bartolini, 769 N.E.2d 609, 613–14 (Ind. Ct. App. 2002) (apportioning 80% of responsibility to bar and 10% to each of two intentional tortfeasors); Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 288 (Ky. Ct. App. 1998) (apportioning 75% of responsibility to church for negligent supervision and 25% to employee for molesting a child); Weiss v. Hodge, 567 N.W.2d 468, 474 (Mich. Ct. App. 1997) ("[J]ury found the dram shop defendant eighty percent at fault and [the intentional tortfeasor defendant] only twenty percent at fault.").

132 *See, e.g.*, *Ortiz*, 22 F. Supp. 2d at 19; *Hutcherson*, 961 P.2d at 455; *Weiss*, 567 N.W.2d at 477–78.

133 *See, e.g.*, Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 660 (Ct. App. 1994) (reversing jury apportionment of one percent of fault to grandmother who severely abused four-year-old and 75% and 24% fault, respectively, to the county and

All of these different doctrinal determinations render a single description of the law in jurisdictions that compare intentional and negligent fault untenable—the differences within these jurisdictions may be as profound as the differences between jurisdictions that compare and those that do not. Similarly, differences between jurisdictions that do not compare defendants' intentional and negligent fault may be equally profound.[134]

II. COMPARISON: A FUNCTIONAL ACCOUNT

The numerous opinions that discuss comparison of intentional and negligent fault rarely address what is actually at stake in the comparison decision. Accordingly, this Part shifts the focus away from what courts are saying about comparisons to what courts are doing—the actual effects of comparing intentional and negligent fault.

From a functional perspective,[135] the effects of comparing intentional and negligent torts are highly dependent on other variables—particularly a state's joint and several liability rules and its rules governing the joinder of nonparties.[136] It is only when comparative apportionment is considered within a context of vanishing joint and several liability[137] and the increasing inclusion of nonparty, and some-

its social worker who negligently failed to protect the child); *Paragon Family Rest.*, 769 N.E.2d at 613–14 (allocation of 80% of fault to pub that frequently served alcohol to minors and 20% to underage drinkers who attacked the plaintiff was "contrary to and not supported by the evidence"); *cf.* Lee v. Coss, 39 F. Supp. 2d 170, 174 (D. Conn. 1999) ("Whether a reckless defendant should be able to escape liability because a negligent plaintiff is found more than 50% responsible is not a question the Connecticut Supreme Court has squarely addressed.").

134 For example, these states may take different views of defendants' original duty, or enact limits through other doctrines such as proximate cause. *See* Pula v. State, 40 P.3d 364, 366–67 (Mont. 2002) (holding that state charged with negligence in female prisoner's rape by male inmate properly presented jury instruction that rapist's intervening acts negated the state's causal role, even though court had previously ruled that fault could not be apportioned to non-party defendants).

135 *See* Guido Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479, 481 (2000) (describing a functional approach to law as one that looks "not at the language of the law, but only to what the law was supposed to do"; viewing the "law as a 'doer' of things").

136 *See* Roger Henderson, Draft of Uniform Apportionment of Tort Liability Act (July 3, 2000) (on file with author) (providing background on changes since the Uniform Comparative Fault Act was promulgated); Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as It Affects Joint and Several Liability*, 49 EMORY L.J. 565 *passim* (2000).

137 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, at 151–59 (2000) (including a state-by-state listing of joint and several liability rules); Cardi, *supra* note 113, at 1302–04 & nn.52–56 (stating that sixteen states have abol-

times even unknown and immune parties,[138] that apportionment issues become practically, not just theoretically, significant.

In the context of intentional and negligent tortfeasor defendants—the main locus of state comparison controversies—comparisons have the potential to decrease the negligent tortfeasor's liability to the plaintiff, decrease the intentional tortfeasor's liability to the plaintiff, increase the plaintiff's burden to bear the costs of the injury, and decrease the intentional tortfeasor's liability to the negligent defendant for contribution or indemnity. In the *Brandon* case,[139] for example, not only might the County of Richardson reduce its liability for damages to Brandon's estate, but the murderers might also reduce their liability to the estate, as well as their obligation to the county for purposes of contribution or indemnity. In addition, these effects would be achieved through an apportionment process that places more reliance on jury discretion and less reliance on defined legal standards than do current noncomparison rules. Of course, there may be additional indirect effects as well.

A. Diminishing Negligent Tortfeasors' Liability to Plaintiffs

Without question, the single most significant effect of current state court intentional/negligent fault comparisons is to decrease negligent defendants' liability to plaintiffs. In jurisdictions that do not retain joint and several liability for negligent tortfeasors, either through joint and several liability statutes or through a "very duty" rule, comparison of defendants' intentional and negligent fault reduces, at times dramatically, negligent defendants' liability to plaintiffs. For example, despite accusations of sexual assault made to an insurance company about a chiropractor, the insurance company did not take steps to remove the doctor from its list of independent medical examiners, but rather required another accident victim to have her independent medical evaluation with that doctor. When she too was sexually assaulted, the jury found the insurance company negligent. However, the insurer was permitted to compare its negligence with the chiropractor's fault for intentional sexual assault. In the

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ished or nearly abolished joint and several liability and that twenty others have eliminated at least part of that liability; these partial joint and several liability systems include jurisdictions that retain joint and several liability for economic but not noneconomic damages, for specific causes of action, and for cases in which the defendant's fault is greater than a certain threshold percentage).

138 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, at 151–59.

139 *See* Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2000) (*Brandon II*); *see also supra* notes 8–17 and accompanying text.

comparison, the insurer's fault was assessed at 40% of the total, thereby reducing the victim's compensatory damage award against the insurer from $40,000 to $16,000.[140]

In another case, despite a jury finding of negligence, an apartment complex that let a woman's agitated ex-boyfriend past security without telling her it had done so avoided its entire responsibility to pay compensatory damages to the woman's estate after the ex-boyfriend confronted her in the hallway and murdered her.[141]

At times, the negligent tortfeasor's liability has been cut by more modest percentages. A housing authority landlord that failed to maintain a working front door lock paid 40% less in damages to a grandmother who was raped at gunpoint in the stairwell.[142] A security company that collected $1 million a year in security premiums but had no response to repeated warnings that a fired employee had returned to the premises was assigned 75% of the total fault in an action brought by the estate of the murdered coworker.[143] A city whose 911 operator listed a domestic violence victim's call as low-priority paid 25% less to the victims' families.[144]

In most cases, the effects of comparison are not easily calculable from appellate records, because court opinions reject an award obtained without comparison but do not report the dollar value of the new award or settlement.[145]

By reducing the share of damages that negligent tortfeasors are required to pay injured plaintiffs in particular cases, comparison of intentional and negligent fault generally increases the share of injury

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140 Slack v. Farmers Ins. Exch., 5 P.3d 280, 283 (Colo. 2000) (explaining the apportionment of liability by the jury and noting that the plaintiff, Slack, was also awarded $16,000 in exemplary damages).

141 Ozaki v. Ass'n of Apartment Owners, 954 P.2d 652, 663 (Haw. 1998) (explaining that when the lower court compared the apartment complex's conduct with the ex-boyfriend's deliberate act of murder, the complex was only left with 3% of the liability, which then—by comparison to the victim's 5% fault—eliminated its responsibility to pay any sum of money to the murder victim's family).

142 Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15, 38 (E.D.N.Y. 1998) (reducing award from $3 million to $1.8 million).

143 Rosh v. Cave Imaging Sys., Inc., 32 Cal. Rptr. 2d 136, 139 (Ct. App. 1994) (reducing $5.5 million judgment by approximately $300,000).

144 Hutcherson v. City of Phoenix, 961 P.2d 449, 455 (Ariz. 1998) (upholding jury's award of $1.7 million in damages based on an allocation of fault to murderer of 25% and 75% of fault to the city).

145 *See, e.g.*, Thomas v. First Interstate Bank of Ariz., 930 P.2d 1002 (Ariz. Ct. App. 1996); Bd. of County Comm'rs of Teton County *ex rel.* Teton County Sheriff's Dep't v. Bassett, 8 P.3d 1079 (Wyo. 2000).

costs that plaintiffs are required to bear.[146] For example, in a case in which a jury assigned 70% of the responsibility to pay damages for an injury to the intentional tortfeasor and 30% to the negligent tortfeasor, if the intentional tortfeasor were unknown or insolvent and the negligent tortfeasor paid only its initial 30% share of the damages, the plaintiff would be left to bear the remaining 70% of the injury costs, even if she was not at fault and the negligent defendant was at fault.[147] Consequently, courts' willingness to compare defendants' intentional and negligent harms reduces plaintiffs' ability to recover damages in cases involving a combination of negligent and intentional harm.[148]

The impact on plaintiff recoveries is likely to be particularly acute when comparisons involve intentional torts because, to the extent that fault plays a role in assigning responsibility, intentional tortfeasors will likely be assigned higher responsibility shares than other types of defendants. In addition, intentional tortfeasors may be less able to pay judgments than negligent tortfeasors—particularly because insurance does not cover most intentional torts.[149] Permitting comparison of negligent and intentional torts will likely influence not only recoveries but settlement values as well.[150]

There is one significant uncertainty in this calculation. Although comparisons minimize negligent tortfeasor liability in particular cases, comparisons could lead to an overall expansion of negligent tortfeasor liability. This could happen if: (1) courts expand negligent defendants' duties or permit a greater number of cases to reach juries in light of comparisons; (2) juries are more likely to hold defendants liable for negligence when that negligence can be assigned in percent-

146 *See* Leonard Charles Schwartz, *Apportionment of Loss Under Modern Comparative Fault: The Significance of Causation and Blameworthiness*, 23 U. TOL. L. REV. 141, 142 (1991) ("With an apportionment method, each of the tortfeasors is liable for only a share of the [total loss,] and the plaintiff bears the share that is not apportioned to any of the tortfeasors.").

147 *See* Cardi, *supra* note 113, at 1295 ("[I]n a several-liability system, each defendant may be held liable only for its comparative share of the fault, leaving the plaintiff to shoulder the burden of an immune or insolvent nonparty's share.").

148 *See, e.g.*, Ortiz v. N.Y. City Hous. Auth., 22 F. Supp. 2d 15, 34 (E.D.N.Y. 1998) (apportioning fault between intentional and negligent tortfeasors).

149 *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722–23 (1997) ("[M]ost standard liability policies do not cover liability for harm that the insured intentionally causes.").

150 *See* Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 28 (1983) ("Of the cases in ten courts studied by the Civil Litigation Research Project, about 88% were settled . . . .").

age shares;[151] or (3) juries and judges in comparative apportionment jurisdictions are more likely to award and uphold punitive damages to avoid compensatory damage caps.[152] In addition, comparing defendants' intentional and negligent fault may produce changes in other rules—more plaintiff "no duty" rules or negligent defendant "very duty" rules, for example, which change the relationship between negligent plaintiffs and defendants.[153]

Not only will comparison of defendants' intentional and negligent fault affect plaintiff awards, but such comparisons will also change the very standards by which juries determine fault and judges review those determinations.

B. Diminishing Intentional Tortfeasors' Liability to Plaintiffs

While courts usually consider the effect of comparison on negligent tortfeasors' liability, they seem to give less thought to another potential consequence of comparing negligent and intentional fault—the potential diminution of intentional tortfeasors' liability for damages to the injured plaintiff in light of another defendant's negligence. However, the potential for this consequence is equally real.

Reducing the intentional tortfeasor's liability to the plaintiff based on another defendant's negligence is a distinct possibility. In Arizona's *Hutcherson v. City of Phoenix* case,[154] for example, a man who deliberately murdered his ex-girlfriend and her new boyfriend was assigned a 25% share of the total responsibility for damages.[155] Because

151 Flood v. Southland Corp., 616 N.E.2d 1068, 1071 (Mass. 1993) (noting that "if the stabbing was intentional" the intentional tortfeasor's conduct "would not be involved in the jury's comparative fault assessment" and that this proof "would tend to increase the prospect that a jury would conclude that the stabbing was not a reasonably foreseeable intervening act for which [the allegedly negligent convenient store] would be responsible").

152 *Compare* Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 287, 291 (Ky. Ct. App. 1998) (apportioning fault for sexual abuse of church-school student between church and abuser for purposes of compensatory damage award, but upholding punitive damage claim against the church), *with* Hutchinson *ex rel.* Hutchinson v. Luddy, 763 A.2d 826, 837–38, 847 (Pa. Super. Ct. 2000) (refusing to apportion fault for sexual abuse of minor parishoner for purposes of compensatory damages, but rejecting punitive damage claim against the church). *See also* Slack v. Farmers Ins. Exch., 5 P.3d 280, 287 (Colo. 2000) (upholding jury award of exemplary damages against insurance company although compensatory damages had been apportioned).

153 *See* David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 188–95 (1998) (discussing "ameliorative doctrines or techniques" used to mitigate effects of contributory negligence regimes).

154 961 P.2d 449 (Ariz. 1998).

155 *Id.* at 451.

Arizona law explicitly does not retain joint and several liability for intentional tortfeasors,[156] the murderer, even if extremely wealthy, might have owed the victims' estates only a quarter of their compensatory damage award, leaving the victim to bear the costs if the negligent defendant were insolvent.[157] Since a number of jurisdictions that compare defendants' intentional and negligent fault do not retain joint and several liability rules for all intentional tortfeasors,[158] the same result would appear likely to occur in other jurisdictions as well.

At least one court rejected an intentional tortfeasor's attempt to diminish her responsibility based on the liability of an additional negligent tortfeasor.[159] However, other reported decisions on this point are scarce.[160] While the possibility of intentional tortfeasor reductions has been raised by parties in other cases, courts have rarely addressed the issue.[161] If apportionment were to reduce intentional tortfeasor liability, as it would seem to, courts and legislatures might then craft additional rules barring such reductions.[162]

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156 *See* ARIZ. REV. STAT. ANN. § 12-2506(D) (West Supp. 2001).

157 However, because the murderer himself was not joined as a defendant in the case and thus could not be bound by the jury's apportionment, *see* ARIZ. REV. STAT. ANN. § 12-2506(B) (West Supp. 2001) ("Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action."), *Hutcherson* raised the possibility but not the reality of such diminution.

158 *See, e.g.*, IND. CODE ANN. § 34-51-2-10 (West 1999) ("In the case of an intentional tort, the plaintiff may recover one hundred percent (100%) of the compensatory damages in a civil action for intentional tort from a defendant who was convicted after a prosecution based on the same evidence."); TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(b) (Vernon 1997) (retaining joint and several liability for intentional tortfeasors committing specified conduct); *see also supra* note 128.

159 *See* Lafer v. Becker, No. B141962, 2002 WL 598973, at *4 (Cal. Ct. App. Apr. 19, 2002) (holding that defendant who was liable for malicious prosecution and intentional infliction of emotional distress could not "shift responsibility . . . to others who . . . may have negligently contributed to [the plaintiff's] injury") (opinion not certified for publication or ordered published).

160 *See id.* (noting that "[t]he parties do not cite, and our research does not reveal, any cases which directly address the question of whether an intentional tortfeasor is entitled to establish the liability of additional negligent tortfeasors in order to invoke the benefits of Proposition 51," which holds parties severally liable for portions of non-economic damages).

161 *See, e.g.*, Martin v. Prime Hospitality Corp., 785 A.2d 16 (N.J. Super. Ct. App. Div. 2001) (raising the possibility that the rapist's recovery could be reduced based on the rape victim's negligence and the third party's negligence, but not directly addressing whether it would be).

162 *See, e.g.*, LA. CIV. CODE ANN. art. 2323(c) (West 1997) ("[I]f a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of

C. *Diminishing Intentional Tortfeasors' Share of Contribution or Indemnity*

Comparison of intentional and negligent torts might also reduce intentional tortfeasor defendants' share of contribution or indemnity to negligent defendants. Some new rules would permit intentional tortfeasors to obtain contribution from negligent defendants.[163]

Overall, comparisons would tend to reduce negligent and intentional tortfeasor liability to plaintiffs (and thereby reduce plaintiff recoveries), reduce intentional tortfeasor responsibility relative to negligent defendants, and change the terms of jury decisions and court review.

III. EVALUATING THE EFFECTS OF COMPARISON

Once courts and legislatures recognize the effects of comparison, the question for decisionmakers is whether these effects are desirable. It is not clear whether courts and legislatures that compare intentional and negligent fault actually desire the effects of comparison, or whether decisionmakers believe that fairness to the parties *requires* comparison, so that questions about the desirability of effects do not deserve direct scrutiny.[164]

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the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.").

163 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. e (2000) ("The policy of allocating a loss according to each person's share of responsibility supports having the negligent tortfeasor and the intentional tortfeasor, as between themselves, each bear their own comparative shares."); *id.* § 23 cmt. *l* ("A person who can otherwise recover contribution is not precluded from receiving contribution by the fact that he is liable for an intentional tort.").

164 *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449, 452–53 (Ariz. 1998) (allowing the comparison of intentional and negligent fault because these comparisons would be more fair to both plaintiffs and defendants, but then mitigating the effects of those comparisons by allowing the negligent tortfeasor to be assigned a greater share of the responsibility than the intentional tortfeasor); Lamp v. Reynolds, 645 N.W.2d 311, 319 (Mich. Ct. App. 2002) (stating that Michigan's comparative fault statute permits a willful and wanton or intentional tortfeasor defendant to assert plaintiff's comparative negligence, but then avoiding that comparison by holding that the plaintiff's conduct was not the proximate cause of his harm); Pamela J. Sewell, Comment, *Tort Law—New Mexico Examines the Doctrine of Comparative Fault in the Context of Premises Liability:* Reichert v. Atler, 25 N.M. L. REV. 353, 359–60, 362 (1995) (noting that New Mexico compares a premises' owner-defendant's negligence with another defendant's intentional fault and thus "diminishes the duty" owed by the negligent tortfeasor, but also adopts a jury instruction which "compensates for the potential unfairness to the plaintiff by increasing the amount of care that the premises owner must exercise in the face of an increasing risk of danger").

Many courts and commentators view comparison of intentional and negligent torts as essential to fairness because of the need to ensure that negligent tortfeasor defendants are liable only for the portion of the harm that they caused. However, this fairness concern misconceives the meaning of the percentages assigned through the comparative apportionment process. While those comparative percentages may provide information about one defendant's fault relative to another's, they do not divide liability based on true shares of causation. Furthermore, issues of justice and policy, rather than causation, must guide determinations about the appropriate scope of negligent defendant liability.

One relevant aspect of justice and policy questions is the internal consistency of intentional-negligent fault comparison rules with rules requiring comparison of negligent tortfeasors' conduct. Including intentional fault in comparative fault systems solves one coherence problem—not requiring a negligent tortfeasor to pay a larger share of the judgment when his codefendant is an intentional tortfeasor than that negligent tortfeasor would have to pay if his codefendant were another negligent tortfeasor. Nonetheless, comparison creates another equally incoherent result and problem—permitting a negligent tortfeasor who has committed the same negligence and produced the same harm to pay less when he is fortunate enough to have an intentional tortfeasor codefendant rather than a negligent tortfeasor codefendant, or no codefendant at all. Coherence problems in comparative fault systems do not result from decisions to exclude intentional torts or to include them. Instead, these coherence problems stem from structuring comparative fault systems around the fallacy that fault is a zero-sum proposition.

Rather than focusing on considerations of causation and coherence, courts and legislatures should direct more attention to normative considerations.[165] Whether decisionmakers ultimately determine that they want to limit or expand negligent defendants' liability, or adopt any of the other effects of apportionment, conscious substantive decisions about the goals and scope of liability would be the preferable route to achieving these effects rather than unguided, unpredictable, and unreviewable jury discretion.

165 *See* David W. Robertson, *Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault*, 45 ST. LOUIS U. L.J. 831, 837 (2001) (citing then-Judge Stephen Breyer who wrote, "assessing 'comparative fault' is not so much an exercise in pure mathematics as it is an exercise in [normative] judgment").

A. Examining Judicial Rationales

1. The Mask of Causation

There is a certain appeal to treating an injury as an organizing event. Contemporary courts routinely permit all parties and causes of action related to a single transaction or occurrence to be joined in a single legal action.[166] The comparative apportionment's single set of percentages for all parties involved in a tort would appear to reflect a similar organizing principle. Instead of the "balkanized" tort-by-tort approach of the traditional law, which suggests that policy concerns change as injuries and states of mind change, a comparative apportionment approach is "undergirded by an assumption that, when several actors cause a single injury, we can treat the injury as a unit and compare the contributions of the various actors."[167] But treat that injury as a unit and compare those actors' contributions for what purposes? To discover an essential truth about the harm that each defendant caused?

The view that apportionment of responsibility performs this latter function—ensuring that each defendant pays for only what that defendant "caused"—is a widely held misunderstanding of the function of comparative apportionment.[168] Courts and commentators repeatedly suggest that the negligent defendant was the cause of only a part (usually a small fraction) of the harm, and that comparative apportionment creates essential, ascertainable, and fair shares of liability based on that causation.[169] But the pervasive claim of courts and commentators that comparative apportionment identifies true causes is

166 *See* FED. R. CIV. P. 13.

167 William Powers, Jr., *What a Comparative Bad Faith Defense Tells Us About Bad Faith Insurance Litigation*, 72 TEX. L. REV. 1571, 1579 (1994).

168 *See, e.g.*, Slack v. Farmers Ins. Exch., 5 P.3d 280, 287 (Colo. 2000) (stating that state apportionment act "demonstrates the General Assembly's intent that a tortfeasor should pay only for the portion of the injury he caused"); Reichert v. Atler, 875 P.2d 379, 381 (N.M. 1994) ("[T]he basis for comparative fault is that each individual tortfeasor should be held responsible only for his or her percentage of the harm. We will not stray from that reasoning in this case." (citation omitted)); Swedlund, *supra* note 21, at 45 (stating that the state needs apportionment between negligent and intentional tortfeasor defendants to "prevent a merely negligent party from being made to incur full liability for an injury caused by the intentional act of another").

169 *See, e.g.*, R. David De Armas & Edward L. White, III, *Judge Ervin's Step in the Right Direction: Apportioning Fault Between the Negligent and Intentional Tortfeasor*, FLA. B.J. Oct. 1995, at 92, 94 (arguing that a jury must apportion fault among all parties to the harm "to ensure that the negligent defendant pays just his or her share of the noneconomic damages").

flawed.[170] Despite the rhetoric, the question of negligent tortfeasor liability usually has little or nothing to do with the question of actual causation—that is, the question of whether the plaintiff would have been injured but for the defendant's negligence.[171] Instead, cases of intentional and negligent fault often involve harm caused by two necessary but not sufficient causes of an injury. In these cases, the absence of either cause would have been enough to avert the plaintiff's entire injury.[172] For example, in Arizona's *Hutcherson v. City of Phoenix* case,[173] a domestic violence victim called a 911 operator to request help because her abusive ex-boyfriend had tried to assault her at a nightclub the previous evening, had threatened to kill her, and was on his way over to her house. The 911 operator classified the call as priority three, for which the police had an average response time of thirty-two minutes. After twenty-two minutes, the ex-boyfriend murdered the victim and her new boyfriend. Had the call been classified as a priority one or two call, the police would have been at the scene in four to thirteen minutes. As such, if *either* the operator had appropriately classified the assistance call such that the police would have arrived in time, or the ex-boyfriend had given up his murderous plan,

170 *See* Robertson, *supra* note 165, at 837 (stating that "the percentage-based approach treats the 'commodity' of fault as though it had an ontological limit of 100 units for each case. But it takes only a moment's reflection to realize that percentage-fault assignments do not and cannot represent some real part of some real whole.").

171 *See* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1738 (1985) (explaining actual causation by reference to the test of whether an actor's conduct was a necessary element of a sufficient set). There may, however, be actual cause questions in some apportionment cases. For example, if a defendant were accused of negligence for failing to repair a door lock but it was unclear whether the attacker entered the home through the door or through an open window. *See, e.g.*, John Elliot Leighton, *Fighting New Defenses in Inadequate Security Cases*, TRIAL, Apr. 2000, at 20, 22 (noting that a recent defense tactic in negligent security cases is to use criminal profiling to show that "no matter what security was provided the criminal would still have attacked the plaintiff"); *see also* Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1408 (2000) (primarily addressing global causation questions but also citing case that address specific actual cause issues in enabling torts).

172 *See* Wright, *supra* note 171, at 1762 (noting that the plaintiff has a corrective justice claim against both tortfeasors for the full amount of the harm); *see also* William K. Jones, *Tort Triad: Slumbering Sentinels, Vicious Assailants, and Victims Variously Vigilant*, 30 HOFSTRA L. REV. 253, 290–91 (2001) (noting that limitations on liability are based on a "faulty premise" and observing that "if that harm is indivisible, and if it could have been avoided had care been taken by any one of the multiple defendants, then the fair share of each is 100%").

173 961 P.2d 449 (Ariz. 1998).

the victims would not have been murdered.[174] In cases like this, both the negligent defendant and the intentional tortfeasor are an actual cause of *all* of the plaintiff's harm.[175]

The situation in which two or more defendants may be the actual cause of a plaintiff's entire harm is not a new possibility. Many basic tort problems involve multiple causes.[176] How courts assign liability to these various actors are policy decisions that are not based on issues of causation.

Individual courts can and have resolved these identical issues in a variety of ways. Kentucky law provides a useful example. At one time, Kentucky held that negligent defendants were not liable for harms produced jointly by negligence and intervening intentional misconduct.[177] Later, Kentucky reversed its position and held that negligent defendants should be jointly and severally liable for indivisible harms involving intervening intentional torts as long as the harm was foreseeable.[178] In Kentucky now, courts hold negligent tortfeasors liable for failing to use reasonable care to prevent foreseeable intentional torts, but limit that liability through comparison with the intentional tortfeasor's fault.[179] Even within a single jurisdiction then, at least three liability approaches have been considered fair. There is no

174 *See id.* at 450–51; *see also* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1120–21 (La. App. 1999) ("Without the fault of Magee, an intentional actor, there would have been no incident; however, the same would have been true had the University and Kappa National intervened to enforce their anti-hazing policies.").

175 *See* Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS ST. U. L. REV. 45, 59 (1992) ("[A] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior does not become 'partial' or 'minimal' simply because other defendants' tortious behavior was much worse, individually or in the aggregate.").

176 For example, the facts in the traditional *Polemis* case—one negligent defendant created the spark, the other leaked the fuel—involved two necessary but not sufficient causes. *In re* Polemis and Furness, Withy & Co., 3 K.B. 560, 564 (Eng. C.A. 1921). But for the actions of either negligent actor, the ship would not have burned. *Id.* at 560.

177 *See, e.g.*, Watson v. Ky. & Ind. Bridge & R.R., 126 S.W. 146 (Ky. 1910).

178 *See, e.g.*, *Britton v. Wooten*, 817 S.W.2d 443, 449 (Ky. 1991) (endorsing the view of the *Restatement (Second) of Torts* that "the negligence of a defendant is actionable as a contributory cause, wherein the immediate cause is a subsequent criminal act"); *see also* Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999) (concluding that fraternity may be held liable for its negligence in connection with a rape committed by an alumnus member of the fraternity on fraternity property, where the tortious conduct was foreseeable to the fraternity); Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267, 277 (1996) (noting that joint and several liability is often used when two necessary causes create a single indivisible injury).

179 *See, e.g.*, Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998).

"true" way to divide responsibility.[180] There are only policy factors that commend or reject each of these three approaches, or the many other approaches that might be enacted in their stead.[181]

A central problem with comparative apportionment is that some courts and commentators believe that apportionment resolves issues of causation in a nondiscretionary way—holding defendants liable only for what they "actually caused"—rather than recognizing the centrality of policy considerations to those holdings.[182] In fact, in many cases, comparative apportionment holds defendants liable for a smaller amount of harm than they actually caused. While this result may or may not be justified on other policy grounds, courts' failure to see that they are dealing with policy questions prevents deliberation of the very questions that are being answered.

Perhaps it is easier for courts to see the centrality of policy issues when they look on the intentional tortfeasor side of the negligent-intentional tortfeasor comparison ledger. In that context, even with apportionment of responsibility by juries, courts do not say that a murderer caused 25% or even 92% of the responsibility for a murder, nor that it would be unfair to hold the murderer accountable for a greater share of the harm than he actually caused.[183] Instead, in that context, decisionmakers are more apt to recognize that the portion of the judgment the intentional tortfeasor must pay depends on issues of policy—usually policies that support full payment by intentional tortfeasors through joint and several liability.

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180 *See* Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 ALA. L. REV. 13, 44 (1989) ("This entire structure of more perfect and simpler justice is false because the underlying premise that negligence comes in discrete and precisely measurable packages is wrong.").

181 *See* Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superceding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1112 (2002) (noting that the realists debunked "the concept that a single cause of an outcome could be identified in a normative and objective fashion"); Morton J. Horwitz, *The Rise and Early Progressive Critique of Objective Causation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 471, 479 (David Kairys ed., 3d ed. 1998) (critiquing the formalist doctrine of objective causation, under which "it was necessary to find a single scientific cause and thus a single responsible defendant, for any acknowledgment of multiple causation would open the floodgates of judicial discretion").

182 Comparison of intentional and negligent fault within a single unitary system appears to be a return to formalist notions of "scientific causation"—that courts can and should determine the "true cause" of an injury, and that tort liability should be so limited. *See* Horwitz, *supra* note 181, at 479.

183 *See* Hutcherson v. City of Phoenix, 961 P.2d 449, 452–53 (Ariz. 1998) (upholding jury apportionment of 25% of fault to murderer); Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644, 644 (Haw. 1998) (discussing jury apportionment of 92% of fault to murderer).

2. Coherence Considerations

When apportionment of intentional and negligent fault is understood not as a question of causation, but as a question of justice and policy, substantive issues can be directly addressed.[184] The main policy factor that animates court comparison of intentional and negligent fault is the desire to achieve internal coherence within comparative negligence systems.[185] On its face, comparing intentional and negligent fault would seem to achieve more consistent results within state systems that already compare the negligent fault of multiple actors. On closer reflection, however, inconsistencies arise both in jurisdictions that compare intentional and negligent fault and those that do not. These inconsistencies stem not from any decision about including or excluding intentional torts, but from the treatment of fault as a zero-sum commodity.

Courts understandably would like to create coherence within their comparative negligence or apportionment systems. Because many states already permit the division of negligent defendants' fault into mutually exclusive fault shares, cases that do not compare intentional and negligent fault create some disjunction at the border with comparison systems.[186]

Professors William Westerbeke and Reginald Robinson provide a useful illustration of the difficulties created by a system in which the misconduct of negligent defendants is compared but the misconduct of an intentional tortfeasor is not. In their example:

> a restaurant owes a duty of reasonable care to protect its guests from unreasonable risks of harm while they are on the premises. Assume that a visibly intoxicated third person in the restaurant negligently stumbles into and knocks down one guest, then intentionally pushes down another guest. In each case the restaurant breached its duty in the same manner—by failing to remove the intoxicated person from the premises before he harmed a guest. The results, however, vary. The restaurant is liable for only a proportionate fault share of the damages suffered by the first guest, but is jointly and severally liable for all damages suffered by the second guest.[187]

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184 *See* Larry S. Stewart, *Phase Two of the ALI Torts Project: Apportionment of Liability*, TRIAL, Aug. 1998, at 26, 27 ("[L]egal rules for causation, joint and several liability, treatment of intentional tortfeasors, division of multiple damages, and allocation of damages were developed, often based on public policy considerations.").

185 *See supra* Part I.

186 *See* William E. Westerbeke & Reginald L. Robinson, *Survey of Kansas Tort Law*, 37 U. KAN. L. REV. 1005, 1049 (1989).

187 *Id.*

As illustrated by Westerbeke and Robinson noncomparison of intentional and negligent fault creates the possibility that the negligent restaurant will have a greater share of liability for its conduct when the harm created by its codefendant patron was intentional rather than negligent. This result not only means that a negligent tortfeasor who has performed the same negligent act may have varying amounts of liability depending on the nature of the intervening actor's conduct, but also that, unlike the result under the traditional rule, negligent tortfeasors may have more, rather than less, liability for harms created in part by intervening intentional acts.[188]

To resolve this coherence problem, Westerbeke and Robinson suggest that "[t]he better approach would be a hybrid system in which the intentional tortfeasor is jointly and severally liable for all damage, but the negligent tortfeasor is limited to a proportionate fault share of the total damages."[189] In such a case, the restaurant, if negligent, would owe the plaintiffs the amount of their damages minus the

188 This result would be opposite to traditional cases like *Watson v. Kentucky & Indiana Bridge & R.R.*, 126 S.W. 146 (Ky. 1910), in which an intentional intervening act was considered superseding and subjected the negligent tortfeasor to no liability whatsoever. Although Westerbeke and Robinson made their critique in response to the Kansas Supreme Court's decision in *M. Bruenger & Co. v. Dodge City Truck Stop, Inc.*, 675 P.2d 864 (Kan. 1984), their critique may be even better illustrated by the Kansas Supreme Court's recent decision in *Wood v. Groh*, 7 P.3d 1163 (Kan. 2000). In *Wood*, a fifteen-year-old boy on probation for joyriding took his parents' gun to a party and accidentally shot a fifteen-year-old girl. *Id.* at 1166. The jury apportioned 10% of the fault to the parents' negligent failure to safeguard their gun and supervise their son, 20% to the girl who was shot, and 70% to the nonparty son who negligently shot the girl. *Id.* at 1167. Because the son negligently shot the girl, his fault was compared to his parents' negligence, and the parents were held responsible for only $10,000 of the girl's $100,000 in damages. If instead, the boy intentionally shot the girl, the parents' fault could not have been compared under Kansas law, and the parents might have been liable for $80,000 (although the jury also might have concluded then that they were not liable at all). If one did not understand that both parties' misconduct in this case was the actual cause of the plaintiff's entire harm, this illustration might seem particularly unfair because a party assigned a small percentage share of the overall responsibility, would bear liability for payment of a large portion of the plaintiff's actual recovery. *Cf.* Walt Disney World Co. v. Wood, 515 So. 2d 198, 199 (Fla. 1987) (approving a jury's finding that although Walt Disney World was 1% responsible for plaintiff's injury, the plaintiff may collect 86% of her damages from Disney under Florida's joint and several liability law).

189 Westerbeke & Robinson, *supra* note 186, at 1049. For further discussion, see William Edward Westerbeke, *Survey of Kansas Law: Torts*, 33 U. KAN. L. REV. 1 (1984). A similar solution is proposed in Lee A. Wright, *Utah's Comparative Apportionment: What Happened to the Comparison?*, 1998 UTAH L. REV. 543, 578 ("[T]he modified comparative fault approach requires negligent actors to pay proportionally while intentional actors pay fully.").

amount of damages the jury assigned to the intoxicated third party, whether or not the plaintiff could actually collect that share from the third party.

But, while Professors Westerbeke and Robinson aptly identify the problem, their solution—folding intentional torts into comparative fault systems to resolve coherence problems—does not in fact resolve that problem. In the restaurant illustration, for example, if the restaurant were permitted to compare its fault with the fault of the intoxicated third party who negligently stumbled over one guest and intentionally pushed another, the negligent tortfeasor's liability would still depend on "the anomalous rule" that negligent tortfeasors are afforded different treatment "depending not on the nature or culpability of their own acts, but on the nature or culpability of some third party's unrelated act"—the very problem that Westerbeke and Robinson hope to avoid.[190]

This is true because although the restaurant and the third party's fault would be compared in both cases (a certain formal coherence), the results of those comparisons should differ. As long as intent to harm another matters to the standard for assigning shares of responsibility to various parties—an intentional tort is, all other things being equal, more blameworthy than a negligent tort—the intoxicated third party's responsibility should be greater when he intended harm than when he negligently caused it. By zero-sum comparison then, the restaurant will have less responsibility to the guest who was intentionally harmed than it will have to the guest who was negligently harmed, even though the restaurant committed precisely the same negligent act in both circumstances, and the same harm to the patron resulted in both cases.

Thus, comparison of intentional and negligent torts creates a different result—making the negligent tortfeasor substantially better off when he exposes his guests to a foreseeable risk of intentional harm rather than to a foreseeable risk of negligent harm—but does not resolve the coherence issue.[191]

But why should a negligent tortfeasor pay less when he is fortunate enough to have a codefendant who is an intentional rather than a negligent tortfeasor?[192] Or when the negligent tortfeasor has no codefendant at all? For example, if a termite inspector negligently

190 *See* Westerbeke & Robinson, *supra* note 186, at 1049.

191 As in *Wood v. Groh*, the parents might be better off had they negligently stored a gun that their child used to intentionally shoot another child than if their son negligently shot his friend. *See supra* note 188.

192 *See* Wright, *supra* note 175, at 59; *cf.* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt. a, illus. 3, 5 (2000).

investigates a home for termites, she may be liable to the home buyer for subsequent termite damage. However, if the inspector conducts the same negligent inspection and the home seller fraudulently conceals a prior termite report, under intentional/negligent fault comparisons the negligent termite inspector would now owe a smaller share of damages to the home buyer, even though the termite inspector had committed precisely the same negligence with respect to the plaintiff in both scenarios, and even if the fraudfeasor were judgment-proof, so that the home buyer had no other source of recovery for that portion of the harm.[193]

Moreover, comparing defendants' intentional and negligent torts can be paradoxical in some cases. The greater the risk to which the negligent tortfeasor exposes the plaintiff, the greater the benefit the negligent defendant derives by comparison.[194] So, for example, an insurer may be better off sending its patients to doctors known to commit intentional torts, rather than to doctors known to commit negligent torts, because the insurer's fault will be less by comparison—a result that seems as anomolous as the one produced by the noncomparison rule.

The reason that a negligent tortfeasor, like the restaurant, does not have a consistent amount of liability that depends on the nature or culpability of its own acts, stems not from a state's choice to exclude intentional torts from comparative fault systems, but rather from a several liability system that views defendants' collective "fault" or "responsibility" as a zero-sum proposition. Once courts decide that fault (and liability) must be exclusive, rather than overlapping (as with joint and several liability), courts must evaluate the negligent defendant's liability, based not only on the wrongfulness of that party's individual acts but also by direct and inverse relation to another defendant's fault—a relationship that may not be justified.

One person's fault does not necessarily detract from another's fault. Not only may the wrongfulness of one person's act not decrease the wrongfulness of another's, but it actually may increase it. This is the basic reason that conspiracies, for example, are often considered worse than individual misconduct.[195] The fact that one perhaps negli-

193 *See* Lynn v. Taylor, 642 P.2d 131, 135 (Kan. Ct. App. 1982) (refusing to permit intentional-negligent comparison).

194 This is particularly true with "a negligent defendant who creates a risk of an intentional tort by another," as opposed to "defendants acting independently but causing a single indivisible injury." DOBBS, *supra* note 19, at 520.

195 *See* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J.L. & PUB. POL'Y 429, 430 (2002) (identifying "the distinctive logic behind the special

gently markets guns as resistant to fingerprints[196] is an act made worse (not better) by the fact that others may intentionally misuse those guns for murder.[197] As such, measuring a party's liability not only by that party's own conduct, but also by a direct and inverse relationship with others' conduct, may lead to results in which defendants who have committed identical acts that produce identical harm may nevertheless be responsible for varying amounts of liability to innocent plaintiffs.[198] Thus, whether courts include intentional fault in comparative fault systems or exclude it, as long as states divide all parties' fault into mutually exclusive shares of liability for damage (as in several liability), coherence problems will remain.

3. Additional Rationales

Court disagreements about whether intentional and negligent torts are different in kind or different in degree are equally unhelpful to resolving comparison issues. Whether intentional and negligent fault are different in kind or degree does not tell courts whether those types of fault should or should not be compared in particular cases.[199] For example, even courts that say intentional and negligent fault are different only in degree still permit comparisons in some contexts—such as the context of intentional and negligent tortfeasor defendants—but not in others—as in the context of an intentional tortfeasor plaintiff and a negligent defendant.[200] This differential treatment may make sense, but it highlights the fact that decisions about whether to compare these types of fault stem from policy rationales, such as whether courts want to diminish negligent tortfeasor liability or intentional tortfeasor liability in particular contexts, and not from

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punishment of conspiracy: those who conspire are likely to move one another in more extreme and hence more dangerous directions").

196 *See, e.g.*, Merrill v. Navegar, 28 P.3d 116, 132 (Cal. 2001).

197 Jonathan E. Lowy, *Litigating Against Gun Manufacturers*, TRIAL, Nov. 2000, at 42, 48 ("[T]he fact that manufacturers know that these lethal weapons are often used by irresponsible and criminal people should heighten their duty to do all they reasonably can to prevent injuries.").

198 To some extent, this problem is about seeking coherence with legislative schemes that were not substantively well-founded. *See* Calabresi & Cooper, *supra* note 6, at 879–80.

199 *See* Hollister, *supra* note 49, at 141–43 (arguing that even if intentional and negligent torts were different in kind, "that difference would not justify denying intentional tort defendants the benefits of comparative fault").

200 *See supra* note 43.

an essential description of the essential nature of intentional and negligent torts.[201]

While courts cite particular law review articles to demonstrate that intentional and negligent fault should be compared, these law review articles do not advocate the broad range of comparisons that the courts invoke them to support. For example, the New Jersey Supreme Court's decision in *Blazovic v. Andrich*[202] repeatedly cites Jake Dear and Steven E. Zipperstein's article, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*,[203] for the proposition that intentional and negligent conduct should be compared in a comparative fault system.[204] But while the New Jersey Supreme Court cites the article to bolster its ultimate holding that a batterer should be permitted to assert the plaintiff's comparative negligence as a defense,[205] the court fails to mention Dear and Zipperstein's direct conclusion that "comparative fault should not be extended to self-help intentional torts, such as battery."[206]

Many other arguments courts make are unfounded as well. While statutes in some states may require comparison of intentional and negligent fault, in many states this issue is a more open question than the courts acknowledge. Furthermore, it is not a claim of distrust in the jury system to suggest that juries cannot effectively and consistently answer questions for which they have been given no concrete standard for comparison.

Rather than continue to focus on rationales such as these, courts must consider the actual effects of their decisions—reducing negli-

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201 *See* Dear & Zipperstein, *supra* note 49, at 20 ("When courts decline to apply comparative fault in intentional torts, they should do so expressly for reasons of social policy and not because of formalistic adherence to an ill-conceived notion that negligent, reckless and intentional torts are different in kind.").

202 590 A.2d 222 (N.J. 1991).

203 Dear & Zipperstein, *supra* note 49.

204 *Blazovic*, 590 A.2d at 229–30 (citing Dear & Zipperstein, *supra* note 49, as support for the proposition that "[r]efusal to compare the negligence of a plaintiff whose percentage of fault is no more than fifty percent with the fault of intentional tortfeasors is difficult to justify under a comparative fault system in which the plaintiff's recovery can be only diminished, not barred").

205 *See id.* at 231.

206 Dear & Zipperstein, *supra* note 49, at 2. The authors further state,

> Some types of intentional torts are by their nature so offensive to our customs and values that we should as a matter of social policy decline to apply comparative fault principles, lest the courts appear to sanction or facilitate the proscribed conduct. "Self-help" measures resulting in damage to persons or property would be the most obvious conduct included in this category.

Id. at 19.

gent tortfeasor liability to plaintiffs, reducing intentional tortfeasors' liability to plaintiffs, decreasing plaintiff recoveries, and reducing intentional tortfeasors' responsibility to pay contribution or indemnity to other negligent tortfeasors.

B. Beyond Causation and Coherence: Examining Effects

1. Negligent Tortfeasors' Liability to Plaintiffs

To decide whether comparison of intentional and negligent torts is desirable, states must take normative considerations beyond questions of formally consistent treatment into account. Courts that compare intentional and negligent fault often insist that defendants should not pay more than their "fair share." But determining what is a fair share is precisely the task at hand for state decisionmakers. Whether states should reduce negligent tortfeasors' liability to plaintiffs through comparisons with intentional tortfeasors depends on both the appropriate level of negligent tortfeasor liability as an initial matter, and the desirability of using intentional/negligent fault comparisons as a means of achieving reductions.

The appropriate level of negligent tortfeasor liability in cases involving intentional torts is an important issue, and plausible arguments can be made for expanding or contracting that liability.[207] The liability of negligent actors in cases involving intentional torts may be desirable because of that liability's ability to provide a broad conception of accountability for harm, as well as incentives for structural safety.[208] Because tort judgments are uncoupled from the oppressive consequences of imprisonment, tort law is free to provide a broader understanding of accountability for intentional harms than can the criminal law.[209] This broader understanding can recognize the role

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207 *See* Uri Kaufman, *When Crime Pays: Business Landlords' Duty To Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89, 101 (1990) (arguing for judges to take a greater role in determining negligence); Schwartz, *supra* note 4, at 620 (comparing various scholars' positions on whether negligent liability amounts to strict liability); Michael J. Yelnosky, Comment, *Business Inviters' Duty To Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883, 911 (1986) (arguing for juries to take a greater role in determining negligence).

208 *See* Calabresi & Cooper, *supra* note 6, at 870 (stating that when comparing responsibility, "[w]e essentially consider how good a safety pressure point one party is compared with the other. That is, we take into account the relative effectiveness of safety incentives placed on either party").

209 *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986) (noting that "[l]egal interpretation . . . can never be the function of an understanding of the text or word alone [because it] must be capable of transforming itself into action").

that actors, beyond the individual wrongdoer, can play in the creation and perpetuation of risks of intentional violence. So, for example, police officers must use reasonable care to protect all potential victims, including domestic violence victims.[210] And fraternities that supply a free flow of alcohol to underage guests must take reasonable care to account for foreseeable possibilities like rape.[211]

This accountability of institutional defendants to use reasonable care for the physical safety of others can have positive consequences. Many institutional actors have real power. Private security companies take in billions of dollars each year.[212] Schools take physical custody of children by the authoritative power of the state.[213] Store safety precautions can reduce the number of crimes committed on the premises.[214] Negligent tortfeasor liability within the context of intentional torts can lead to structural solutions to safety problems, by requiring a wide range of actors—schools, businesses, employers, gun manufacturers, security services, parole officers and others—to be accountable for choices that create real risks to the physical well-being of others.[215] Many types of actors create real risks of physical harm to others, even though their careful action might have been able to prevent those harms. To the extent that tort law can influence these groups to take proactive precautions, it may be able to reduce harm.[216]

Although comparative apportionment stories often depict negligent tortfeasors as innocent victims whose only fault is a deep pocket,[217] there is a strong moral accountability basis for negligent

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210 *See* Hutcherson v. City of Phoenix, 961 P.2d 449, 455 (Ariz. 1998).

211 *See* Delta Tau Delta v. Johnson, 712 N.E.2d 968, 974 (Ind. 1999).

212 *See* Tomas J. Philipson & Richard A. Posner, *The Economic Epidemiology of Crime*, 39 J.L. & ECON. 405, 407 (1996).

213 *See, e.g.*, *People v. Bennett*, 501 N.W.2d 106, 119 (Mich. 1993) (holding that if home school does not comply with rigorous state requirements, "the attendance officer may initiate criminal proceedings against parents for failing to send their children to schools in violation of compulsory education laws").

214 *See, e.g.*, McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 902 (Tenn. 1996).

215 *Cf.* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1041 (2002) ("[A]ttention to cities, neighborhoods, and individual buildings can reduce criminal activity."). This structural safety approach is similar to the Occupational Health and Safety Act and its guidelines, which require implementation of engineering controls before looking to more individualized safety measures. *See, e.g.*, Brock v. City Oil Well Serv. Co., 795 F.2d 507, 509–10 (5th Cir. 1986).

216 *Cf.* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001) (arguing that holding an entity liable to the government for costs the government incurred from citizens' injuries will promote efficient deterrence).

217 *See* Swedlund, *supra* note 21, at 51.

tortfeasor fault. In some cases, defendants take numerous precautions for the safety of their property that they do not take for their customers. For example, in *Wassell v. Adams*,[218] a small motel with a history of previous crimes invested money in an alarm system to protect its television sets, but did not provide alarms or even phones to protect its guests.[219] In other cases, defendants do not take the care for their customers that they would likely have taken for themselves. For example, in *Slack*, a patient told her insurance company that the doctor it sent her to had sexually assaulted her.[220] The insurer appears not to have conducted an investigation or imposed other requirements like the presence of a female nurse in the room during the examination; in fact, the insurance company subsequently sent another patient to the same doctor.[221] The doctor then sexually assaulted the second patient, who sued.[222] Would an executive of that insurance company have sent a family member to that doctor without any safeguard? A jury might have thought that a reasonable person would not. A number of other accountability bases appear throughout the negligent security cases.[223]

On the other hand, negligent tortfeasor liability, if not focused on meaningful safety precautions, can foster proliferation of costly but wasteful security measures. If the case law responds to crime myths and not crime realities, focusing on potentially ineffective precautions, negligent tortfeasor liability may purchase little additional safety in exchange for its high pricetag.[224]

Moreover, negligent tortfeasor liability, by putting a premium on safety, may not give enough weight to other social values.[225] For example, constant video surveillance may add to security but eliminate privacy. Similarly, from a liability-limiting perspective, and sometimes

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218 865 F.2d 849 (7th Cir. 1989).

219 *Id.* at 851.

220 Slack v. Farmers Ins. Exch., 5 P.3d 280, 282 (Colo. 2000).

221 *Id.* at 282–83.

222 *Id.*

223 *See, e.g.*, Rosh v. Cave Imaging Sys., Inc., 32 Cal. Rptr. 2d 136, 139–41 (1994) (imposing liability where defendant took money to provide protection but did not provide security services in return).

224 *See* Katyal, *supra* note 215, at 1132–33 (discussing the possibility that use of architecture as crime prevention in affluent communities but not others may displace some amount of crime to poorer communities).

225 *See* Marshall S. Shapo, *On First Looking into General Principles of Torts: Ruminations on Restating for an Ex-Dean*, 78 NEB. L. REV. 891, 893 (1999) (noting with approval the "supple pluralism" of the tort law goals mentioned in the draft Restatement of General Principles, which included "fairness," "providing appropriate safety incentives," and "broadly humanitarian goals").

from a safety perspective, employers facing liability may shy away from hiring prior felons. But such liability may make other goals like social reintegration of criminals more difficult to achieve.[226] Furthermore, requiring racial or religious groups to pay for special security may combat the threat of group-based violence, but at other costs.[227]

In addition, court concerns about negligent tortfeasors paying more than intentional tortfeasors are real, though these concerns are inherent in the creation of third party duties as an original matter, not a particular concern of apportionment.

It is not necessary to resolve these arguments for and against liability in the negligent security context to resolve whether comparison of intentional and negligent fault should be the method of achieving such liability reductions. Regardless of whether negligent tortfeasor liability should be extended or limited in certain types of cases, comparison of intentional and negligent torts is a poor means for realizing these extensions or limitations.

Specifically, comparative apportionment is a poor means of reducing liability because it looks at defendants' relative—rather than absolute—fault when resolving issues of plaintiff compensation, examines ideal rather than real-world situations, leaves innocent plaintiffs bearing greater shares of fault than negligent defendants, has ill-defined standards, leaves juries unguided, and unreviewable discretion, and is likely to yield legal outcomes that are unpredictable and inconsistent. Although comparison can make powerful postmodern statements about collective responsibility, the value of those statements is diminished by the reality that comparison in practice serves to reduce plaintiffs' recovery from those collective actors.

a. Defendants' Individual Versus Relative Fault

One main problem with comparative apportionment is that it views fault (or responsibility) as a zero-sum attribute—if one defendant has more of it, another defendant necessarily has less. But consider this example: a person suffering from a gunshot wound enters a hospital for treatment. The doctor commits medical malpractice. From the combination of the gunshot wound and the malpractice, the patient dies. The patient would have lived if either one of these two

226 *Cf.* John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 413 (1999) (arguing that therapeutic jurisprudence should be taken into account when evaluating how sexual predators are treated after their release).

227 CAL. INS. CODE § 676.10 (Deering 2001) (restricting insurer's right to cancel or refuse to renew policy due to hate crime losses).

events—the gunshot or the malpractice—had not occurred. The patient's compensatory damages, which are indivisible, are $100,000.

In the first scenario, imagine that the patient was wounded accidentally. The gunshot wound was not the product of any party's negligence. In a jurisdiction with apportionment and several liability, the doctor, as the sole tortfeasor, potentially could be liable for all $100,000 in damages.

In the second scenario, suppose that the patient was instead injured by another person's negligence, perhaps in a hunting accident. In this same jurisdiction, if the injury is indivisible,[228] the doctor could now compare her own negligence with the hunter's negligence. Perhaps the jury would find each defendant responsible for 50% of the damages. So, the doctor would now be liable for $50,000 in damages.

In the third scenario, suppose that the patient was shot at point-blank range by a family member who planned the murder. Now the doctor's negligence would be compared with the murderer's intentional fault. If the level of fault matters for apportioning responsibility, as it generally should, the jury might assign the lion's share of the responsibility to the intentional tortfeasor—perhaps 90% of the liability for damages. Consequently, the doctor would be liable for only $10,000, a small fraction of the damages stemming from the injury.

Consequently, even though the doctor committed the same negligence in each of the three cases and caused the same amount of harm to the plaintiff in each of the three scenarios, the doctor would be liable for a different amount of damages in each case. Under a comparative apportionment system that includes intentional torts, the doctor's liability in these scenarios *will not* be assessed based on a consistent examination of the doctor's own conduct and culpability (as comparative apportionment rhetoric often supposes), but will be based on a direct and inverse relationship to the culpability of the person who shot the patient. Thus, in order to limit its liability, the negligent defendant simply must hope that someone else has done (or will do) something worse to the patient. As such, comparative apportionment no longer accounts for absolute levels of fault. Instead, it looks at only the fault of one wrongdoer relative to another.

While a legislature might want to reduce medical malpractice liability as an initial matter, ideally the extent of that liability should be

228 Causal apportionment may make fault apportionment unnecessary if the injuries are divisible—for example, where the treating doctor aggravated the injury in an identifiable way. *See* Schwartz, *supra* note 6, at 512.

commensurate with the defendant's own fault and the harm that it caused, not reduced based on another defendant's culpability.[229]

b. Relative Defendant Fault and Plaintiff Compensation

Although the fault being weighed is the defendant's relative fault, the comparison is being used to determine not only the defendant's relative contribution, but also the plaintiff's recovery. In apportioning percentages, courts are looking at the ideal way to divide the costs of a given injury among all relevant actors. The problem with this focus on the ideal situation is that judges and juries never ask the real-world question: which of the parties should bear the costs when only a second best solution is possible? Just because a defendant would ideally pay a particular percentage of the damages when all other defendants are known and solvent does not mean that any other allocation would be unfair when other defendants are unknown or insolvent. In this situation, the harsh reality is that either the plaintiff or the negligent defendant will bear the remaining cost of the injury.[230] In courts that apportion intentional and negligent fault and adopt several liability, the plaintiff, even if completely innocent, is always forced to bear the burden of any uncollectible portion of the judgment (though some states have begun to reapportion these uncollectible judgments).[231] Courts do not articulate why having an innocent plaintiff pay more than her fair share (as defined by her ideal percentage) is more fair than having the negligent tortfeasor pay more than her fair share.[232] Ironically, in jurisdictions with several liability and compari-

229 *See* Wright, *supra* note 175, at 59; *cf.* Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 833 (1989) (demonstrating "that the efficiency of apportionment rules under negligence depends almost exclusively on whether the negligent actors must pay for damage caused by non-negligent actors, as they must under joint and several liability" and arguing that "[e]xcept where one actor's damage does not affect the extent of damage caused by another, only joint and several liability rules produce the efficient result").

230 This is true absent some kind of public fund or private insurance that covers intentional torts. *See* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 146–69 (2001) (proposing insurance reform to deal with this reality).

231 *See* Green & Powers, *supra* note 22, at 36 ("The adoption of several liability imposes the risk of insolvency of other tortfeasors on the plaintiff. It is now the plaintiff that bears the risk that some responsible tortfeasor will not be able to pay anything, or at least the full amount of his share."); *see also* RESTATEMENT (THIRD) OF TORTS: COMPARATIVE APPORTIONMENT § 17, at 156 (1999) (listing reallocation jurisdictions).

232 *See* Wright, *supra* note 175, at 78 ("There is absolutely no justification, however, for treating the contributorily negligent plaintiff worse than the defendants who tortiously injured him.").

son of defendants' intentional and negligent fault, plaintiffs who are not contributorily negligent "would actually be better off under the doctrine of contributory negligence than they are under comparative fault."[233]

While concerns about shifting burdens to plaintiffs are appropriately raised in comparative negligence systems, the concerns are heightened when intentional/negligent fault comparisons are added to the mix. Intentional/negligent fault comparisons, by putting an even heavier thumb on the scale for the liability of the intentional tortfeasor, are likely to have the corresponding effect of assigning negligent parties an even slighter share of liability.[234] As such, in some number of cases, comparisons will minimize or eliminate negligent tortfeasor liability.[235] In addition, intentional tortfeasors are more likely to be insolvent and unable to pay judgments because of the lack of insurance funds to cover most intentional torts.[236] Consequently, with defendant intentional/negligent fault comparisons, plaintiffs are more likely to be left uncompensated for part of the judgment.

This diminished ability to recover is weighed against the real needs for compensation of plaintiffs injured by a combination of intentional and negligent torts.[237] Although comparative fault may not

233 Brown & Morgan, *supra* note 45, at 512.

234 *See, e.g.*, Clouse v. State, 16 P.3d 757, 759 n.3 (2001) (in case involving family tortured and set on fire by criminals who sheriffs had improperly released on the side of the road, jury apportioned 85% of fault to criminals and 15% to county); Nasteway v. City of Tempe, 909 P.2d 441, 443 (Ariz. Ct. App. 1995) (in case in which officer negligently failed to block road for police chase which killed plaintiff bystander, jury apportioned 80% of fault to person fleeing police and 20% to negligent cities and officers); Weidenfeller v. Star & Garter, 1 Cal. App. 4th 1, 4 (1991) (in case in which victim was assaulted in bar parking lot, jury apportioned 75% of fault to attacker, 20% to the bar for inadequate security precautions, and 5% to the victim for unspecified conduct).

235 *See, e.g.*, Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644 (Haw. 1998) (eliminating negligent defendant's liability).

236 *See* Wriggins, *supra* note 230, at 122 (discussing creation of "a massive epidemic of uncompensated intentional torts" by domestic violence).

237 *See* TED R. MILLER ET AL., U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1, 19 (1996) ("Victims pay about $44 billion of the $57 billion in tangible non-service expenses for traditional crimes of violence—murder, rape, robbery, assault, and abuse and neglect."). Although it has been suggested that plaintiffs in contrast to defendants "can always bear their comparative share of liability" as they "merely bear a greater portion of portion of the harm without compensation," *see* Green, *supra* note 181, at 1131, this preference for settled distributions, *see* Eric A. Posner, *Law and Regret*, 98 MICH. L. REV. 1468, 1475 (2000) (discussing the preference courts give to settled distributions in contract law), overlooks the sometimes life-crushing costs of serious injuries to victims. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 44–45 (1970) (stating that "accidents are a

have changed plaintiffs' total recoveries, comparative responsibility will reduce them.[238] To the extent that making an injured victim whole is a central part of tort law's fairness agenda, comparisons of defendants' fault are even less likely to meet that objective than when comparison includes intentional tortfeasors.

Courts that limit the negligent tortfeasor's liability rarely acknowledge that plaintiffs, whether innocent or negligent, will bear a larger portion of the injury tab under comparative apportionment.[239] However, given this real effect, it is not surprising that groups that have testified against intentional/negligent fault comparisons before state legislatures include victims' rights organizations, low-income advocacy groups, and plaintiffs' lawyers.[240] But even with some representation, here as elsewhere, what is missing from reform proposals in legislatures "is the significant presence of people who are looking specifically to the interests of those who are injured and to the administrative costs of granting such people recovery."[241]

c. Metaphysical Questions

Not only is the use of relative fault comparison problematic as a tool for reducing plaintiff recoveries, the procedures for making those intentional/negligent fault comparisons are also troubling. Some comparative apportionment advocates concede that comparative apportionment is "impossible in theory," and yet contend that such comparisons are nevertheless feasible in practice.[242] But when courts say that juries can apportion responsibility between intentional and negligent parties, do they mean anything more than that the jury can cre-

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source of some of the most dramatic concentrations of costs in our society," that "some of the direst examples of poverty stem from accident situations," and that "some unspread accidents costs reduce people from a good to a minimum standard of living").

238 *See* Calabresi & Cooper, *supra* note 6, at 870.

239 *See, e.g.*, Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998).

240 In Connecticut, for example, groups testifying before the Connecticut legislature included the Connecticut Sexual Assault Crisis Services, Inc., the Legal Assistance Resource Center of Connecticut, Inc. (a low-income advocacy organization), the Connecticut Bar Association, and the Connecticut Trial Lawyers Association. *See* Scheffey, *supra* note 21, at 2. In the Pennsylvania legislature, Mothers Against Drunk Driving testified against proposed comparative responsibility legislation. *Hearings on Joint and Several Liability Before the House Judiciary Comm.*, 2002 Leg., 185th Sess. 229–45 (Pa. 2002) [hereinafter *Joint and Several Liability Hearings*] (testimony of Nancy P. Oppedal, State Chair of Mothers Against Drunk Driving).

241 Calabresi & Cooper, *supra* note 6, at 864.

242 Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY xii–xiii (Proposed Final Draft (Revised) 1999).

ate a set of percentages that totals 100%?[243] When a jury assigns 50% to a defendant, it is 50% of what? Fault? Causation? Responsibility? Liability for damages? Courts vary in how they speak about this task.[244]

If these numbers are intended to reflect assessments of fault, as many courts say they are, courts frequently do not provide guidance about how to compare negligent and intentional fault.[245] One court that refused to make comparisons noted the difficulty of devising a standard. As that court wrote, "unless fraud has a fault basis with which negligence can compare, it is difficult to envision how the court should have divined a particular portion of fault as traceable to [the negligent defendant]."[246]

One solution to the inability of courts to articulate an answer to the metaphysical questions of how to compare intentional and negli-

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243 *Cf.* William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 37 (1953) (proposing a separation of verdicts into discrete parts, including one that does not consider comparative negligence); Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 329 (2002) ("Comparing negligence to supposedly 'more serious' forms of fault, such as recklessness, knowledge, and purpose, is treacherous. Depending on the type of negligence, as well as the type of recklessness or other fault, this might amount to comparing apples and oranges.").

244 *See Hutcherson*, 961 P.2d at 453 (stating a jury has the authority and ability to evaluate "degrees of fault" but then framing fault not in terms of "culpability" but in terms of "responsibility for foresight and avoidance"); Paragon Family Rest. v. Bartolini, 769 N.E.2d 609, 621 (Ind. Ct. App. 2002) (discussing the jury's allocation of "fault" but then weighing "spontaneous, unforeseeable, and independent criminal acts" by minors as more culpable than acts of negligent party which could have avoided the situation, and reviewing the matter as an issue of damage assessment); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1105, 1119 (La. Ct. App. 1999) (discussing jury allocation of "fault" but suggesting that in allocation consideration should be given to fault and "extent of the causal relationship between the conduct and the damages claimed").

245 *But see Morrison*, 738 So. 2d at 1119. The *Morrison* court stated,

> In allocating comparative fault, consideration must be directed toward the nature of each party's conduct and the extent of the causal relationship between the conduct and the damages claimed. Factors which may influence the degree of fault include: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk the conduct created; (3) the significance of what the actor sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

Id.

246 Lynn v. Taylor, 642 P.2d 131, 135 (Kan. Ct. App. 1982).

gent fault is to foist that task onto juries.[247] This is where courts must express exuberant confidence in juror abilities.[248] The result is at once less assailable—it is difficult to know how or why a jury has reached a given set of percentages, thus making the result less permeable to questioning—and more worrisome.

Standardless jury determinations present a particular problem for appellate review. Without a legal standard governing jury decisions, the possibilities for that review are quite limited.[249] The limited judicial review of American negligence cases[250] seems even more limited when the cases involve negligence and intentional torts combined.[251] This soft review is particularly troublesome given the prospect that apportionment will expand evidence related to subjective intent,[252] and that juries will focus their inquiries on the parties' moral worth, rather than their conduct.[253]

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247 In other contexts, courts shy away from doctrines that would require answers to metaphysical questions. *See, e.g.*, Greco v. United States, 893 P.2d 345, 347 (Nev. 1995) (refusing to recognize the claim of wrongful birth since that kind of claim would require the courts "to weigh the harms suffered by virtue of the child's having been born with severe handicaps against 'the utter void of nonexistence'" (quoting Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967))).

248 *Cf.* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1198 (2001) ("I doubt that the process of norm creation, which I submit is at the core of unbounded negligence cases, could have survived if we did not have juries.").

249 Thus, there is no countermajoritarian possibility through appellate review. *See id.* at 1194, 1197 (noting both the importance of judicial review of jurors' norm creation decisions, and the current lack of such review).

250 *See* Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 CHI-KENT L. REV. 489, 490 (2002) (noting that appellate review of negligence issues in England is freer and better informed than is such review in the United States because an English "appellate tribunal is confronted with a judge's explanatory opinion, rather than a jury's delphic verdict").

251 *See* Yount v. Johnson, 121 N.M. 585, 587 (Ct. App. 1996) (noting that juries now "perform complicated tasks such as comparing the simple negligence of one party with the intentional or reckless conduct of another" and that "[t]oday, courts are less often compelled to direct the jury's work"); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1119 (La. Ct. App. 1999) ("Allocation of fault is a factual determination subject to the manifest error rule."); *see also* Vandall, *supra* note 136, at 606 (questioning how "a jury [can] effectively compare apples and oranges by assigning shares to plaintiffs and defendants"); DOBBS, *supra* note 19, at 521 (noting that tort rules "must apply the fault comparison in ways that can be rationally evaluated by reviewing judges").

252 Stewart, *supra* note 184, at 27 ("[E]vidence that could not make it in the front door could, under an allocation justification, come in the back door."); *see also* Vandall, *supra* note 136, at 608–09 (claiming "heresy" that evidence irrelevant to defendant's liability could be admitted to reduce proportion of liability).

253 *See* DOBBS, *supra* note 19, at 521 ("Such difficulties [in comparing fault] open the door to highly subjective judgments about an individual's moral worth rather than

d. Consistency and Transparency

Each jury can have a different interpretation of what responsibility means.[254] Thus, juries, which are not required to articulate the standards they apply,[255] may not be applying a consistent standard. This lack of consistency leaves tort law in a situation in which there is no law, just a process for resolving disputes.[256] Rather than resolve litigation as a lottery, where the winner takes all or nothing,[257] comparative responsibility brings the jury in closer line with the roulette wheel, where the plaintiff can win a large amount, nothing, or any number of combinations in between. Inconsistent verdicts that stem from the jury's discretionary lawmaking undermine the legitimacy of the tort-law system.[258]

Apportionment also hurts the transparency of tort-law rules. A court may say that gun manufacturers have a duty to victims of gun violence, or a duty only in limited circumstances, or no duty at all—and in any of these cases, litigants can know the rules of decision. However, if the rule is that gun manufacturers have liability that can only be realized to the extent that a jury believes the fault of that actor is worse than the fault of an individual who used the weapon—the actual substance of that rule is opaque.[259]

In addition, lack of objective standards for juries to follow may magnify the effects of undesirable factors such as bias.[260] A standardless approach may be particularly problematic in cases in which race

about an individual's conduct. Biased judgments would be difficult or impossible to detect and review on appeal in the absence of a firm standard for comparison.").

254 *See* Abraham, *supra* note 248, at 1189 (arguing that "negligence is a far less satisfactory standard" in cases where the finder of fact must create a norm than in cases governed by a pre-existing independent norm).

255 *See id.* at 1199.

256 *See id.* at 1197 ("Given this norm creation in unbounded cases, instead of having a law of negligence that applies in such cases, we merely have (as Leon Green put it long ago) a process for deciding negligence cases.").

257 *See* Hollister, *supra* note 49, at 122–23 (arguing that when both parties are at fault, the court's results are either a complete victory or a complete loss for the plaintiff).

258 *See* Abraham, *supra* note 248, at 1204–05.

259 *Cf.* Simons, *supra* note 243, at 307 ("The negligence concept, even if articulated somewhat by such criteria as 'reasonable person in the community' or risk-utility balancing, remains fundamentally vague. To employ such a standard more extensively in the criminal law would present problems of fair notice and unreviewable discretion.").

260 *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 775 (2001) (noting the value of objective standards in comparable worth cases).

and gender biases are likely to be reflected in, but not revealed by, jury judgments.[261]

e. Expressive Value

An interesting facet of apportionment is the expressive content it creates. Comparative apportionment requires plaintiffs, in order to recover, to tell stories about why intentional tortfeasors are not to blame for the harm.[262] Jury findings convey these stories—a 911 operator who negligently misclassifies a domestic violence call as low priority bears 75% of the responsibility for the murder victim's death, while the murderer himself bears only 25% of the responsibility.[263] If any judgment could send shock waves through a culture committed to individual accountability, this apportionment judgment (and others like it) would be a likely candidate.[264]

Comparative apportionment not only can assess broader social fault on its own (as negligent tortfeasor liability did before comparative apportionment), but it can also do so in relation to individual fault. Here then is the ultimate vehicle of the postmodern message—police inattention is more responsible for domestic violence injuries than is deliberate violence by batterers; schools are more responsible for child abuse than are abusers.[265]

But the value of that message's recognition of broader social responsibility is diluted because apportionment acknowledges that responsibility only as part of a broader equation to reduce the financial accountability of those social actors.

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261 *See* Bublick, *supra* note 16, at 1457–62 (arguing that tort law compels female victims to treat minority males as dangerous); *cf.* Audio tape: Walter Dellinger, Association of American Law Schools Annual Meeting (Jan. 7, 2000) (on file with author) (criticizing the Supreme Court's confidence in segregation-era juries to treat African-Americans fairly).

262 Such a system creates concerns like those addressed in the context of underpleading. Pryor, *supra* note 149, at 1722–23.

263 *See* Hutcherson v. City of Phoenix, 961 P.2d 449, 451 (Ariz. 1998).

264 *Id.* at 455.

265 *See Hutcherson*, 961 P.2d at 451, 455 (upholding a jury verdict that allocated 75% of liability to the city for negligently responding to a 911 distress call in a case where a tortfeasor intentionally shot and killed the plaintiff's decedent); Ortega v. Pajaro Valley Unified Sch. Dist., 64 Cal. App. 4th 1023, 1056–59 (1998) (remanding the case for a new allocation of fault between a school district that suppressed evidence of a teacher's history of molestation and the teacher, where the jury found the district 100% responsible for the plaintiff's injuries); *see also* Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 2D 39, 46 (2000) (noting that postmodernism is, in part, a critique of Enlightenment notions about the autonomous self).

2. Intentional Tortfeasors' Liability to Plaintiffs

Comparing defendants' intentional and negligent fault can also reduce intentional tortfeasors' liability to plaintiffs. If a state has not retained joint and several liability for intentional tortfeasors and a court permits a murderer's fault to be compared with a negligent party's fault, the murderer himself may owe less than full compensatory damages to the murder victim's estate.

A number of courts have addressed whether an intentional tortfeasor should be able to reduce liability for damages to the plaintiff based on the *plaintiff's* fault. In that context courts are nearly unanimous in rejecting comparisons except in cases that challenge the definitional boundaries between intentional and negligent torts. However, courts generally have not addressed whether an intentional tortfeasor should be able to reduce its liability to plaintiff because of another defendant's fault—a question that raises both the issue of whether an intentional tortfeasor should be able to diminish responsibility for damages to a plaintiff, and whether comparison of defendants' relative fault is a means for achieving those reductions in plaintiff's recovery.

Although the issue of whether intentional tortfeasors should be able to reduce damage payments to plaintiffs may seem unimportant because many intentional tortfeasors will be absent or insolvent, there are large categories of cases in which this debate could have a significant financial impact—for example, in cases of intentional environmental harm.[266] Moreover, even when the practical import is slight, this subject is an area laden with particularly strong expressive dimensions.

The initial responsibility of an intentional tortfeasor to pay plaintiff full compensatory damages seems straightforward. In general, holding intentional tortfeasors liable for full damages to the persons they have intentionally harmed leads to and reflects a notion of plaintiff entitlement—specifically, a person's entitlement not to be intentionally harmed.[267] Implicit in noncomparison of intentional and negligent torts is an assumption that intentional torts are more blameworthy than negligent torts.[268] This view that an actor's intentional

266 Vandall, *supra* note 136, at 618–19 (suggesting that the reason for the *Restatement's* comparisons is to allow toxic tortfeasors to reduce payments).

267 McNichols, *supra* note 31, at 641–42.

268 *See* Simons, *supra* note 243, at 326 (stating that tort law differentiates "three kinds of torts—intentional, negligence, and strict liability," which "creates the appearance of a single, very general hierarchy of fault" and describing situations in which that hierarchy is unpersuasive).

misconduct is more culpable than that actor's negligent misconduct is shared by criminal as well as tort authorities.[269] Moreover, the view that states of mind and culpability are central to the tort system is firmly rooted in American jurisprudence[270] and the American conception of justice.[271]

These principles are not beyond challenge. One may reconsider whether moral culpability and intent to harm are useful principles for making policy decisions about payment for injuries.[272] An argument has been made, for example, that shifting legal responsibility from intentional tortfeasors to their careless victims will promote efficiency.[273]

Such arguments for reductions in intentional tortfeasor liability seem less worrisome at the border of intentional and negligent torts.[274] Intentional torts that lack indicia of culpability are more sympathetic candidates for reduction, and not surprisingly, it is in those contexts that most advocates of comparison have made their case.[275] But allowing comparisons in cases such as trespass, nuisance, excessive force in self-defense that was subjectively but unreasonably believed to have been necessary (sometimes classified as a negligent tort for insurance purposes), and intentional torts committed by young children does not seem to threaten the fabric of the central rule that intentional tortfeasors cannot diminish their liability by comparison with another party's negligence. Instead, these cases simply flag problems

269 The Model Penal Code establishes levels of blameworthiness—purposefully, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (1962).

270 *See* Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 13 (1998) ("[T]he morality from which those [legal] terms is drawn is Judeo-Christian and so gives primacy to intentions and other mental states bearing on culpability, rather than focusing, as the ancient Greeks did, primarily on results.").

271 *See* Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265, 297 (2001) (studying the way in which people understand enabling torts and concluding that "the determination of the legal consequences of an action depended upon whether the enabler's state of mind was willful, reckless, negligent, or nonnegligent").

272 *Id.*

273 *See* Alon Harel, *Efficiency and Fairness in the Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181 *passim* (1994) (arguing that comparing victims' conduct in determining sanctions imposed on a criminal will promote efficiency).

274 *See* Jones, *supra* note 172, at 263 (suggesting that the category of intentional torts is overinclusive and that the relevant distinction should not be "between intentional and negligent behavior but between predatory and nonpredatory behavior").

275 *See supra* note 49.

in the definition of intentional-versus-negligent torts.[276] The labels given to individual torts may or may not track important policy reasons to treat torts differently.[277] Moreover, policy distinctions that make sense for a broad group of cases may be problematic in individual cases.[278] And the conduct of parties in particular cases may resist classification along the traditional intentional and negligence lines.[279]

While these inroads suggest that tort scholars may have to think more carefully about the culpability-related questions examined by our criminal law colleagues, such as questions concerning the liability of reduced-capacity actors and the defense of provocation, and similar questions that examine issues relating to actors' state of mind,[280] they do not suggest that there are no intentional torts that warrant differential treatment.

Moreover, any pleas for relief from over-burdensome debt in the intentional tort context are unlikely to commend comparative apportionment as their solution. When a defendant intended harm and may be liable for punitive as well as compensatory damages, there is little logic in relieving the defendant from responsibility for payment

276 *See* Theresa L. Fiset, *Comparative Fault as a Tool To Nullify the Duty To Protect: Apportioning Liability to a Non-Party Intentional Tortfeasor in* Stellas v. Alamo Rent-a-Car, Inc., 27 STETSON L. REV. 699, 732 (1997) (arguing that exceptions to the general rule that intentional tortfeasors cannot claim the plaintiff's comparative fault for cases involving strictly liable defendants, such as batteries involving provocation and nuisances, "make sense because the defendant's 'intentional conduct' either involves a level of risk that mimics the plaintiff's negligence, or the plaintiff's conduct involves a level of risk that mimics the defendant's intentional acts").

277 *See* Sandifer Motors, Inc. v. City of Roeland Park, 628 P.2d 239, 245 (Kan. Ct. App. 1981) (noting that not only do "the two concepts [of nuisance and negligence] overlap and . . . often coexist," but also that "'[w]here the acts or omissions constituting negligence are the identical acts which it is asserted gave rise to a cause of action for nuisance, the rules applicable to negligence will be applied'" (quoting 58 AM. JUR. 2D *Nuisances* § 35 (2000))); Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the* Restatement (Third) *'s Definition of Intent,* 54 VAND. L. REV. 1165, 1183–85 (2001) (arguing that substantive policy decisions and not formal definitions of acts as "reckless" or "intentional" should drive practical decisions with respect to insurance's coverage of those acts).

278 *See* McNichols, *supra* note 31, at 652.

279 *See* Cummings v. Sea Lion Corp., 924 P.2d 1011, 1023 (Alaska 1996) (noting that comparisons are permissible because the jury is comparing the plaintiff's negligence with the defendant's negligence, not the defendant's intentional tort, but the same underlying conduct by the defendant was the basis for both the intentional tort of fraud and the professional negligence claim).

280 *See* Simons, *supra* note 243, at 322–28 (examining the "hierarchy of fault" in tort and criminal law and separating and discussing distinct features embedded within the concept of "intentional torts" and "negligence"); Kenneth Simons, *Rethinking Mental States,* 72 B.U. L. REV. 463 (1992).

of full compensatory damages. Moreover, arguments about protecting intentional wrongdoers from over-burdensome debt have not been persuasive in the bankruptcy context,[281] which seems a more appropriate forum for the question.

Procedurally, as with reductions in negligent tortfeasor liability to plaintiffs through comparison of relative defendant fault, reduction in intentional tortfeasor liability on that basis is equally flawed. When a defendant intentionally harms a plaintiff—and the defendant's only claim to lesser payment is that another defendant wronged the plaintiff as well—one can hear the faint suggestion of the old adage "two wrongs don't make a right" in denial of the claim for diminution of liability.[282]

3. Intentional Tortfeasors' Situation Relative to Negligent Defendants

Comparing defendants' intentional and negligent fault can also improve an intentional tortfeasor's position relative to a negligent tortfeasor for purposes of contribution and indemnity. When an intentional tortfeasor and a negligent tortfeasor jointly caused an injury, the traditional rule was to treat the intentional tortfeasor as an indemnitor. The more recent trend toward comparison of intentional and negligent torts, which appears to affect contribution, places less emphasis on the intentional tortfeasor's primary responsibility for the harm. Accordingly, even if the intentional tortfeasor could pay the

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281 *See* Sebok, *supra* note 277, at 1181 (noting that in bankruptcy, "intentionally caused tort liability is not [dischargeable]").

282 *See Joint and Several Liability Hearings*, *supra* note 240, at 129 (testimony of Jay N. Silverblatt, Immediate Past Chair, Civil Litigation Section, Pennsylvania Bar Association). Silverblatt stated,

> [T]his moral judgment that is being made is something that our mothers all taught us as youngsters. Imagine a group of friends, 5 boys throwing rocks. And they finish their frivolity and go home. And my mother finds out that I was throwing rocks along with 4 other boys and our neighbor's window is broken and there's a rock in her living room, a single rock. But 5 boys all throwing rocks. What do you think my mother is going to say to me? Well, I bet my mother is going to say the exact same thing that all of your mothers will say. You were there. You were throwing rocks. You pay for that window. And if I say to her, But Mom, all the other boys were throwing rocks, too, she'll say to me, Then you talk to those 4 other boys; but you get your rear end down to that hardware store and you buy another window. That's my mother's moral judgment. And I'm sure it's your mother's moral judgment as well. That's joint and several liability.

Id.

entire judgment, if intentional tortfeasors can take advantage of contribution they would not be required to do so.

It is difficult to understand why courts would be willing to allow intentional tortfeasors to take advantage of doctrines of contribution, when these same courts are uniformly hostile to the idea of direct intentional tortfeasor plaintiff recoveries outside extremely limited contexts.[283] Perhaps courts see contribution benefits as very small given the possibility that many intentional tortfeasors will be judgment-proof or subject to punitive damages or criminal sanctions.[284] Perhaps, too, this difference reflects the reluctance of courts to make the negligent tortfeasor pay the intentional tortfeasor despite being willing to offer the intentional tortfeasor a credit—reflecting the stickiness of settled distributions.[285] Still, permitting intentional tortfeasors to take advantage of contribution seems difficult to justify[286] outside certain intentional torts in which harm was not intended or in cases where the negligent defendant's very duty was to an intentional tortfeasor.[287]

C. Summary

The aggregate effects of comparing defendants' intentional and negligent torts are a likely decrease in negligent tortfeasor liability to plaintiffs, a decrease in intentional tortfeasor liability to plaintiffs, a decrease in plaintiff recovery from defendants adjudged to be at fault, and a decrease in intentional tortfeasor liability to other negligent defendants. Because courts do not address these multiple effects of comparison, their rationales are not as helpful as they might be. Invocations of "fair share" rhetoric do not help determine what shares of liability are fair. While statutes may require comparisons in some

283 *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1020, 1060 (2002) (stating that the rules barring claims arising from plaintiffs' serious misconduct command increasing support in the courts but are undergirded by questionable rationales); *cf.* Williams v. Thude, 934 P.2d 1349 (Ariz. 1997) (upholding differential treatment of willful and wanton plaintiffs and defendants).

284 *See* Pryor, *supra* note 149, at 1722–23 ("[M]ost standard liability policies do not cover liability for harm that the insured intentionally causes.").

285 *See* Posner, *supra* note 237, at 1475 (noting that courts give more protection to those in possession of a good than those who have merely been promised that good).

286 *See* Robertson, *supra* note 153, at 204 ("[I]ntentional tortfeasors ought not to be able to get contribution from 'merely' negligent ones . . . .").

287 *See* DOBBS, *supra* note 19, at 520 (noting that comparison is "an approach that might be justified in some claims between defendants for contribution"); *see also supra* notes 52–53.

states, in many more states the issue is more open than courts acknowledge. It is precisely policy issues that affect judicial decisions.

IV. TOWARD THE FUTURE: SUGGESTIONS FOR THE STATES

States have resolved issues surrounding comparative apportionment and intentional fault in a variety of ways. Two legal authorities—the American Law Institute and the National Commissioners on Uniform State Laws—also have recently addressed these issues. The Institute's *Restatement (Third) of Torts: Apportionment of Liability* includes some types of intentional torts within its comparative apportionment system, but then minimizes many of the most problematic effects of that inclusion. In contrast, the National Commissioners' Uniform Apportionment of Tort Responsibility Act excludes intentional fault from its default provisions[288] but allows states to add such conduct to the Act's apportionment-with-reallocation plan at their own election.[289]

This Part reviews each apportionment proposal with respect to comparisons of intentional and negligent fault. The Article finds that the *Restatement* provisions are superior to existing state solutions because the *Restatement* systematically accounts for subsidiary issues and prevents particularly problematic aspects of comparing intentional and negligent fault. However, the Article further concludes that the Uniform Apportionment Act is preferable both to state comparisons of intentional and negligent fault and to several possibilities under the *Restatement* because the Uniform Apportionment Act's default rules and reapportionment mechanism more fully and consistently eliminate problems associated with including intentional fault in comparative apportionment systems.

Still, the Part concludes with a caution for states that have not ventured into the apportionment process. Because legal decisionmakers want only a few of the many potential effects of comparing intentional and negligent fault, states may be better served by continuing to exclude intentional fault from comparative fault and comparative apportionment systems, and instead directly addressing the functional issues that animate their perceived need for comparisons, rather than embarking on the apportionment process.

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288 UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 2 *Definitions* (2002).

289 *Id.* § 2 cmt. (noting that "an adopting jurisdiction is still free to determine . . . which types of conduct should be compared").

A. Restatement (Third) of Torts: Apportionment of Liability

1. The *Restatement* Provisions

The *Restatement (Third) of Torts: Apportionment of Liability* provides for apportionment of all personal injury claims "regardless of the basis for liability."[290] Despite this inclusive language, the intentional/negligent fault comparisons authorized by the *Restatement* are less encompassing than they originally appear. First, comparisons of intentional and negligent fault recommended by the *Restatement* are confined to the single context of comparison between two tortfeasor defendants. The *Restatement* takes "no position" on whether to permit intentional tortfeasor defendants to invoke the plaintiff's negligence, or to permit suits to be brought against negligent defendants by plaintiffs who intended harm.[291]

Moreover, even within that context of intentional and negligent tortfeasor defendants, the *Restatement* does not require comparison of all intentional torts. By its terms, the *Restatement* retains a large carve-out for suits for purely non-tangible economic loss caused by breach of contract or warranty, fraud, misrepresentation, non-medical professional malpractice, or, where recognized, negligence; for suits by insureds or others against insurers for inappropriate claims-settlement practices; and for suits for breach of fiduciary relationship, interference with contractual relations, defamation, and invasion of privacy as well as suits based on "a statutory cause of action."[292] In these cases, the *Restatement* suggests that "special policy considerations" may render apportionment inappropriate.[293]

In addition to the *Restatement*'s specified carve-out, the *Restatement* provides courts "with flexibility to fashion appropriate special rules for victims of intentional torts."[294] In commentary, the drafters note that courts have discretion to decline to use intentional-negligent comparisons when those comparisons would yield an unfair result.[295] If courts make use of this commentary, the *Restatement* could exclude a range of intentional torts from within its ambit.[296]

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290 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (2000).

291 *Id.* § 1 cmt. c.

292 *Id.* § 1 cmt. e.

293 *Id.*

294 *Id.* § 1 cmt. c.

295 *Id.*

296 *Cf.* Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 717–19 (La. 1994) (deciding to use a case-by-case analysis in determining "whether to apply comparative fault principles in cases where it is alleged that comparative fault exists among intentional tortfeasors and negligent tortfeasors").

Perhaps as important as the *Restatement*'s exceptions from intentional/negligent fault comparisons is its creation and retention of doctrines that eliminate some of the adverse effects of intentional/negligent fault comparisons when such comparisons apply. Of particular import, although the *Restatement* does not retain full joint and several liability for all negligent defendants whose actions produce a single indivisible injury, the *Restatement* does preserve negligent defendants' whole liability to plaintiffs in a significant category of cases.[297] In particular, the *Restatement* preserves negligent tortfeasor liability through a "very duty" rule—a rule eliminating the negligent defendant's ability to take advantage of intentional fault comparisons when the negligent defendant's very duty of care related to prevention of the intentional tort.[298] Specifically, under the *Restatement* rule, a negligent tortfeasor cannot reduce its liability to the plaintiff if it is liable for "a failure to protect the [plaintiff] from the specific risk of the intentional tort."[299]

Moreover, the *Restatement* retains the full joint and several liability of intentional tortfeasors to plaintiffs for indivisible injuries.[300] Consequently, an intentional tortfeasor cannot reduce its share of liability to the plaintiff because another defendant was negligent.

In addition, the *Restatement* through plaintiff "no duty" rules may prevent negligent defendants from diminishing their obligations to plaintiffs in cases also involving intentional torts. Plaintiff no-duty rules limit plaintiffs' obligations to take precautions to prevent their own victimization. Such rules may shield plaintiffs from being assigned a fault share with respect to either intentional or negligent tortfeasors.[301]

Accordingly, although the *Restatement* compares defendants' intentional and negligent fault in a number of cases, plaintiffs, particularly if exposed to the risks of intentional torts by negligent defendants, have a more robust possibility of recovery under the *Restatement* than may be afforded in a number of states.

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297 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14.

298 *Id.*

299 *Id.*

300 *See id.* § 12.

301 *See, e.g., id.* § 3 cmt. d (proposing plaintiff no-duty rules); Hutchinson *ex. rel.* Hutchinson v. Luddy, 763 A.2d 826, 848–49 (Pa. Super. Ct. 2000) (holding that minor parishoner who had been sexually abused had no duty to avoid being harmed and that even negligent defendant could not raise the plaintiff's comparative negligence as a defense); Bublick, *supra* note 16, *passim* (discussing the problems in applying a comparative fault system to rape cases filed against rapists or third parties).

As between the intentional and negligent tortfeasor defendants, the *Restatement* improves the position of intentional tortfeasors relative to negligent tortfeasors. The *Restatement* changes the rules of contribution and indemnity between intentional and negligent tortfeasors so that an intentional tortfeasor would not be an indemnitor of the negligent tortfeasor[302] but would instead be entitled to obtain contribution.[303]

As for jury standards and appellate review, the *Restatement* enunciates two factors by which to apportion responsibility: fault and causation.[304] Factors in this comparison not only include traditional negligence criteria such as the reasonableness of the parties' conduct, but also additional criteria like the parties' subjective intent and their individual abilities and disabilities.[305] Although the *Restatement* admits that "it is not possible to precisely compare conduct that falls into different categories, such as intentional conduct, negligent conduct, and conduct governed by strict liability, because the various theories of recovery are incommensurate,"[306] it nevertheless asserts, primarily based on administrative ease, that juries routinely compare incommensurate values and should make such assignments of responsibility.[307]

2. Benefits of the *Restatement* Approach

The new *Restatement* is an improvement over the practices of states that compare defendants' intentional and negligent fault. The *Restatement* has systematically worked through many of the most important apportionment questions and eliminates some of the harshest consequences of comparing intentional and negligent torts.

The *Restatement* is one of the first and only authorities explicitly to recognize that the context in which an intentional-negligent fault

302 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. e ("The policy of allocating a loss according to each person's share of responsibility supports having the negligent tortfeasor and the intentional tortfeasor, as between themselves, each bear their own comparative shares. That is accomplished by contribution, not indemnity.").

303 *Id.* § 23 cmt. l ("A person who can otherwise recover contribution is not precluded from receiving contribution by the fact that he is liable for an intentional tort.").

304 *See id.* § 8.

305 *Id.* § 8 cmt. c.

306 *Id.* § 8 cmt. a.

307 *Id.* § 1 cmt. b ("[L]eaving intentional torts out of a comparative-responsibility system can create problems. In a multi-party lawsuit involving negligent tortfeasors and intentional tortfeasors, it would be cumbersome to have different apportionment systems apply to different parts of the same case.").

comparison is proposed makes a difference. In particular, the *Restatement* acknowledges that comparisons between the intentional and negligent fault of defendants does not require comparisons between plaintiffs and defendants.

Moreover, although the *Restatement* generally attempts to maintain a separation between primary issues of liability and secondary issues of apportionment, the *Restatement* rightly abandoned that fictional separation when apportionment threatens to obliterate negligent tortfeasors' obligation to use reasonable care to prevent intentional torts.

Furthermore, the *Restatement*'s retention of other ameliorative doctrines will likely result in fairer outcomes for plaintiffs. For example, the *Restatement*'s decision to retain joint and several liability for intentional tortfeasor defendants, regardless of the state's choice of liability track and joint and several liability rule for negligent tortfeasors, ensures that an intentional tortfeasor will not be able to use another defendant's fault as a reason to pay the plaintiff less than full compensation for a single indivisible injury caused by the defendant's intentional act.

Finally, the *Restatement*'s plaintiff no-duty rules provide a way for courts to recognize plaintiff entitlements in cases involving both negligent and intentional tortfeasors.

3. Continued Problems Under the *Restatement*

But problems remain under the *Restatement* approach. The *Restatement*'s decision to compare defendants' intentional and negligent torts creates a number of ill effects that ameliorative doctrines cure only in part. The *Restatement*'s attempt to resolve apportionment rules independently of substantive rules leads to a system that not only perpetuates but also extends the unfairness inherent in some state systems. Moreover, the *Restatement*'s ameliorative doctrines lack analytical consistency with its basic rules. Consequently, as compared with an approach that excludes intentional fault from comparative apportionment altogether, the *Restatement* approach may create more problems than it solves.

One of the main problems with the *Restatement*'s choice to compare intentional and negligent torts is that it includes this comparison in a framework that does not retain joint and several liability for all negligent tortfeasors.[308] Rather than retain joint and several liability

308 *See* Mark M. Hager, *What's (Not) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 CONN. L. REV. 77, 94–106 (2000) (arguing that the *Restatement* should have retained the doctrine of joint and several liability); Brown & Morgan,

as the governing rule, the *Restatement*'s blackletter provisions provide that "the law of the applicable jurisdiction" determines whether independent tortfeasors who produce a single indivisible injury "are jointly and severally liable, severally liable, or liable under some hybrid of joint and several liability."[309] The *Restatement* then provides five different "tracks" of liability for multiple tortfeasors who produce indivisible harm.[310] One of the five tracks provides for joint and several liability.[311]

However, the presence or absence of a joint and several liability rule affects the functional effects of apportionment and, therefore, the substantive fairness and desirability of particular apportionment rules like comparison of intentional and negligent fault. In jurisdictions that retain full joint and several liability, adding intentional torts into comparative systems is relatively unproblematic. However, adding intentional torts into comparative systems that eliminate joint and several liability exacerbates the justice and policy problems already present in those systems.[312]

Consequently, in a number of the *Restatement*'s five "tracks" that do not adopt joint and several liability, the inclusion of intentional torts in comparative apportionment systems will come at a real cost to injured plaintiffs. Even though injured plaintiffs in these tracks are also covered by the "very duty" rule, which will effectively retain the joint and several liability of some negligent tortfeasors, plaintiffs who are injured by a combination of intentional and negligent torts but cannot seek aid under the "very duty" rule will bear additional cost burdens because of the *Restatement.*

Specifically, the *Restatement*'s inclusion of intentional torts in comparative apportionment leads to problematic results for plaintiffs in cases that involve harms caused by intentional and negligent fault but fall outside the "very duty" exception. For example, under the *Restate-*

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supra note 45, at 509 (arguing that legislatures and courts "should adopt a comparative fault system that holds the negligent defendant responsible for the entire amount of damages that he and the intentional tortfeasor have caused when the intentional tortfeasor is unknown or insolvent"); *see also* Kornhauser & Revesz, *supra* note 229, at 846–55 (demonstrating that if "the standards of care are set at the socially optimal level," joint and several liability rules "are always efficient" but that rules that abandon joint and several liability "generally are not"). *But see* Wright, *supra* note 189, at 563 (arguing that "[w]hile holding a negligent defendant fully liable is a deterrent, it is an over-deterrent").

309 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17.

310 *Id.* at § 18(A–E).

311 *Id.* at § A18.

312 *See* Wright, *supra* note 171, at 1816–21 (exploring the problems with several liability for negligent defendants in comparative fault systems).

ment approach, innocent plaintiffs will receive less compensation when they are injured by both a negligent and an intentional tort than they would recover if they were injured by only the negligent tort itself. A *Restatement* example illustrates this point. A driver intentionally rams his car into the plaintiff's car. Due to a defect, the plaintiff's airbag does not inflate, causing her serious injury that would not have occurred if the airbag had operated properly. Under the *Restatement,* the automobile manufacturer can compare its fault with that of the intentional tortfeasor, and is not liable for the intentional tortfeasor's share of responsibility "because the risk that made [the automobile manufacturer] negligent was the general risk of an accident in which [the plaintiff] might be injured without an airbag, not the specific risk of an intentional tort."[313]

However, if the plaintiff's car had instead slipped on ice and slammed into a tree and the same defect in the airbag caused it not to inflate, causing the plaintiff to suffer the identical injury, there would be no intentional tortfeasor for the car maker to divide damages with, and the plaintiff could then recover the full amount of her damages from the negligent automaker. Thus, under the *Restatement*'s approach, the negligent automobile manufacturer gets a windfall (and the plaintiff is left with a shortfall) because the negligent tortfeasor, despite committing the identical act of negligence and causing the identical harm to the plaintiff, fortuitously had a codefendant that intentionally harmed the victim as well.

In addition, the *Restatement* would seem to protect plaintiffs who are harmed by negligence that occurs before but not after an intentional tort. For example, under the *Restatement,* if an employer fails to take care to protect its gas station attendant from attack, it cannot split its fault with that of the assailant who attacks the attendant[314] because the employer's liability is based on a failure to protect the employee from the very risk of the intentional tort. But if the employer negligently fails to transport its injured employee to the hospital for treatment, the *Restatement* would seem to allow that negligent employer to divide fault with the assailant because the employer did not create the risk of the intentional tort, just the risk that the employee would not recover from it. As such, the negligent employer's liability (and the plaintiff's prospects for recovery), may depend not only on whether

313 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 cmt. a, illus. 3.

314 *See, e.g.*, Exxon Corp. v. Tidwell, 867 S.W.2d 19 (Tex. 1993) (involving the action of service station employee against employer for negligence leading to armed robbery shooting).

its negligence caused harm to the plaintiff, but also on when its negligence occurred.

The problem with the *Restatement*'s "very duty" rule, which is helpful in so far as it applies, is that it overlooks the fact that *every* comparison of a negligent defendant's fault with an intentional defendant's fault in a several liability system diminishes the negligent defendant's duty to victims of intentional torts.[315] If the reason for the car manufacturer's duty to use reasonable care in manufacturing cars is to make those cars safer for occupants in crashes, whatever the origin of those crashes, comparisons undermine that duty too.[316]

Moreover, because the *Restatement* includes intentional torts but eliminates many undesirable effects of that inclusion, its exceptions lack analytic consistency. For example, the *Restatement* drafters wisely noted that individual policy considerations might shape the advisability of comparisons in the case of economic harms or statutory causes of action. It is unclear, however, why purely economic harms presumptively raise more special policy considerations than do physical harms. Fraud resulting in physical injury is presumptively the subject of comparison under the *Restatement*, while fraud resulting in economic loss raises a question for courts to review.

Similarly, while the *Restatement*'s "very duty" rule eliminates some problematic results, it does not follow the full import of its own rationale. The *Restatement* adopts a "very duty" rule to bar some negligent defendants from taking advantage of comparisons with other *intentional* tortfeasors if that comparison would undermine its very duty, but does not bar comparisons between two *negligent* tortfeasors when those comparisons would undermine the defendant's duty as well. For example, if the very duty of some car safety features is to prevent car crashes or to protect plaintiffs during them, why not bar negligent

315 *See* DOBBS, *supra* note 19, at 520 (noting two types of categories involving a combination of negligent and intentional harms: cases in which the defendants act independently but cause a single indivisible injury, and cases in which a negligent defendant creates a risk of an intentional tort by another). In this latter category at least, comparison of the negligent defendant's fault with the intentional tort would generally eviscerate the defendant's duty. Though the former might not eviscerate the defendant's general duty, it would eviscerate the defendant's duty to the class of persons harmed by intentional torts. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14, illus. 3.

316 *Cf.* Green, *supra* note 181, at 1131–32 (arguing that for the purpose of superceding cause "it should not be necessary" for the plaintiff to show that an intervening act was foreseeable since the nature of the act that produced the foreseeable harm is "entirely fortuitous," so that the ignition source of a fire whether lightning, a discarded match, or arson should be irrelevant to plaintiff's ability to prove proximate cause).

car manufacturers from comparing their fault with the *negligence* of a driver who caused the crash as well?

The *Restatement*'s inclusion of intentional torts in comparative apportionment also leaves judges and juries without a clear standard to apply and will confuse issues of causation and culpability. The *Restatement* section that apportions responsibility asks jurors to compare fault and cause in a way that not only compares incommensurable quantities, but gives so little guidance to judges and juries about how those comparisons should be made that jury resolution in tort cases becomes simply a process without standards.[317]

Overall then, the *Restatement* ameliorates some of the harshest effects of comparing intentional and negligent fault, but it does so in a way that is incomplete and inconsistent.

4. The *Restatement* Plus

States that include intentional torts in comparative apportionment systems and adopt an approach like the *Restatement*'s might further minimize ill-effects. To begin, states can choose the *Restatement*'s track adopting joint and several liability.[318]

Within any track, states can better retain the scope of negligent defendants' substantive obligations to plaintiffs by refusing to compare particular types of intentional and negligent fault beyond the *Restatement* exclusions,[319] and they can adopt a more expansive conception of the "very duty" rule than that embraced by the *Restatement.* In addition, to abate the problem of leaving fault shares to persons who will likely be unable to repay them, states can exclude nonparties and unknown or immune defendants from the apportionment process,[320] and they can reapportion shares

317 *See* Abraham, *supra* note 248, at 1191 ("The negligence decision in an unbounded tort case is neither a finding of empirical fact nor an application of law, and it is not really a mixture of the two either.").

318 *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A18.

319 *See* Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 718–19 (La. 1994) (noting public policy exceptions that work against inclusion of intentional torts in comparisons in physical injury context).

320 *See* Cardi, *supra* note 113, at 1297 ("[T]he soundest and most efficient approach is to exclude all immune nonparties from the apportionment process. Although such exclusion may seem contrary to the goal of comparative responsibility, in fact it serves the principle—by automatically redistributing the immune nonparty's fault pro rata among the remaining parties—while avoiding the difficulty and expense of protracted litigation."); *id.* at 1296 (arguing also that the fault of parties who have nominal immunity should be reallocated); *id.* at 1298 (arguing that workers' compensation claims should not be included); *see also* Hager, *supra* note 308, at

that cannot likely be collected, or retain joint and several liability.[321]

In making the apportionment decision, courts can set clearer guidelines for apportionment between actors with different types of mental states and can ask juries to make specific findings with respect to fault and causation. These findings would both facilitate judicial review of apportionment decisions and assist courts in uncovering biases concealed by a "do justice" approach. They would also permit better empirical study of judgments throughout the system.

Moreover, to avoid the misconception that percentages assigned in comparisons reveal an essential truth about parties' fault, states can ask juries to apportion "damages," not "fault," and can call the percentages "apportionment of damages" rather than "apportionment of responsibility."[322] In addition, at the time of trial, courts can ask juries not only to establish what the plaintiff's damages are and how they would ideally apportion damages between the parties, but also how those damages should be reapportioned if that ideal apportionment were unachievable. For example, if the intentional tortfeasor's portion of the damages would have to be borne by the plaintiff or the negligent defendant, which party or what combination of the parties should pay that portion of the damages?[323] In addition, with respect to defendants' liability as between themselves, states can continue to use active-passive tortfeasor indemnity rules to curb benefits to at least some solvent intentional tortfeasors whose very duty was not to protect an intentional tortfeasor.

B. Uniform Apportionment of Tort Responsibility Act

1. The Uniform Apportionment Act Provisions

The Uniform Apportionment of Tort Responsibility Act does not include intentional fault in its default provisions.[324] However, the Act

119–26 (arguing that "phantom share allocation" should be "disallowed for both no-party and tortfeasor immunities").

321 This approach avoids the re-litigation and collection problems that have been experienced by the states that reapportion shares when the share cannot be collected after one year. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C18.

322 *Cf.* Prosser, *supra* note 243, at 1 & n.2 (stating that the new doctrine is "commonly miscalled 'comparative negligence'" and that it should instead be called "damage apportionment" or "comparative damages").

323 *See* Calabresi & Cooper, *supra* note 6, at 880–81 (urging that courts consider jury intent in determining how to divide defendant's percentage of responsibility between the plaintiff and remaining defendants). The jury, however, would obviously have to be informed of standards for that determination.

324 UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 2 *Definitions* (2002).

permits an adopting state "to resolve these issues in any manner that it wishes."[325] States that exclude intentional fault can directly evaluate negligent and intentional tortfeasors defendants' liability with respect to the plaintiff. States that include intentional fault under the Act will initially apportion the parties' liability into mutually exclusive responsibility shares.[326] In order to determine these shares, the trier of fact will be instructed to consider both the "nature of the conduct" and its "causal relation" to the damages.[327] As long as the plaintiff's fault is less than or equal to 50% of the total fault, the plaintiff can then recover each party's several share.

In a number of circumstances, the Uniform Apportionment Act permits the plaintiff to recover more than the defendant's several share. Notably, the Uniform Act includes a provision akin to the *Restatement*'s "very duty" provision. The Act's provision provides: "[i]f a party is adjudged liable for failing to prevent another party from intentionally causing personal injury to, or harm to the property of, the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility."[328]

Moreover, in situations in which the defendants are not jointly and severally liable, the plaintiff can move the court to reallocate a defendant's share if it is shown by a preponderance of the evidence not to be "reasonably collectible."[329]

The net result of these rules is that in some states intentional and negligent fault will not be compared, but rather examined individually. When intentional and negligent fault are compared, the negligent defendant's liability will be preserved by a very-duty rule (which in effect creates joint and several liability in those situations) and by reapportionment of uncollectible shares in others.

2. Benefits of the Uniform Apportionment Act

It is difficult to compare the Uniform Apportionment Act and the *Restatement* because both plans leave a variety of issues to individual state decision. If a court were to choose the *Restatement*'s reallocation track, the *Restatement* and the Uniform Act provisions would be nearly identical. However, the Uniform Act's decision to enact reallocation, not merely leave that choice as an option for the states, ensures that the Act will never create the harshest effects that the *Restatement* plan

325 *Id.* § 2 cmt.
326 *Id.* § 4(2).
327 *Id.* § 4(4)(b).
328 *Id.* § 6(2).
329 *Id.* § 5(b).

might generate in its several liability track. For example, an uncollectible share of the damages can only be reassigned to plaintiffs who are at fault to some degree. But while the Act does not risk some of the harshest effects possible under the *Restatement*, neither does it preserve the possibility that states can retain joint and several liability for all indivisible harms, despite the fact that many states still embrace that approach. The Act is a reasonable compromise between competing state positions, which may well make it more likely to be adopted by a number of states—the ultimate goal of a Uniform Act.

The Act's choice of reallocation of uncollectible shares makes it more consistent across definitional lines than the *Restatement* would be on a number of its tracks. Under the Act, reallocation of uncollectible shares occurs both in cases involving only negligent defendants as well as cases involving a negligent and an intentional tortfeasor defendant. As such, the Act prevents particularly unjust results in the negligence context as well as the intentional tort context. Furthermore, ameliorative doctrines like the provision retaining joint and several liability of parties that fail to prevent intentional torts are more consistent with other Act provisions.

3. Continued Problems Under the Uniform Apportionment Act

One of the Uniform Act's main disadvantages in the intentional-negligent tort context is that its provisions, which permit but do not require the inclusion of intentional torts, have not fully anticipated the inclusion of intentional torts. For example, the Act does not retain joint and several liability for intentional tortfeasors, and the Act fails to address whether, after fault shares have been allocated to each party, an intentional tortfeasor can take advantage of the plaintiff's assigned contributory negligence. Moreover, while the Act appears to prevent a plaintiff guilty of intentional fault from bringing a cause of action—the definition of comparative fault makes no mention of intentional fault—this result is far from clear.

Presumably, provisions that specifically relate to intentional torts have been omitted because the Act does not explicitly sanction the inclusion of intentional fault. Accordingly, provisions relevant to that inclusion may not be necessary. Even so, if a state does include intentional fault within the auspices of the Act, it will need to provide supplementary provisions related to the effects of that inclusion. In particular, if states include intentional fault under the Act, they must distinguish between the different contexts in which the intentional negligent fault comparisons may arise—between two or more

tortfeasor defendants, or between a plaintiff and a defendant—and plan for the possibilities in each.[330]

There are other concerns raised by the Uniform Act. The mathematical determinacy of the mutually exclusive allocations in the Uniform Act are likely to feed both misunderstandings about the essential nature of parties' responsibility shares, and a desire to abandon the reallocation system it creates, which then seems as though it requires one party to pay another party's share.[331] In addition, relatively trivial differences in plaintiff and defendant fault in the initial allocation can take on exaggerated significance during the reallocation process,[332] and some difficult calculations can be expected to arise.[333] Further, the Act's decision to adopt modified comparative fault on the basis of a tally and no justifications suggests the political process has already begun to take its toll on the Act even before a single state's adoption.

Still, the Act is a vast improvement over the law in many states that compare because it would exclude intentional torts, and either retain joint and several liability or reallocate uncollectible shares, and would thus avoid many of the most troubling consequences of including intentional torts in apportionment.

4. The Uniform Apportionment Act Plus

To improve upon the Uniform Act, courts may want to account for intentional torts more explicitly by retaining joint and several lia-

330 UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT, at 6 (Final Draft 2002) (on file with author) (discussing the inclusion of intentional torts as though including intentional fault would necessarily allow intentional tortfeasors to assert contributory negligence defenses, not merely to allow negligent tortfeasor defendants to diminish their liability based on comparisons). *See* Part I.B with regard to the importance of context.

331 *See* Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Responsibility*, 41 ALA. L. REV. 13, 44 (1989) (stating that "[o]nce the idea that negligence can be measured and divided in precise and accurate packages takes hold of a mind, then that mind is susceptible to being sent off, in the name of perfect fairness, on a quest to reform other aspects of the law," such as abolishing joint and several liability).

332 For example, a fault apportionment of 5% to the plaintiff and 3% to a negligent tortfeasor may take on more significance in the reallocation process than the jury meant. Ozaki v. Ass'n of Apartment Owners, 954 P.2d 644, 650 n.5 (Haw. 1998) (stating that "[h]ad the jury, for example, apportioned ninety-two percent of the total fault to the intentional conduct of [the murderer], five percent to the negligent conduct of [the apartment complex], and three percent to the negligent conduct of [the murder victim], the result would be quite different," because the actual allocation of 92-3-5 barred the plaintiff's recovery entirely).

333 For example, what happens when the plaintiff's fault is less than 50% before the reallocation, but would be more than 50% after it?

bility for intentional tortfeasors and preventing intentional tortfeasors from diminishing their fault shares based on plaintiff negligence. Moreover, if small percentage allocation differences are likely to yield vastly different results, as with modified comparative negligence, courts may want to inform juries of the consequences of their decisions.[334]

C. *Direct Substantive Consideration*

If, at the end of the day, comparison of intentional and negligent torts is not an essential attribute of a fair tort system but simply one means of generating a certain number of effects, the question becomes not only whether states want these effects, but whether the apportionment method is the most desirable method of achieving them.

Because a comparative apportionment system that includes intentional fault bases a defendant's liability (and a negligently injured plaintiff's compensation) on a relative comparison of the defendant's fault with the fault of others, it is not an accurate barometer of either the harm that defendant's conduct has caused or the defendant's individual fault toward the plaintiff. Moreover, because comparative apportionment depends on a process that creates wide latitude for unreviewable jury discretion, it is not likely to produce consistent standards or holdings.

Consistent then with the majority approach, states would be better advised not to compare intentional and negligent torts, but rather to directly address a number of questions raised by the apportionment process. In particular, policymakers should examine the appropriate scope of negligent tortfeasor liability and the distinctions between intentional and negligent torts that warrant special policy considerations.

In terms of negligent tortfeasor liability, one question is whether negligent tortfeasors, like the county in the *Brandon* case,[335] should be held jointly and severally liable for harm to the plaintiff that was produced by a combination of two or more defendants' intentional and negligent acts. The bulk of scholarly authority weighs strongly in favor of joint and several liability in such cases.[336]

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334 Brown & Morgan, *supra* note 45, at 524 (urging that states that compare inform juries of the consequences of their decisions and allow special jury instructions explaining the duty to protect).

335 *See* Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2000) (*Brandon II*); *see also supra* notes 8–17 and accompanying text.

336 *See supra* note 308.

At times, joint and several liability may seem unfair because slight negligence can produce great harm and, therefore, great liability. But tort law is designed to provide compensation for wrongful injuries, and until some rule of nature prevents plaintiffs from being injured out of proportion to defendant's fault, compensation to injured plaintiffs must continue to be based on the actual harm caused by that fault.

To the extent that courts and legislatures have deliberately chosen to establish negligent tortfeasor liability in the situations they have set—dram shop liability, parental liability, premises liability and so forth—to ensure reasonable care for physical safety, decisionmakers should ensure that the liability remains at the levels they have set.[337]

If states fear that negligent tortfeasor liability levels are too high, there are a wide variety of ways to directly address that problem. First, courts and legislatures might undertake an empirical study of judgments and settlements in the state. State legislative processes are filled with anecdotes, but short on actual data.[338] With empirical study of state cases, states can design solutions to reflect real problems—whether those solutions entail liability limitation or expansion, more aggressive or less aggressive use of judicial prerogatives like summary judgment, or clearer definitions of defendants' obligations in particular types of cases.

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337 *See, e.g.*, Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 87 (Tenn. 2001) ("We believe that in the context of a negligent defendant failing to prevent foreseeable intentional conduct, the joint liability rule 'is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all.'" (quoting Resolution Trust Corp. v. Block, 924 S.W.2d 354 (Tenn. Ct. App. 1996))); Frank A. Sloan et al., *Liability, Risk Perceptions, and Precautions at Bars*, 43 J.L. & ECON. 473, 497 (2000) (conducting an empirical study of bar owners/managers and concluding that management's increased perception of the probability of a tort suit "increased the bar's level of precaution in serving obviously intoxicated adults" and its level of monitoring "to avoid serving alcoholic beverages to minors," and noting previous empirical studies finding that "implementation of dramshop liability lowers motor vehicle fatality rates as well as fatality rates for other alcohol related causes").

338 In recent hearings Pennsylvania legislators asked witnesses who offered anecdotal evidence about the unfairness of joint and several liability in particular cases to provide the legislature with docket numbers of those cases. *See, e.g.*, *Joint and Several Liability Hearings*, *supra* note 240, at 76 (testimony of Del. Thomas Gannon, Majority Chairperson, House Judiciary Comm.) (objecting to a witness' simultaneous use of a case example while invoking confidentiality to avoid answering specific questions about it); *id.* at 106 (testimony of Del. Kevin Blaum, Minority Chairperson, House Judiciary Comm.) (requesting the docket number of a case that the witness characterized as unfair in testimony). Such a verification mechanism is one that other legislatures would do well to emulate.

Second, states that want to calculate negligent tortfeasors' share of the plaintiff's damage bill at something less than the full amount of damages caused by the defendant's negligence in negligent security cases need to combine fair procedures for making those comparisons with other forms of compensation for plaintiffs, and measures of deterring unreasonable conduct.[339] A wide range of programs might be considered.

While it is not the purpose of this Article to enumerate possible alternative programs, it might be useful to briefly illustrate one additional type of approach. Legislatures could adopt an apportionment approach but eliminate the central fallacy of comparative apportionment with several liability—that all parties' fault must be divided into mutually exclusive shares. A jury could instead assign liability for damages in overlapping shares; for example, an intentional tortfeasor could be liable for 100% of the plaintiff's damages, while a negligent tortfeasor could be liable for up to only 80% of the plaintiff's damages (subject to the one-satisfaction rule).

In such a system the negligent defendant might be liable for partial rather than full damages, but reductions would not be based on the intentional tortfeasor's fault, but rather on a series of factors related to the negligent tortfeasor's own fault relative to the plaintiff. To provide for consistency and review, states might, for example, devise a points system akin to the Federal Sentencing Guidelines.[340] Under an apportionment guidelines system, juries could answer a series of questions involving the defendant's state of mind, the scope and type of harm that the defendant intended, the defendant's degree of deviation from an objective standard of reasonableness, any aggravating factors related to the defendant's conduct, such as whether the defendant committed the tort against a vulnerable victim, and any mitigating factors with respect to that conduct, such as age or incapacity.[341]

339 *Cf.* Solan & Darley, *supra* note 271, at 297 (suggesting from an empirical study of citizen beliefs with respect to enabling torts that it seems that "citizens would be uncomfortable with a system that assigned full liability to an enabler, although they are sometimes willing to assign considerable liability to the enabler, and often express a desire that the enabler who hopes for the completion of the action be dealt with by criminal punishments").

340 U.S. SENTENCING GUIDELINES MANUAL (2001).

341 *Cf.* Robertson, *supra* note 165, at 850–51 (proposing a fault line in whole numbers from zero to ten to communicate the trier of fact's "normatively-based estimation of the extent to which each relevant actor's relevant conduct departed from what was required of that actor under the circumstances").

In addition to criteria related to defendants' fault, such a system could incorporate more detailed criteria with respect to other aspects of the negligence case. For instance, states could allow juries to evaluate cause in fact based on the probability that the defendant's negligence caused the plaintiff's harm.[342] Juries could evaluate cause in fact in a variety of increments of certainty, such as the following—certain of causation, causation very likely, causation more likely than not, causation very unlikely, certain of the absence of causation. Such measures could allow recoveries to be discounted based on uncertainty about a given defendant's role,[343] not by the certainty of another defendant's role.

Harms could be measured in more particularized categories as well. A guidelines method would result in less discretion and also allow for judicial review. How specific findings would translate into percentages of the plaintiff's compensatory damage judgment to be paid would depend on state legislative formulas reflecting policy choices.[344]

But if plaintiff recovery from the defendant were permitted in proportion to the negligent defendant's own fault and not the full amount of damages caused to the plaintiff, some type of supplemental compensation for plaintiffs would have to be planned. A meaningful expansion of victim compensation programs would take the pressure off the tort system to be the only forum for victim compensation.[345] Legislatures could examine direct compensation programs for intentional tort victims, and revision of existing insurance laws. For example, states might reconsider laws barring insurance coverage for intentional torts.[346] Legislatures could also examine the possibility of creating broadly accessible, first-party insurance to cover potential victims.[347] Such compensation programs are important even when tort

342 *Cf.* Alvin I. Goldman, *Quasi-Objective Bayesianism and Legal Evidence*, 42 JURIMETRICS J. 237 (2002) (looking at knowledge in terms of outlining degrees of belief or truth-possession).

343 Twerski & Sebok, *supra* note 171, at 1388–96 (arguing for proportional liability in enabling torts).

344 *Cf.* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 323 (1989) (finding wide and unjustified variations in pain and suffering awards but eschewing guidelines in part because they would have to be devised by legislatures rather than courts).

345 *See* Matsuda, *supra* note 5, at 2211–18.

346 *See* Wriggins, *supra* note 230, at 152–69.

347 *See* Jordan H. Leibman, *Comparative Contribution and Intentional Torts*, 30 AM. BUS. L.J. 677, 705 (1993) ("[P]erhaps efficient first party insurance coverage analogous to that of the inexpensive 'uninsured' or 'underinsured motorist' found in modern automobile policies could be appended to homeowners' and renters' policies that

recoveries are fully recognized. For victims without a valid claim that a negligent defendant should have engaged in different conduct ex ante, insurance or compensation funds represent the only benefits available.[348]

Moreover, states might rehaul safety regulations related to intentional torts in light of the importance of the subject—murder is now the second leading cause of death in the workplace[349]—and because of the need to ensure adequate safety incentives.

Not only can courts directly examine and resolve appropriate levels of negligent tortfeasor liability, but they can also reexamine the distinctions between negligent and intentional fault. The *Restatement (Third) of Torts* has already redefined intentional torts as those torts in which the defendant had an intent to harm, not merely an intent to act,[350] a decision that should ensure more consistency in intentional tort categories for policy purposes. However, even further divisions may be desirable. Courts might want to consider special liability rules for persons who did intend to harm, but whose physical or mental capacity makes that intent to harm less culpable. So, for example, the liability of a young child who deliberately intends to hit a babysitter might be subject to less severe tort sanctions.[351]

Finally, examining the problems posed by intentional/negligent fault comparisons should not only help states avoid unintended effects with respect to defendants' intentional/negligent fault comparisons, but it should also create an opportunity for states to reexamine other kinds of comparisons permitted under tort reform programs. Although comparison of defendants' torts poses special compensation and valuation problems in the intentional-negligent fault comparison context, the problems of zero-sum apportionment in several liability jurisdictions extend beyond this area.[352]

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would reimburse victims for the unpaid portions of judgments assessed against intentional tortfeasors under several only apportionment rules.").

348 *See* Wright, *supra* note 175, at 68 ("Why should the defendant, rather than society at large, provide this social insurance?"); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540 (1972) (arguing that "the two central issues of tort law—whether the victim is entitled to recover and whether the defendant ought to pay—are distinct issues").

349 *See Accidents and Murders Cause Most Job Deaths*, N.Y. TIMES, Apr. 25, 1998, at A16.

350 *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 (Discussion Draft Apr. 5, 1999).

351 *See supra* notes 49–50.

352 *See* McNichols, *supra* note 29, at 234–36 (addressing problems with comparisons of negligence and strict liability); Wright, *supra* note 175, at 51–62 (addressing problems with comparing negligent torts in several liability systems).

CONCLUSION

For many years it was a given that state comparative fault systems exclusively compared parties' negligence. That is no longer the case. An increasing minority of states are comparing some intentional and negligent fault, primarily the fault of intentional and negligent tortfeasor defendants. This fact will likely come as a surprise to many. In fact, when a Connecticut legal newspaper reviewed the Connecticut Supreme Court's 1998 decision to compare defendants' intentional and negligent torts, the article's first line read, "Think you know Connecticut tort law? Think again."[353] The issues raised by comparisons are as significant as they are new.

Courts that now compare defendants' intentional and negligent fault have repeatedly relied on rationales that do not adequately justify their choices. For example, while courts that compare defendants' intentional and negligent fault often say that these types of fault are "different in degree," not "in kind," this rationale does not explain why courts consistently compare intentional and negligent fault in some contexts—as with intentional and negligent tortfeasor defendants—but not in others—as with intentional tortfeasor plaintiffs and negligent defendants.[354] The most notable red herring is the argument that comparison assures that each party is only liable for his fair share of the harm, as though the apportionment process could parcel all parties' fault into distinct and mutually exclusive shares.

Underneath the comparison rhetoric, comparisons create tangible effects in tort cases—specifically, reducing negligent and intentional tortfeasors' liability to plaintiffs, reducing intentional tortfeasors' share of liability for indemnity and contribution, and changing jury standards and judicial review. An evaluation of these effects suggests that, at most, a few are desired by the states that adopt comparisons. Even if desired, the effects of comparison can be more consistently and fairly achieved through direct substantive rules.

If policymakers could see that comparison is just one way of achieving particular substantive objectives, perhaps they could decide these issues directly, rather than burying their decisions behind a mask of fairness rhetoric where not even they can always see the policy choices that they are making.

353 Patricia W. Welch, *Torts*, CONN. L. TRIB., Mar. 8, 1999, at 19.

354 *See supra* Part I.