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Comparative Fault to the Limits

Ellen M. Bublick

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Comparative Fault to the Limits

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I. INTRODUCTION

Comparative-fault defenses rarely attract much public attention. However, a recent lawsuit highlighted the subject. In a suit filed against the archdiocese of Boston stemming from an ongoing sexual abuse scandal, Cardinal Bernard Law asserted that a boy who had been abused by a priest from the time that he was six years old to the time that he was thirteen years old was himself guilty of comparative fault.¹ The defense became the subject of immediate public scrutiny. Commentators described the defense with adjectives ranging from “reprehensible,” “appalling,” and “not sensitive,” to “legalese,” “boilerplate,” “standard,” and even “necessary.”²

The Cardinal’s defense, and the accompanying public reaction, brings an important legal question to the fore—after states’ widespread adoption of comparative fault and comparative apportionment, when should courts consider barring a comparative-fault defense altogether?

This question about appropriate judicial limits on comparative-fault defenses is particularly timely in light of the proposed *Restatement Third of Torts: Liability for Physical Harm*. The *Restatement*, which places jury risk-utility analyses at the center of tort decisionmaking in both negligence and comparative negligence, has revitalized debate about the appropriate scope of and limits on jury risk-utility analyses in tort law.³

Given the recent shift of states from all-or-nothing contributory-negligence defenses to evaluations of incremental comparative fault and responsibility,⁴ it might be argued that courts

1. Walter V. Robinson, *An Alleged Victim Is Called Negligent*, BOSTON GLOBE, Apr. 29, 2002, at A1 (noting that the Cardinal raised this defense in the current case and had also raised the defense in a previous case).

2. *Id.*; Editorial, *When Legalese Causes Pain*, BOSTON HERALD, Apr. 30, 2002, at 24; Henry C. Luthin, *A Necessary Defense*, BOSTON HERALD, July 23, 2002, at 22.

3. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 (Tentative Draft No. 1, 2001) [hereinafter RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1]; Richard Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI-KENT L. REV. 425, 425 (2002).

4. Only four states have retained contributory-negligence rules: Alabama, Maryland, North Carolina, and Virginia. The District of Columbia also uses a contributory-negligence

should never bar comparative-fault defenses.⁵ Comparative fault not only weakens traditional justifications for withholding questions of defendant and plaintiff negligence from juries, but was arguably meant to do so.⁶

And yet, an approach that wholly substitutes jury process for articulated legal standards has never been accepted with respect to defendants' obligations.⁷ Even under the proposed *Restatement*, which has been challenged as insufficiently protective of defendants' categorical legal interests,⁸ judges still would curtail defendant obligations through no-duty doctrines and other judicial limits.⁹

While limits on plaintiff and defendant obligations need not be identical, some contemporary tort authorities treat plaintiff and

standard. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 (2000) [hereinafter RESTATEMENT OF APPORTIONMENT]. As Dean Prosser wrote almost fifty years ago, the term "comparative negligence" should be avoided in favor of the term "damage apportionment" or "comparative damages." However, as he also noted, "comparative negligence" is "in much too general use to permit much hope of its elimination." William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 1 n.2 (1953).

5. See *Gunnell v. Ariz. Pub. Servs.*, 46 P.3d 399, 405 (Ariz. 2002) (en banc) (interpreting a state constitutional torts provision to require *all* defenses of plaintiff fault to go to a jury); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 173 (La. 1985) (Watson, J., concurring) ("An approach which has merit would be to allow victim fault to be advanced as a defense in any case considered under the regime of comparative negligence with appropriate instruction to the jury or appropriate application of certain legal principles in a bench trial.").

6. See David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 198-99 (1998) (praising comparative fault as the best vehicle for achieving justice); David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1361-63 (1984) (arguing that duty-risk limits on comparative-fault defenses are undesirable because they create all-or-nothing claims, lack predictability, and confuse multiparty litigation).

7. See Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1209-23 (2001) (arguing that leaving negligence questions to juries for determination substitutes process for standards in a way that undermines legitimacy and consistency); see also 1 DAN B. DOBBS, *THE LAW OF TORTS* § 225, at 575-77 (2001 & Supp. 2002) (describing limits on defendant obligations).

8. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 661 (2001) (criticizing the *Restatement's* attempt to "downplay" the role of duty in negligence law).

9. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 (Tentative Draft No. 2, 2002) [hereinafter RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2] ("A defendant is not liable for any harm caused if the court determines the defendant owes no duty to the plaintiff, either in general or in relation to the particular negligence claim."); RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 7 ("Even if the defendant's conduct can be found negligent under § 3 and is the legal cause of the plaintiff's physical harm, the defendant is not liable . . . if the court determines the defendant owes no duty to the plaintiff, either in general or relative to the particular negligence claim.").

defendant standards of conduct as such.¹⁰ The rival view treats contributory negligence as involving lesser obligations since the relevant risks often (although not always) involve harm to self rather than to others.¹¹

Still, even if the reverse presumption (that plaintiffs have greater obligations of care than do defendants) is indulged, as it is in the current draft of the *Restatement*,¹² at the outer limits of comparative fault some allegations of plaintiff fault are plainly problematic. What if a landlord argues that an infant was negligent for eating lead paint chips?¹³ What if a church argues that a child was at fault for failing to report promptly sexual abuse by its priest?¹⁴ What if an emergency room doctor who carelessly misdiagnosed a heart attack as heatstroke argues that the heart attack victim was negligent for the cigarette smoking that led to his coronary artery disease?¹⁵ What if an apartment manager argues that a tenant who was raped in its complex was negligent for living in a first-floor apartment while female?¹⁶ What if the producer of an ammonia cloud

10. RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 3 (“Plaintiff’s negligence is defined by the applicable standard for defendant’s negligence. Special ameliorative doctrines for defining plaintiff’s negligence are abolished.”).

11. See, e.g., Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1191 (1988); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 22.4, at 291-293 (2d ed. 1986) (rejecting a “specious appearance of symmetry” between negligence and contributory negligence and suggesting that given interests in plaintiff compensation a “double-standard” had rightfully emerged); see also RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 3 cmt. b (noting that in many situations—“especially those involving highway traffic—the conduct of the actor imperils both the actor and third parties”). Although this Article generally refers to the plaintiff’s negligence as comparative negligence, courts and the *Restatement* often refer to the plaintiff’s contributory negligence even within a comparative-fault or apportionment jurisdiction. “In a comparative fault regime, the conduct may still be called contributory negligence, but the legal effect of that contributory negligence is different.” *Id.*

12. See RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 3 cmt. b.

13. See *Lopez v. No Kit Realty Corp.*, 679 N.Y.S.2d 114, 115 (App. Div. 1998) (striking defendant’s affirmative defense on the ground that a two-year-old child who ate paint chips “was not yet legally capable of negligence”).

14. *Hutchison v. Luddy*, 763 A.2d 826, 846 (Pa. Super. Ct. 2001) (finding that the trial court properly removed comparative fault from sexual abuse case against diocese because fifteen-year-old abuse victim who met priest at a motel on two occasions had no “duty” to protect himself from sexual abuse).

15. *Magee v. Pittman*, 761 So. 2d 731, 739 (La. Ct. App. 2000) (upholding jury determination of comparative fault in plaintiff’s case against doctor for emergency room malpractice in part because “[t]he evidence reveals that Mr. Magee smoked cigarettes regularly, and that smoking is a risk factor in coronary artery disease”).

16. *Jackson v. Post Props., Inc.*, 513 S.E.2d 259, 262-263 (Ga. Ct. App. 1999) (calling the comparative-fault argument “untenable” but nevertheless holding that “a jury must determine whether [plaintiff’s] move to a ground floor apartment was a failure to exercise ordinary care for her own safety”).

argues that a homeowner was negligent for getting into her car and driving off her property when its chemicals seeped through her windows?¹⁷ What if a seventeen-year-old driver argues that a passenger injured in the speed-related car accident the driver caused was negligent for accepting a ride from the inexperienced driver?¹⁸

Although courts have permitted some of these comparative-fault defenses and rejected others, my goal in this Article is to show that in all of these cases judicial *consideration* of limits on plaintiff-fault defenses (and through them the baseline entitlements of tort litigants/citizens) is appropriate.¹⁹

Courts limit comparative-fault defenses in a wide array of cases (far wider than has been previously acknowledged). I argue that these court-created limits are not haphazard but rather grounded in identifiable, consistent, and important normative principles. This Article does not attempt to prove that comparative-fault defenses should be limited in any particular situation, although in many of the cases addressed there is a strong normative argument for such limits. Rather, this Article attempts to elucidate the broader structure of principles and policies that underlie judicial limits on comparative-fault defenses. Further, when these special issues of principle or policy arise in comparative-fault defenses, I argue that courts should seriously consider employing the *Restatement's* proffered plaintiff no-duty provisions to limit those defenses.

By way of overview, Part II of this Article examines provisions of the *Restatement of Liability for Physical Harm* that define and limit plaintiff obligations. The *Restatement* requires plaintiffs and defendants to use reasonable care to avoid physical injuries to others (and to self when others are also at risk). However, only plaintiffs are required to use reasonable care to avoid exclusive self-harm. The *Restatement* then provides a parallel method for courts to create exceptions to plaintiff and defendant duties of care based on special problems of principle or policy: no-duty rules. Consequently, the

17. *Haydel v. Hercules Transp., Inc.*, 654 So. 2d 418, 431 (La. App. 1995) (finding no manifest error in jury allocation of ten percent fault to plaintiff who "panicked" and feared for her and her children's lives when she saw an ammonia cloud).

18. *Thompson v. Michael*, 435 S.E.2d 853, 854 (S.C. 1993) ("The fact that [the passenger] knew [the driver] had been driving only a short time is not evidence of contributory negligence.").

19. Cf. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 7 cmt. a ("Common-law courts traditionally rejected [suits against negligent property owners initiated by trespassers], but a limited number of modern courts have found them acceptable; *whatever the result, judicial consideration in terms of duty is appropriate.*") (emphasis added). I use the term "citizen" to emphasize that before any specific injury, entitlements belong not only to plaintiffs but to the general population. I do not mean to suggest that these entitlements depend on formal requirements of national citizenship.

Restatement creates both broader obligations for plaintiffs than for defendants and meaningful judicial mechanisms for curtailing comparative negligence as well as negligence claims.

Part III then examines the many cases in which, even without a formal mechanism for considering principle or policy factors, courts have elected to limit comparative-fault defenses. This part first explores methods that judges have employed to limit comparative-fault defenses. It then identifies common principle and policy factors that arise in these cases. The Article contends that judges limit comparative-fault defenses when one or more of the following six principle and policy factors are present: 1) recognized absence of capacity—the plaintiff lacks total or partial capacity for self-care and the plaintiff's incapacity is recognizable and socially accepted; 2) structural safety—due to systemic differentials in knowledge, experience or control, the defendant can be expected to take better care of the plaintiff's safety than can the plaintiff herself; 3) role definition—it is the defendant's obligation to care for a negligent plaintiff because of social or contractual understandings about the defendant's responsibilities as a professional rescuer; 4) process values—the very process of litigating the comparative-fault defenses would harm the litigants, create expensive or unmanageable litigation issues, or produce a statement of relative fault in an area in which relative statements are viewed as problematic; 5) fundamental values—a determination of plaintiff comparative fault would encroach on fundamental, sometimes constitutional, values; and 6) autonomy and self-risk judgment—plaintiff's conduct can be considered reasonable or unreasonable but risked only harm to self and as such receives more latitude for risk.

Although separately identified for analytic clarity, these principle and policy factors can and frequently do overlap. For example, in the case involving Cardinal Law, if a court were to disallow the comparative-fault defense that the Cardinal raised against the child sexual abuse victim, as some courts have done in similar cases,²⁰ the defense could be disallowed based on 1) the plaintiff's lesser capacity for self care as a child, 2) the structural

20. See *Hutchison v. Luddy*, 763 A.2d 826, 847-48 (Pa. Super. Ct. 2001) (stating that church that was negligent in hiring, supervising, and retaining sexually abusive priest could not claim comparative fault of boy for continuing to see priest despite ongoing abuse); *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 231 (Colo. Ct. App. 1994) (rejecting church claim against boy who had been sexually abused, as boy could not be expected to report instances of abuse in such situations), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1997); *cf. Landreneau v. Fruge*, 676 So. 2d 701, 707 (La. Ct. App. 1996) (holding that a child's teacher, coach, and bus driver could not claim that the child was at fault for molestation).

concern that the Church—as employer of the abusive priest, guardian of the children, and holder of previous complaints about the priest—would be better able to protect children from priests' sexual advances than would the children themselves, and/or 3) the process concerns that stem from litigating a child's "fault" for ongoing sexual assault—both because of the trauma that such victim-blaming might visit on the child victim and because a jury conclusion that a child bears partial responsibility for his own victimization would be normatively unacceptable.

Having identified a number of principle and policy factors that underlie state cases limiting plaintiff comparative-fault defenses, Part IV proposes that when these issues of principle and policy arise, courts should seriously consider excluding comparative-fault defenses as a matter of law. In this consideration, judges should not only analyze whether reasonable jurors could differ with respect to an issue of comparative-fault (a negligence question), but should also state some categorical rules about when comparative-fault questions will not be left to a jury reasonableness determination as a matter of policy or principle (a duty question). Specifically, in cases in which principle and policy factors justify barring the claim of comparative fault, judges should strike defendants' comparative-fault defenses on the basis that the plaintiff has no duty in general²¹ or in relation to the particular comparative-fault claim.²²

21. See RESTATEMENT OF APPOINTMENT, *supra* note 4, § 3(d) (enumerating "[s]ubstantive rules of legal liability with respect to plaintiff's negligence, including plaintiffs who own real property and plaintiffs injured by intentional tortfeasors"); DOBBS, *supra* note 7, § 200, at 503 (defining no-duty cases as "cases in which the plaintiff has a liberty (or right) to be free from constraints imposed by the defendant"); RICHARD A. EPSTEIN, TORTS § 8.2.1, at 189 (1999) (including "duty" as an element of contributory negligence).

22. Even after the shift to comparative negligence, trial courts continue to grant summary judgment, motions in limine, directed verdicts, and judgments notwithstanding the verdict for plaintiffs on the issue of comparative fault. See, e.g., *Maloley v. Glinsmann*, No. A-96-516, 1997 WL 817830, at *6 (Neb. Ct. App. Dec. 23, 1997) (granting directed verdict for plaintiff on the basis that "[i]t was not negligent for [plaintiff] to fail to run a yellow light to avoid being hit by a vehicle that is following too closely while attempting to change lanes"). Occasionally, courts even grant motions for summary judgment or directed verdict for the plaintiff on the issue of comparative negligence and on the issue of defendant's negligence. See, e.g., *Thompson v. Michael*, 433 S.E.2d 853, 854-55 (S.C. 1993) (affirming trial court's grant of summary judgment for the plaintiff on issue of comparative fault). In addition, appellate courts continue to hold that instructions on comparative fault constitute an abuse of discretion in particular cases. See, e.g., *Harding v. Deiss*, 3 P.3d 1286, 1288-89 (Mont. 2000) (holding that trial court abused its discretion when it instructed the jury on comparative fault in a medical malpractice case brought by sixteen-year-old who went horseback riding despite her asthma).

II. DEFINING PLAINTIFFS' OBLIGATION OF CARE: THE *RESTATEMENT OF LIABILITY FOR PHYSICAL HARM*

In the most recent draft of the *Restatement of Liability for Physical Harm*, "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct poses a risk of physical harm."²³ If the actor "does not exercise reasonable care under all of the circumstances," she is negligent.²⁴ This definition of negligence applies to both plaintiffs and defendants.²⁵

Although the current *Restatement* draft creates a duty for both plaintiffs and defendants to take reasonable care to avoid "a risk of physical harm," the draft is unclear about which risks of physical harm plaintiffs and defendants have a duty to avoid—harms to others, harms to self, either of these harms individually, or both only when together. The draft is also unclear about whether the same duty pertains to both plaintiffs and defendants.

With respect to plaintiffs' and defendants' duty to avoid risks to self, the *Restatement's* black-letter rules are silent. However, the *Restatement* commentary now states that "an actor whose conduct poses risks of physical harm to others has a duty to exercise reasonable care."²⁶ A similar statement restricting actors' duty to cases of "conduct that poses risk to others" is echoed in commentary to section 7, which appears for the first time in this draft of the *Restatement*.²⁷

But while the duty provisions mention only harm to others, the *Restatement's* negligence provisions clearly envision that both risks to self and risks to others will be considered when evaluating plaintiff and defendant negligence. Specifically, the *Restatement* counsels that when "the conduct of the actor imperils both the actor and third parties," "all the risks foreseeably resulting from the actor's conduct are considered in ascertaining whether the actor has exercised reasonable care."²⁸

23. *RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, supra* note 9, § 6.

24. *Id.*

25. *RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, supra* note 3, § 3 cmt. b ("The definition of negligence set forth in this section applies whether the issue is the negligence of the defendant or the contributory negligence of the plaintiff."). Although the 2002 *Restatement* draft supersedes the 2001 *Restatement* draft with respect to the black-letter sections addressed by the new 2002 draft, the sections not addressed in the 2002 draft are controlled by the 2001 draft.

26. *RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, supra* note 9, at § 6 cmt. b (emphasis added).

27. *Id.* § 7 cmt. a.

28. *Id.*

These seemingly contrary provisions might be harmonized by reading them to require courts to make a threshold inquiry into risks to others at the duty stage and then by permitting juries to evaluate all risks to self and others during the breach inquiry.

Whether this focus on harm to others in the duty analysis and harm to self and others in the breach analysis would be the same for both plaintiffs and defendants is somewhat ambiguous. On one hand, the use of neutral black-letter terms like "a person" and "an actor" instead of "plaintiff" or "defendant" suggests that both plaintiff and defendants have parallel duties under these *Restatement* terms.²⁹ This view of parallel plaintiff and defendant obligations would be consistent with other *Restatement* sections, including section 3 of the *Restatement of Liability for Physical Harm* and section 3 of the *Restatement of Apportionment*.³⁰ And yet, although no mention is made of risk to self as a potential source of obligation for plaintiffs in the duty section, the negligence section comments that "in many cases, the conduct of the plaintiff that counts as contributory negligence—for example, carelessly climbing a household ladder—creates a risk only to the plaintiff and not a third party."³¹ This comment, and perhaps other commentary, is apparently meant to establish that plaintiffs, unlike defendants, have an obligation of self-care (presumably owed to some category of defendants).³²

The *Restatement's* new standards arguably expand plaintiffs and defendants' existing legal obligations beyond their traditional bounds. For defendants, the *Restatement's* standard expands liability in two ways. First, under the *Restatement*, the defendants' duty of reasonable care for others becomes a more explicit norm.³³ Second,

29. *Id.* § 7.

30. The text represents a proposed amendment to the *Restatement* draft. The latest draft of section 7 now reads:

A court may determine that an actor has no duty or a duty other than the duty of reasonable care. Determinations of no duty and modifications of the duty of reasonable care are unusual and are based on special problems of principle or policy that warrant denying liability or limiting the ordinary duty of care in a particular class of cases. A defendant is not liable for any harm caused if the court determines the defendant owes no duty to the plaintiff, either in general or in relation to the particular negligence claim. If the court determines a defendant is subject to a modified duty, the defendant is subject to liability only for breach of the modified duty.

RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7.

31. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 3 cmt. b.

32. Correspondence with Mike Green, *Restatement Reporter* (on file with author).

33. Formally, this framework departs from the traditional rule that plaintiffs in negligence cases must establish the defendant's duty. *See, e.g.*, Goldberg & Zipursky, *supra* note 8. In practice, however, this general rule of duty to use reasonable care for the physical safety of others may already be the norm. *See* DOBBS, *supra* note 7, § 227, at 578 ("Among strangers—

when defendants create risks of harm to self as well as to others, those risks of personal harm now can be formally considered in the negligence equation.³⁴

The *Restatement* also expands the plaintiff's legal obligations. The *Restatement* notes, but makes no effort to accommodate, "certain differences in emphasis between negligence and contributory negligence."³⁵ These differences arise because negligence typically involves risks of harm to others, while comparative negligence often (though not always) involves risks of harm to self.³⁶ Because imposing risks of harm on oneself has been considered less blameworthy, equal treatment of the two types of harm is a setback for plaintiffs.³⁷

After establishing the parties' asymmetric obligations to exercise reasonable care for others and sometimes for self, the *Restatement* entrusts the question of whether each party has exercised reasonable care to jury decision.³⁸

Accompanying the *Restatement's* general standards for duty and breach is a section permitting courts to craft no-duty exceptions from those rules based on policy and principle. Plaintiffs' ability to invoke these no-duty exceptions has steadily and encouragingly increased with each *Restatement* draft.

In its first draft, the *Restatement's* rules exempted negligent defendants from liability in cases of "special problems of principle or policy that justify the withholding of liability" but afforded no similar provision, in text or notes, to plaintiffs.³⁹

The second *Restatement* draft (which, due to a name change in the *Restatement* project, is referred to as draft 1), acknowledged that

those who are in no special relationship that may affect duties owed—the default rule is that everyone owes a duty of reasonable care to others to avoid physical harms.”)

34. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 3 cmt. b (“In many situations the conduct of the actor imperils both the actor and third parties. In such situations, all the risks foreseeably resulting from the actor’s conduct are considered in ascertaining whether the actor has exercised reasonable care.”); *cf.* Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19, 25 (2000) (“By ignoring the effect of injurer’s precaution on self-risk, American common law systematically fails to analyze accurately the problem of joint risk.”). If, however, defendants’ duty is to avoid conduct that poses risks of harm to others, defendant conduct that threatens harm to the defendant, although included in the negligence inquiry, may still encounter proximate cause problems.

35. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 3 cmt. b (stating that “[t]he definition of negligence set forth in this section applies whether the issue is the negligence of the defendant or the contributory negligence of the plaintiff”).

36. *Id.*

37. *See* Wright, *supra* note 11, at 1141.

38. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 8 (giving jurors the decision “as to the facts” and “as to whether the conduct lacks reasonable care”).

39. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 (Discussion Draft, 1999).

“no duty determinations” could “focus on the plaintiff.”⁴⁰ However, the *Restatement’s* black-letter rules, commentary, and illustrations all offered a limited view of what those plaintiff no-duty determinations might look like. In the black-letter rules, the *Restatement’s* no-duty section left room for courts to find that *defendants* had no duty “based on judicial recognition of special problems of principle or policy.”⁴¹ No equivalent black-letter provision through which courts might limit plaintiffs’ obligations based on considerations of principle or policy was listed.⁴² The *Restatement* commentary was also uneven. It viewed no-duty determinations as “typically” relieving the defendant of liability and only “on occasion” relieving the plaintiff of “the obligation to act reasonably by way of self-protection.”⁴³ Moreover, the *Restatement* provided few citations to cases in which courts have limited plaintiff, rather than defendant, obligations. Although the *Restatement* set out a number of categories in which no-duty determinations might be appropriate and highlighted a number of cases in which courts had found no legal obligation, with few exceptions the examples provided were cases in which courts found that *defendants*, and not plaintiffs, had no duty.⁴⁴

In its most recent draft, however, the *Restatement* pays much greater attention to plaintiff as well as defendant exceptions. The *Restatement’s* black-letter provision for exceptions from duty now provides: “A court may determine that *an actor* has no duty or a duty other than the ordinary duty of reasonable care.”⁴⁵ The language of the text no longer limits the application of these exceptions solely to defendants.

If there were any doubt from the text itself, the *Restatement* commentary now explicitly recognizes that “just as special problems of policy may support a no-duty determination for a defendant, similar concerns may support a no-duty determination for plaintiff

40. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 7 cmt. a.

41. *Id.* § 7.

42. *Id.* Because section 8 says that seatbelt cases can be decided en masse, it may be that this section can be used to create plaintiff no-duty rules. However, the *Restatement* does not clearly delineate section 8 as a policymaking provision, and it is not clear why this particular policy determination should be decided under the breach section rather than section 7’s no-duty provision.

43. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 7 cmt. a.

44. *Id.* § 7 cmt. a & rep.’s note at 102-05 (listing the suicide cases and citing Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999), as the sole examples of plaintiff no-duty rules).

45. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 (emphasis added).

negligence.”⁴⁶ In such cases, the commentary makes clear that a court’s exception would “eliminate the defense of comparative negligence that otherwise would diminish plaintiff’s recovery.”⁴⁷ An increased number of citations to cases invoking plaintiff no-duty rules have also been provided.⁴⁸

This expanded *Restatement* support for judicial limits on plaintiff obligations should encourage courts to explore more fully the important principles and policies that at times warrant restriction of plaintiff as well as defendant obligations. In anticipation of courts’ exploration of these principles and policies, the next part examines the principles and policy factors that have influenced those court-created limits to date.

III. COMPARATIVE FAULT AND ITS LIMITS

Comparative fault is ordinarily viewed as a jury question. Cases in which comparative-fault defenses are decided as a matter of law—in favor of plaintiffs or defendants—are often regarded as “exceptional.”⁴⁹ This view of judicial limits as the exception rather than the rule appears stronger in comparative-fault than in contributory-negligence jurisdictions.⁵⁰

Nevertheless, courts in comparative-fault jurisdictions endorse a wide range of limits on plaintiff-fault defenses. Before addressing some principle and policy factors that underlie these cases, this part first addresses the form in which judicial limits appear, the role of policy, and the rationale for acknowledging some limits.

46. *Id.* § 7 cmt. h.

47. *Id.*

48. *Id.* § 7 rep.’s note h.

49. *Taylor-Rice v. State*, 979 P.2d 1086, 1095 (Haw. 1999); see also MARSHALL S. SHAFQ, BASIC PRINCIPLES OF TORT LAW ¶ 31.02, at 128-29 (1999):

[C]ourts occasionally hold that, as a matter of law, a plaintiff’s conduct may not be said to be contributorily negligent, . . . [and] courts often refuse to rule as a matter of law that a plaintiff was contributorily negligent, reasoning that the jury should decide whether the plaintiff exercised reasonable care under the circumstances.

50. States that have shifted from contributory to comparative negligence seem to impose fewer limits after that shift. For example, in a Westlaw search, of 5800 cases that discuss contributory negligence or comparative fault along with the phrase “as a matter of law” from the 1940s to present, only a few hundred cases were decided in the 1990s. Similarly, states that currently have comparative fault rather than contributory negligence appear less likely to limit plaintiff fault defenses. For example, in one search, 38 of 112 (thirty-four percent) recent state supreme court opinions regarding such limits were from the five jurisdictions that retain contributory negligence—Alabama, Maryland, North Carolina, Virginia, and Washington D.C.

A. The Form of Limits

As a practical matter, cases limiting comparative-fault defenses based on principle or policy can be difficult to unearth. Courts generally have not recognized plaintiff baseline entitlements through plaintiff no-duty terminology. Instead, courts ordinarily recognize plaintiff entitlements through one of three methods: 1) building plaintiff entitlements into general comparative-fault rules, 2) holding that comparative-fault defenses do not apply to certain categories of cases, or 3) employing case-specific limitations on comparative-fault defenses even when broader principles underlie those limits.

In the first set of cases, general rules incorporate categorical limits on comparative-fault defenses. For example, some courts have made plaintiff capacity a requirement for a successful comparative-negligence defense.⁵¹ This requirement excuses plaintiffs from exercising reasonable self-care when they lack the capacity to do so. Similarly, the general rule that a defendant takes the plaintiff as he finds her limits some comparative-fault claims. Under that rule, even if a plaintiff's previous injury stemmed from her own fault—for example, if the plaintiff's herniated disc stemmed from a prior car accident in which she failed to stop at a red light—the defendant can not litigate the plaintiff's causal negligence in a subsequent suit.⁵²

In the second instance, courts create category-specific rules that limit the availability of comparative-fault defenses. For example, a court may excuse plaintiff rescuers from liability for failure to exercise reasonable care.⁵³ Similarly, a court may adopt a rule that certain institutions cannot plead the comparative negligence of a ward

51. See *Ford v. State ex rel. Dep't of Transp. & Dev.*, 760 So. 2d 478, 485 (La. Ct. App. 2000) (holding that the actor's capacity is a part of the contributory-negligence requirement in Louisiana, a comparative-fault jurisdiction). Cf. *Hill v. Williams*, 547 S.E.2d 472, 479 (N.C. Ct. App. 2001) (stating that "[e]very person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so").

52. See *Gross v. Lyons*, 721 So. 2d 304, 307-08 (Fla. Ct. App. 1998) ("[I]f the injuries sustained as a result of the two accidents are inseparable and cannot be apportioned, [the jury] may return a verdict for the entire medical condition."); *Washewich v. Le Fave*, 248 So. 2d 670, 673 (Fla. Ct. App. 1971) (holding that in contributory-negligence case, defendant who had collision with plaintiff could be liable for full damages even if plaintiff negligently caused her prior collision); *Matsumoto v. Kaku*, 484 P.2d 147, 150 (Haw. 1971) ("[W]here the preexisting back ailment was not the result of any transaction involving other persons, we hold that such preexisting condition should be treated no differently than from a condition brought about by disease."); *Lasha v. Olin Corp.*, 625 So. 2d 1002, 1005-06 (La. 1993) (holding that defendant who exposed plaintiff to chlorine gas was liable for full damages of plaintiff who was smoker).

53. See, e.g., N.Y. PATTERN JURY INSTR. 2:41 ("The law will not view an attempt to preserve life as negligent unless the attempt, under the circumstances, was reckless.")

who commits suicide.⁵⁴ Or it may reject comparative-fault defenses raised in response to particular claims against defendants, as in certain strict liability actions.⁵⁵

Courts create these categorical exceptions through a number of doctrines. Some courts address the plaintiff's "duty" directly.⁵⁶ Other courts that refuse to employ "duty" terminology may simply use a parallel phrase such as "obligation."⁵⁷ In certain types of cases, courts may hold that comparative-fault defenses are simply not an available defense,⁵⁸ or they may define the *defendant's* duty to include the very purpose of protecting plaintiffs who lack care.⁵⁹

A final way that courts may bar comparative-fault defenses is through case-specific language limiting the defenses even when the limits stem from broader issues of policy or principle. For example, a court may grant a plaintiff's motion in limine to exclude evidence of comparative fault in cases in which those comparative-fault defenses are particularly problematic.⁶⁰ Or a court may find a lack of substantial evidence to support the finding of plaintiff fault, even when a plaintiff arguably failed to use reasonable care for her own well-being.⁶¹ Courts also limit claims of comparative fault by increasing the defendant's evidentiary burden to present actual evidence of what others in the plaintiff's position would have done.⁶² A

54. See, e.g., *Myers v. County of Lake*, 30 F.3d 847, 852 (7th Cir. 1994).

55. See, e.g., *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985).

56. See, e.g., *Hutchison v. Luddy*, 763 A.2d 826, 846 (Pa. Super. Ct. 2001); *Brown v. Dibbell*, 595 N.W.2d 358 (Wis. 1999); see also *Jankee v. Clark County*, 612 N.W.2d 287, 324-27 (Wis. 2000) (Abrahamson, J., dissenting).

57. *Law v. Superior Court*, 755 P.2d 1135, 1141 (Ariz. 1988) (noting that "[b]ecause in all but the rarest situation nonuse of a seatbelt presents no foreseeable danger to others, it is probably incorrect to conceptualize the seatbelt defense in terms of duty" but then characterizing the need for plaintiff to wear a seatbelt as "part of the [plaintiff's] related obligation to conduct oneself reasonably to minimize damages and avoid foreseeable harm to oneself").

58. See, e.g., *Bell*, 462 So. 2d at 171.

59. See, e.g., *Cavanaugh v. Skil Corp.*, 751 A.2d 564, 589 (N.J. Super. Ct. App. Div. 1999).

60. See *Harms v. Lab. Corp.*, 155 F. Supp. 2d 891, 901 (N.D. Ill. 2001) (granting the plaintiff's motion in limine to exclude evidence that she should have known of her own blood type and RH factor from previous blood tests, in a case in which defendant lab negligently misidentified plaintiff's blood as RH positive during her pregnancy, on the basis that "[a]ny evidence or reference to [plaintiff's] alleged contributory negligence would be highly prejudicial with little—if any—probative value").

61. See, e.g., *Greenwood v. Mitchell*, 621 N.W.2d 200, 206 (Iowa 2001) ("[T]he defendant has failed to introduce substantial evidence to prove that [plaintiff's] failure to continue his home exercise program was unreasonable.").

62. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 231 (Colo. 1995) (rejecting church's claim of comparative fault by boy sexually abused by priest since the church presented no testimony as to what would have been reasonable conduct by the plaintiff); see also *King v. Clark*, 709 N.E.2d 1043, 1048-49 (Ind. 1999) (Robb, J., dissenting) (arguing that there must be evidence presented with respect to the reasonableness question).

surprising number of courts have excluded comparative-negligence defenses as a matter of law when the defendant did not produce evidence to support the claim that other reasonable plaintiffs would have done something differently than the plaintiff did.⁶³

B. *The Role of Principle or Policy*

Whether limits on comparative fault defenses are considered to be a part of the comparative-negligence rules or as general or specific exceptions to those rules, courts limit comparative-fault defenses for a number of reasons. Of course, judges reject comparative-fault defenses when a reasonable plaintiff would not have foreseen a risk⁶⁴ or taken steps to reduce it⁶⁵—in short, cases in which no reasonable jury could have found that the plaintiff breached an objective standard of reasonable care for herself or others. In addition, courts reject plaintiff-fault defenses when the plaintiff's alleged negligence was not the actual⁶⁶ or proximate cause of the harm.⁶⁷ Such case-specific limitations would be appropriately decided with or without a specific

63. *Greenwood*, 621 N.W.2d at 206 (holding that comparative-fault defense failed because defendant did not present any evidence that others would have acted differently than the plaintiff); *Perales v. City of N.Y.*, 711 N.Y.S.2d 9, 10 (App. Div. 2000) (excluding a comparative-fault defense due to lack of evidence); cf. *Ponirakis v. Choi*, 546 S.E.2d 707, 711 (Va. 2001) (stating in a contributory-negligence case that there “[m]ust be more than a scintilla of evidence” and that defendant had presented no evidence of how patients other than the plaintiff would have acted).

64. *Marple v. Sears, Roebuck & Co.*, 505 N.W.2d 715, 717-18 (Neb. 1993) (finding that a customer did not know of department store employee blindly pushing refrigerator down aisle).

65. This could be either because the plaintiff had no choice at all or because plaintiff did not have a choice of a safer alternative. See *Phillips v. United States*, 743 F. Supp. 681, 686-87 (E.D. Mo. 1990) (holding that a mechanic working on a vehicle stalled on a highway was not comparatively negligent for injuries sustained when he was hit by a truck); *Anderson v. Werner Enters., Inc.*, 972 P.2d 806, 813-14 (Mont. 1998) (holding that a motorcyclist had no choice but to be hit by a truck).

66. See, e.g., *Brandon v. County of Richardson*, 624 N.W.2d 604, 627 (Neb. 2001) (“[N]othing in the record indicates that Brandon’s failure to return for the second December 29 interview contributed to the county’s failure to protect Brandon.”); *Townsend v. Legere*, 688 A.2d 77 (N.H. 1997) (finding no evidence that plaintiff tripped on the sidewalk because she was a little woman who could not control her big dog); *Hunt v. Freeman*, 550 N.W.2d 817, 818 (Mich. Ct. App. 1996) (finding no evidence that plaintiff’s consumption of part of a wine cooler affected her ability to perceive and react); see also EPSTEIN, *supra* note 21, at 194 (“[A] causal link is as important in dealing with P’s conduct and P’s harm as it is in dealing with D’s conduct and P’s harm.”).

67. See Dan B. Dobbs, *Accountability and Comparative Fault*, 47 LA. L. REV. 939, 956 (1987) (providing an example of a plaintiff who was negligent in walking onto a dark patio because she might have fallen into the swimming pool, but who was instead hit by a runaway car that entered the backyard); see also *Skinner v. Ogallala Pub. Sch. Dist.*, 631 N.W.2d 510, 526 (Neb. 2001) (upholding trial court ruling that a plaintiff who failed to turn on the lights was not contributorily negligent in a case in which the defendant left open a trap door in a school classroom).

mechanism for limiting comparative-fault defenses based on issues of principle or policy.⁶⁸ However, judges also limit comparative-fault defenses when a reasonable jury *could* have found that the plaintiff's conduct posed an unreasonable risk and was the actual and proximate cause of harm.⁶⁹

The line between no-breach cases, in which no reasonable jury could have found plaintiff negligence, and no-duty cases, in which no defense could be raised despite arguable plaintiff negligence, is a fine, if not invisible, line. To illustrate, I have argued elsewhere that citizens should have no duty to take reasonable care to protect themselves from the threat of rape.⁷⁰ Two preeminent torts scholars characterized this same argument in different ways. One wrote that the proposed limit was a case in which "the plaintiff's autonomy or citizenship rights permit her to ignore reasonable self-care," and called it an entitlement or no-duty case.⁷¹ The other wrote that the plaintiff's autonomy or citizenship rights themselves should be seen as defining reasonable self-care, such that the plaintiff would not have been negligent.⁷² Either of these characterizations might seem apt.

However, the terminology used to define the judicial limit is not critical. Whether a court says that the plaintiff's conduct is negligent but cannot go to the jury based on the plaintiff's policy-based entitlements or that the plaintiff's conduct could not be considered negligent in light of the plaintiff's entitlements, the court is identifying and weighing the plaintiff's entitlements outside the province of the jury.⁷³ This Article focuses on court-created limits

68. See, e.g., CAL. CIV. JURY INSTR. 14.91 (comparing the parties fault when the jury finds "there was negligence on the part of the plaintiff which contributed as a cause of plaintiff's injuries"), available at http://netlawlibraries.com/jurinst/ji_014a.html#14.91. The *Restatement of Liability for Physical Harm* recognizes actual cause limits in its basic formula for liability, which provides that liability only attaches when negligence causes harm. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 6. If the *Restatement* makes no-duty exceptions appropriate in particular cases and not just general categories, situations in which a plaintiff's negligence is not the proximate cause of the harm may overlap with situations in which a plaintiff has no duty.

69. See *supra* Part II.

70. Bublick, *supra* note 44, at 1477-90.

71. DOBBS, *supra* note 7, § 200, at 503.

72. Letter from Professor Oscar Gray (Apr. 27, 2001) ("The issue is not that rape victims are entitled to be unreasonable by behaving freely—but that such behavior is *not* unreasonable.") (emphasis in original) (on file with author).

73. See SHAPO, *supra* note 49, ¶ 32.01, at 131:

Sometimes more than one of these doctrinal labels, including contributory negligence, various forms of implied assumption of risk, and no duty, may be appropriate to the same behavior. Therefore, both advocates and judges should look to the functional purpose of defenses involving the plaintiff's conduct in order to determine how best to characterize the behavior. [;]

based on underlying entitlements or principles, in whatever form these arise. These limits suggest rules based on normative considerations—that a plaintiff is not legally obligated to engage in or refrain from certain kinds of conduct as a condition of full recovery.

C. Traditional Limits

Over the last half century, many thoughtful authorities have described the various categories of cases in which contributory-fault defenses should be precluded. Dean Prosser focused on three exceptions to the ordinary rule of contributory negligence: contributory negligence was not a valid defense to intentional and reckless torts, it could not be raised when the plaintiff's action was "founded upon the defendant's violation of a statute"; and it did not apply when the defendant had the last clear chance to avoid the injury.⁷⁴ When the *Restatement (Second) of Torts* outlined limits on contributory-fault defenses, it included these categories and added two more: the defense of contributory negligence did not apply to claims of strict liability or to the defendant's tort of nuisance.⁷⁵ Harper, James, and Gray recognized this same set of exceptions.⁷⁶

A more recent account of comparative-fault defenses in Professor Dobbs's new torts treatise declares that limits on plaintiff fault as a defense to intentional and reckless torts still prevail in comparative-negligence jurisdictions, although exceptions for last clear chance very rarely survive the transition from contributory negligence.⁷⁷ In addition, the treatise adds two lucid sections about a range of risks that are allocated entirely to the defendant under either comparative or contributory negligence.⁷⁸

The traditional categories for limiting comparative-fault defenses shed much light on current case law. Most current limits on comparative-fault defenses trace their roots to these historical categories. However, the traditional categories also pose some difficulties. One reason is change. For better or for worse, comparative-fault and comparative-apportionment jurisdictions do not

see also Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superceding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 901-07 (2000) (showing how courts use the notion of superseding cause to replace other forms of liability limits).

74. Prosser, *supra* note 4, at 5-6.

75. See RESTATEMENT OF THE LAW (SECOND) TORTS §§ 479-84 (1984).

76. HARPER ET AL., *supra* note 11, §§ 22.7-22.8, at 304-22.

77. DOBBS, *supra* note 7, §§ 207-08, at 517-23.

78. *Id.* § 200, at 500-03.

always follow these traditional rules. Many courts have permitted comparative-fault defenses to claims of strict liability,⁷⁹ and a few have even permitted such defenses to reckless and intentional torts.⁸⁰

Even when change is less clear, the traditional categories can be problematic. For instance, courts still limit plaintiff-fault defenses in some cases in which the defendant violated a statute.⁸¹ However, courts appear to limit the comparative-fault defenses more often when certain statutes are at issue, such as laws governing workplace injuries or injuries to children, than they do with others. In a similar vein, although it is true that courts limit plaintiff-fault defenses when the defendant's very duty involves care for a negligent plaintiff, that category begs the further question of when a defendant's duty is considered to involve the care not merely of a plaintiff, but of a negligent plaintiff. Moreover, limits to comparative-fault defenses have appeared in a number of other circumstances less easily subject to traditional categorization.⁸²

D. The Rationale for Limits

Although courts continue to limit some comparative-fault defenses, they often provide little explanation for doing so. These limits reflect a diverse range of principles and policies. Although a complete taxonomy of potential normative influences is not possible, there are certain identifiable situations in which the fairness, deterrence, and compensation rationales for requiring comparative fault are relatively unpersuasive, and in those situations a number of exceptions tend to appear.

79. 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, 234-35 (1994).

80. See, e.g., *Martin v. Prime Hospitality Corp.*, 785 A.2d 16, 24 (N.J. Super. Ct. App. Div. 2001) (holding that court erred in refusing to apportion fault between rapist, rape victim, and third party, and stating that "[t]he sole fact that [the rapist defendant] pled guilty to a crime would also not bar apportionment"); see also *Bonpua v. Fagan*, 602 A.2d 287, 289-90 (N.J. Super. Ct. App. Div. 1992) (holding that a defendant convicted of aggravated assault sufficiently alleged comparative fault of plaintiff who called him a "faggot" in front of his girlfriend).

81. See, e.g., *Steiner v. Mont. Dep't of Highways*, 887 P.2d 1228 (Mont. 1994).

82. *Jacobs v. Westgate*, 766 So. 2d 1175, 1178-80 (Fla. Dist. Ct. App. 2000) (holding that landlord and neighbor who put plaintiff's property outside his apartment without plaintiff's knowledge before it started to rain could not claim plaintiff's fault for the bad character which prompted them to want to evict him or for plaintiff's failure to move property out of the rain quickly enough); *Richwalt v. Richfield Lakes Corp.*, 633 N.W.2d 418, 424-25 (Mich. Ct. App. 2001) (holding that a lifeguard could not assert plaintiff's comparative fault for his decision to go swimming in the ocean despite his heart condition and prior heart surgery).

Contributory negligence is often defined as “conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection.”⁸³ Comparative fault is simply contributory negligence decided in incremental percentages.⁸⁴ These defenses are measured by an objective test—what a reasonable person under like circumstances would do.⁸⁵

Comparative fault, like contributory negligence, is thought to be animated by tort law concerns for corrective justice and deterrence.⁸⁶ Although the compensation role of comparative fault has been emphasized less, an argument might also be made that comparative fault furthers that objective as well.

Corrective-justice concerns are often considered the primary rationale behind comparative-fault defenses.⁸⁷ If the rationale behind negligence law is essentially the golden rule—a person should take the same care for others that she would have others take for her—the rule of comparative fault appears to be something of a corollary—a person must take as much care for herself as she would have others take for her.⁸⁸ Principles of fairness have been thought to require the plaintiff to exercise the same level of care for herself that she demands from others,⁸⁹ or the same level of care that a person would will to be universalized.⁹⁰ In addition, the plaintiff’s obligation to care for herself

83. RESTATEMENT (SECOND) OF TORTS, *supra* note 75, § 463.

84. See DOBBS, *supra* note 7, § 201, at 503:

A rule of comparative fault “merely reduces the amount of the award to a plaintiff who is chargeable with contributory fault. The plaintiff’s conduct is not necessarily different in the two cases. In a comparative-fault regime, the conduct may still be called contributory negligence, but the legal effect of that contributory negligence is different.

85. SHAPO, *supra* note 49, ¶ 31.01, at 127.

86. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 721-23 (1978).

87. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693 (1995) (exploring carefully a number of rationales for limiting plaintiff’s recovery through the doctrine of contributory negligence); Schwartz, *supra* note 86, at 699 (“[E]conomics, standing alone, furnishes no persuasive basis for any contributory negligence defense, but . . . such a basis is adequately provided by reasons of fairness.”).

88. Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 255 (1908) (“[T]he plaintiff can ask from others no higher respect for his rights than he himself pays to them.”). A different corollary might be that one must take as much care for herself as she takes for others.

89. Schwartz, *supra* note 86, at 722 (noting that to do otherwise would be an “uneven application of the fault standard”); Dobbs, *supra* note 67; SHAPO, *supra* note 49, ¶ 31.03, at 130.

90. Cf. Curtis Bridgeman, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 260 (2003) (discussing corrective-justice theories that stem from Kant’s moral philosophy).

has been tied at times to the idea that a person owes herself as much respect as she owes others.⁹¹

As for deterrence, the "dominant" view is that accident prevention "depends on the loss prevention efforts of both sides."⁹² A bilateral duty of care is thought to reduce the overall frequency and severity of injuries.⁹³ Penalizing careless victims may promote victim care.⁹⁴

Relatively little has been said about comparative fault with respect to compensation. However, comparative fault can be thought to increase compensation by giving more people access to recovery, even if fewer of those people receive as great a recovery.⁹⁵ In addition, if a broad notion of plaintiff comparative fault creates or reflects a broad notion of defendant fault, comparative fault may increase aggregate compensation to plaintiffs as a result of defendants' larger liabilities. Moreover, it might be argued that comparative-fault defenses further insurance goals by imposing, in effect, a risk premium on negligent plaintiffs.⁹⁶

And yet, each of these rationales is open to criticism. In terms of corrective justice, the existence or nonexistence of a contributory-negligence defense may not impact corrective-justice principles at all. If Aristotle's idea of corrective justice requires only "the provision of *some* remedy for a wrongful injury *after* the injury occurs," and the details of compensation are not essential,⁹⁷ the presence or absence of

91. See Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed., 1997); Bohlen, *supra* note 88, at 254 ("It was manifestly unfair that . . . any man should be required to take better care for others than such persons are bound to take of themselves."); Schwartz, *supra* note 86, at 723 n.118; cf. George Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1628-29 (1999) ("The basis of egalitarian jurisprudence should not be the state and its interests but, rather, the intrinsic equality of all persons created in God's image.").

92. EPSTEIN, *supra* note 21, at 190 (citing Mark Grady, *Common Law of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15 (1988)); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 124 (1990); Schwartz, *supra* note 86, at 699 (arguing that law and economics scholarship has "strongly endorsed the idea of a contributory negligence defense"). But see Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence* (unpublished manuscript on file with author) (concluding that in certain circumstances "a simple negligence rule with no defense can induce efficient self-selection").

93. EPSTEIN, *supra* note 21, at 19-91; Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1081-82 (1986).

94. SHAPO, *supra* note 49, ¶ 31.03, at 130, ¶ 33.02, at 138 n.7 (noting that passing no-fault insurance laws is associated with a rise in fatal accidents); Schwartz, *supra* note 86, at 704 ("[T]he law can discourage people from engaging in conduct that involves an unreasonable risk to their own safety . . .").

95. See SHAPO, *supra* note 49, ¶ 33.03, at 142; Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868-69 (1996).

96. Cf. Simons, *supra* note 87, at 1747.

97. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 322-23 (1990).

a contributory-fault defense does not support or offend corrective-justice principles. With respect to deterrence it is not at all clear whether comparative fault promotes safety in the personal injury context.⁹⁸ Even without comparative fault, the plaintiff already has incentives to prevent harm to herself and, at the margin, may already have too many incentives for self care.⁹⁹ In terms of compensation, comparative fault may not only leave plaintiffs without adequate resources to pay the cost of their injuries, but also may prevent them from taking advantage of the loss-spreading function of insurance for all or part of the claim.¹⁰⁰

These general criticisms of comparative fault have not shaken courts' or commentators' general support for that doctrine. However, in particular types of cases, the justifications for the comparative-fault doctrine seem particularly suspect.

Implicit within the corrective-justice and deterrence rationales for comparative fault are two critical prerequisites—that there was a better course of action for the plaintiff to choose and that she should have made that choice *ex ante*. “The very essence of contributory negligence is that the plaintiff has misconducted himself, that he has done or omitted to do something which under the circumstances of the

98. Schwartz, *supra* note 86, at 721 (“[T]here is inadequate reason to believe that any contributory negligence rule is a good idea in safety terms; the traditional rule, moreover, appears to be a distinctly bad idea.”); Prosser, *supra* note 4, at 4:

It has been said that the comparative-fault rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant.

99. The plaintiff already retains liability for whatever accidents are caused to her by another without negligence or for those accidents for which the defendant has no duty or immunity. See EPSTEIN, *supra* note 21, § 8.5, at 197 (“[T]he general adoption of negligence liability imposes on P the risk of these unavoidable accidents as a matter of social policy.”); Simons, *supra* note 87, at 1702-03 (referring to this result as plaintiff strict responsibility); Schwartz, *supra* note 86, at 710-11 (noting that “[t]o the extent that the victim cannot predict that his accident will involve the tort liability of another party, his original incentive for careful conduct remains fully in effect” and that plaintiff damages fall short of full compensation because of legal fees, experience of litigation, and pain and suffering). Furthermore, the plaintiff's interests in her own safety stem from concern for her well-being, not simply from concern about her inability to recover for her losses in economic terms. See Schwartz, *supra* note 86, at 712 (“[T]he plaintiff is the biological victim of the accident. Hence the plaintiff has a strong ‘first-party’ incentive to prevent the accident without regard to tort liability rules.”).

100. GUIDO CALEBRESI, *THE COST OF ACCIDENTS* 279-81 (1970) (noting that unless comparative fault “were administered with a fine eye to who the best loss spreader was, many heavy unspread losses would remain”).

case a reasonably prudent man would not have done or omitted to do."¹⁰¹

When no better choice of conduct was available, the rationales for comparative fault would seem to fail. In many no-breach cases, it is easy to see that the plaintiff did not have a better choice of conduct.¹⁰² However, in other cases, it is difficult to determine the best course of conduct for the plaintiff. Usually, the jury determines what the plaintiff's best course of conduct would have been. But when the process of determining whether the plaintiff had a better choice is itself likely to impose independent harms on the parties, the litigation, or its social message, courts may prefer to resolve the liability issue without it. Similarly, when plaintiff's course of conduct touches on her fundamental, sometimes constitutional, rights, courts may be wary about letting juries decide whether the plaintiff made the prudent choice. Moreover, when the plaintiff's choice risks harm only to herself and a reasonable person might make the choice either way, courts may want to leave the reasonableness of that choice to the plaintiff's judgment rather than to jury decision.

Even when there was a better choice of conduct available, the second fundamental premise of comparative fault is that the plaintiff, like other reasonable persons, should have made that choice *ex ante*. But if the plaintiff was incapable of making that reasonable choice because of incapacity, or because of structural factors that predictably hamper plaintiffs' efforts, her failure of care is less likely to trigger accountability and deterrence concerns. In situations in which plaintiffs are unable to care for themselves, their failure to use reasonable care does not reflect a lack of self-respect.¹⁰³ Likewise, holding a plaintiff responsible for comparative fault does not remove her incapacity or the structural barriers that prevented her from compliance with the standard of reasonable care in the first place.

Accordingly, exceptions to comparative-fault defenses may be not only predictable, but also desirable, when the plaintiff cannot make a favored choice because she cannot take care for herself, cannot take as effective care for herself as others can take for her, or is thought to deserve some kind of care in spite of her own negligence. In

101. Bohlen, *supra* note 88, at 247.

102. For example, when the plaintiff incurs larger damages than might be expected from the defendant's negligence because of plaintiff's preexisting condition, tort law commonly finds that the defendant takes the plaintiff as he finds her. *See, e.g.*, *Benn v. Thomas*, 512 N.W.2d 537, 538 (Iowa 1994) (requiring the defendant to take his plaintiff as he finds him and pay for "harm an ordinary person would not have suffered").

103. Wright, *supra* note 91, at 269-70 (stating that plaintiff contributory negligence is a question of whether "the plaintiff failed properly to respect one's own humanity").

addition, exceptions should be considered when the process of determining whether the plaintiff has taken care is likely to be harmful in itself, raises significant normative concerns, or invades the plaintiff's autonomy to make decisions about conduct that poses risks to self alone.

E. Principle and Policy Factors

For the purpose of this Article, I will explore six principle and policy factors: 1) plaintiff incapacity—when the plaintiff is incapable of total or partial self-care; 2) structural safety—when the plaintiff is less capable of self-care than is the defendant due to positional or situational factors; 3) role definition—when the plaintiff is capable of self-care, but the defendant must care for a negligent plaintiff due to contractual or social obligations; 4) process-related harms—when the process of asking about plaintiff care will be destructive in itself; 5) fundamental values—when the very issue of a plaintiff's reasonableness implicates fundamental, sometimes constitutional, values; and 6) autonomy and self-risk judgment—when evaluating the reasonableness of plaintiff self-care encroaches on the plaintiff's autonomy not to act or to act in ways that do not risk harm to others.

Before exploring these principle and policy factors, three caveats are necessary. First, my claim is that when courts *do* limit comparative-fault defenses, it is typically because of these factors. My claim *is not* that courts limit comparative-fault defenses whenever these factors are present. Second, these principle and policy factors are not mutually exclusive, and a given comparative-fault defense may suggest several, if not all, of them.¹⁰⁴ And third, my goal is not to convince readers that any particular category is normatively justified, but simply to show that courts have crafted these exceptions in a number of situations in which there are principled reasons to consider them.

1. Plaintiff Incapacity

At times, courts limit comparative-fault defenses when the plaintiff lacks the capacity to exercise reasonable care for her own

104. For example, limiting claims of comparative fault as a defense to intentional torts may serve process, freedom, and autonomy considerations.

safety and when the plaintiff's incapacity is recognizable and socially accepted.¹⁰⁵

The relevance of plaintiff capacity to comparative-fault defenses is most apparent when the plaintiff lacks any ability to care for himself, as in the case of an infant. The New York case *Rider v. Speaker* is illustrative.¹⁰⁶ In *Rider*, fourteen-month-old Michael Clarkin, Jr. and two other children were traveling in a car with Michael's babysitter and her sister. One of the children was placed in the car's single child-safety seat. Michael and another child were placed directly in the car's backseat, possibly secured by a seatbelt. While the babysitter's sister was driving, the car collided with a delivery van, and Michael sustained serious injuries.

Michael's parents sued both drivers and the babysitter for negligence. As an affirmative defense, each of the three defendants claimed that Michael's failure to wear a seatbelt or to sit in a child safety seat constituted contributory negligence or failure to mitigate damages.¹⁰⁷ Michael's parents brought a motion to strike the affirmative defense, and the court granted the motion to strike with respect to all three defendants. "As a matter of law," the court wrote, "a 14-month-old is incapable of contributory negligence."¹⁰⁸ This result pertained to all three defendants even though Michael had no prior relationship to the defendant van driver and even though the driver apparently did not have any knowledge of the child's presence in the car.¹⁰⁹

Other cases reach the same result. For example, a two-year-old plaintiff who eats lead paint chips cannot be charged with the failure to use reasonable care.¹¹⁰

The rationale for this exception from comparative fault for young children seems obvious to judges, who generally do not elaborate on the principles that support it. The incapacity of very young plaintiffs affects both the accountability and deterrence rationales for comparative fault. An infant plaintiff who lacks any ability to choose an alternative course of conduct (like buckling a seatbelt), also lacks moral fault for failing to live up to the objective

105. Cf. Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735 (2002) (arguing that negligence law relies on communities to buttress its authority).

106. 692 N.Y.S.2d 920 (App. Div. 1999).

107. Before disposition of the case, one of the three defendants—the babysitter—withdraw her defense. *Id.* at 921.

108. *Id.*

109. *Id.* at 922.

110. *Lopez v. No Kit Realty Co.*, 679 N.Y.S.2d 114, 115 (App. Div. 1998).

standard of care as well as the ability to be deterred from his conduct.¹¹¹ Traditional rationales for comparative fault therefore do not merit application of the comparative-fault doctrine in this situation.

Plaintiff's incapacity claims are particularly strong in the context of infancy because of the natural dependency of young children¹¹² and because social norms recognize greater obligations for the care of children in light of that dependency.¹¹³ Accordingly, resolving these cases by reference to the single issue of defendant's negligence is likely to be more consistent with normative understandings of fault than are resolutions reached by reference to both defendant and plaintiff negligence. Accommodations for incapacity may well be stronger when the party invoking them is a plaintiff rather than a defendant.¹¹⁴

But rejecting comparative-fault defenses, even in this context, is not without potential controversy. If comparative-fault defenses are not based on an individual's moral fault but on the fault of failing to meet an objective standard of reasonable care, failure to comply with the standard of care may be all that is morally required. Moreover, to the extent that comparative fault operates as a limit on the defendant's liability—limiting defendant's liability to only those damages that would have occurred if the other party had exercised reasonable care—it might seem unfair to require a defendant to pay a greater share of the damages because the unbuckled passenger in the car he hit happened to be a child.¹¹⁵

111. See *Chu v. Bowers*, 656 N.E.2d 436, 439 (Ill. Ct. App. 1995) (“[T]he primary rationale for [the tender-years] rule is the belief that children under the age of seven are incapable of recognizing and appreciating risk and are therefore deemed incapable of negligence as a matter of law.”).

112. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

113. Children are often considered protected by the state, not simply reliant on themselves and their parents for safety. See *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972).

114. There are structural reasons that courts may use incapacity to limit comparative negligence defenses more often than they do with negligence claims. In cases of plaintiff incapacity, there is always another negligent party—the defendant—or the comparative-fault claim could not be raised. In cases in which the defendant suffers from an incapacity, a nonnegligent party may have been injured. When incapacitated defendants injure negligent plaintiffs, courts may curtail those defendants' liability more readily as well. See *Creasy v. Rusk*, 730 N.E.2d 659, 667-68 (Ind. 2000) (denying claim brought against patient suffering from Alzheimer's disease).

115. What is fair for the plaintiff to receive in damages may differ from what it is fair for the defendant to pay. George Fletcher, *Fairness and Utility in Tort Law Theory*, 85 HARV. L. REV. 537, 540-42 (1972). Moreover, the plaintiff's fault may impact the defendant's fault. The defendant's conduct therefore may appear more blameworthy not just as a result of his own

And yet, courts seem quite willing to impose greater liability on defendants in light of a young plaintiff's lack of subjective ability,¹¹⁶ (although in some cases the child's damages may be reduced through other avenues).¹¹⁷ As one court wrote,

[T]here is something to be said for requiring citizens to assume total responsibility if their negligence causes injury to a child. While the child may have acted carelessly or thoughtlessly, it is in the nature of children to be careless and thoughtless on occasion, and society must be ever aware of the need to exercise extraordinary caution when children are present.¹¹⁸

It may be argued that infants—who are incapable of caring for their own needs—are the only group of plaintiffs for whom incapacity warrants a complete limit on comparative-fault defenses. The draft *Restatement* takes this position. Moreover, current case law most clearly excludes this group of plaintiffs from comparative fault.

Nevertheless, case law and principle also suggest that other people whose total or near-total incapacity precludes their self-care might be exempted from comparative fault as well.¹¹⁹ In a number of cases, people institutionalized with dementia have been found incapable of comparative fault with respect to their caregivers.¹²⁰ It is not clear whether these cases are based solely on plaintiff incapacity, as in this category, or whether they are also based on structural safety concerns outlined in the next section. There are few cases in which someone other than a caregiver has raised a comparative-fault claim against an incapacitated plaintiff, so there is little opportunity to test the rationale. In one of the few cases on point, a speeding driver hit a woman who was suffering from Alzheimer's disease and had wandered

negligence, but as a result of his negligence plus the resulting harmful consequence such that some sort of downward adjustment seems fair.

116. See *Chu*, 656 N.E.2d at 439; *Stinespring v. Natorp Garden Stores, Inc.*, 711 N.E.2d 1104, 1107 (Ohio Ct. App. 1998) ("The amount of care required to discharge a duty to a child of tender years is necessarily greater than that required to discharge a duty to an adult.").

117. For example, in some jurisdictions, the child's guardian could be sued for negligent supervision. *Y.H. Invs., Inc. v. Godales*, 690 So. 2d 1273, 1277-78 (Fla. 1997). In certain circumstances, this doctrine appears to revive the discredited notion of imputed negligence. Accordingly, some courts have refused to assign fault to the child's parent when that assignment would diminish the child's ability to recover from other negligent defendants. See *Crotta v. Home Depot, Inc.*, 732 A.2d 767, 771-72 (Conn. 1999) (holding that parental immunity bars parent from being joined as a third-party defendant or assigned a percentage of fault in injury suits brought on behalf of the child).

118. *Chu*, 656 N.E.2d at 439.

119. See *Birkner v. Salt Lake County*, 771 P.2d 1053, 1060-61 (Utah 1989) (stating that "[t]hose who are insane are incapable of contributory negligence" but concluding that a mentally impaired patient could be found ten percent liable in sexual misconduct by her therapist).

120. Cf. *Bochenek v. State*, 32 Ill. Ct. Cl. 20, 25 (1977) ("It is also clear that the deceased was mentally incompetent at the time of the accident, and was unable to care for himself. We therefore find that he was incapable of contributory negligence.").

into the street. The state trial court wrote that a departure from the ordinary comparative-fault standard would be required in light of the plaintiff's incapacity.¹²¹ But rather than resolve that difficult question, the state supreme court rendered it moot with a ruling that there was insufficient evidence that the defendant, who allegedly was speeding and had failed to sound his horn when he saw the woman in the street, breached his duty of reasonable care.¹²²

As a matter of principle, there seems little reason to limit comparative-fault defenses raised against young people incapable of self-care but not against others with serious incapacities.¹²³ Administrative ease may be a practical concern, however.¹²⁴ Not only do infant plaintiffs lack the capacity to meet the standard of care, but they also do so in a way that is easy to judge categorically (although as children get older, this classification becomes more difficult to apply). Accordingly, it is not surprising that, in comparative-fault claims against other arguably dependent persons, courts seem to rely upon demonstrable indicia of incapacity for self-care such as institutionalization.¹²⁵ Perhaps courts would be more willing to bar comparative-fault defenses in cases in which a person's incompetence had been adjudicated in prior proceedings.

In cases of partial incapacity, in which the plaintiff is capable of some but not necessarily full self-care, as with older children and mentally or physically disabled adults, and in cases of temporary incapacity, as with emergency doctrine cases, courts have generally limited but not barred comparative-fault defenses.¹²⁶ In these cases, a case-by-case judgment about each plaintiff's capacity to make

121. *Sharbino v. State Farm Mut. Auto. Ins. Co.*, 690 So. 2d 73, 78 (La. Ct. App. 1997) (noting that the trial court held that the plaintiff "was not contributorily (or comparatively) negligent because she acted as a reasonably prudent person with senile dementia").

122. *Id.*

123. See *Bohlen*, *supra* note 88, at 253 ("The courts are the last resort of him who not merely does not, but cannot, protect himself."); *Schwartz*, *supra* note 86, at 714 (stating that accident risk varies by age and that less care can be expected from the young and the elderly).

124. Perhaps this is why courts have drawn many rules of thumb, such as the tender-years doctrine. See *Chu v. Bowers*, 656 N.E.2d 436, 439 (Ill. Ct. App. 1995) (endorsing a bright-line rule rather than a test of an individual child's capacity on the basis that such a rule fosters "predictable results and judicial economy").

125. Compare *Sharbino*, 690 So. 2d at 78, with *Fields v. Senior Citizens Ctr., Inc.*, 528 So. 2d 573, 581 (La. Ct. App. 1988) (holding that a nursing home patient suffering from mental confusion should be held to a "relaxed standard of care").

126. See, e.g., *Smith v. Lebanon Valley Auto Racing Inc.*, 598 N.Y.S.2d 858, 859-60 (App. Div. 1993) (noting that "a plaintiff with diminished mental capacity 'should not be held to any greater degree of care for his own safety than that which he is capable of exercising' " but holding that a "borderline mentally retarded" racetrack patron who was injured in the pit area may have had the mental capacity to understand the warning to leave the spot where he was standing).

particular choices might serve accountability and deterrence principles. However, the courts' use of semisubjective standards may reflect the difficulty of making individualized determinations of capacity.

On the other hand, when courts view the plaintiff's incapacity as flowing from a voluntary choice—as in the case of persons who are voluntarily intoxicated or have chosen not to medicate a psychiatric condition—they are unlikely to carve out exceptions.¹²⁷

2. Structural Safety

While courts may limit comparative-fault defenses in some cases solely based on the plaintiff's incapacity, in other cases the limit is based on a combination of plaintiff incapacity and the defendant's special abilities and relationship to the plaintiff. Specifically, in a number of cases, courts have limited plaintiff comparative-fault defenses when the defendant was in a better position to exercise care for the plaintiff's interests than was the plaintiff herself. These cases involve 1) plaintiffs who are relatively incapable of self-care due to personal or situational factors, 2) defendants who have greater maturity, information, or control and can foresee that some people in plaintiffs' position will not exercise self-care, and 3) relationships of trust or care between the parties that require the defendants to exercise care for the plaintiffs' protection.¹²⁸

a. Experience Differentials

Courts may prevent defendants from raising comparative-fault defenses when immature plaintiffs are involved with dangerous instrumentalities or adult activities outside the plaintiff's ordinary experience.

An example of a limit on a comparative-fault defense in the case of an immature plaintiff engaging in an adult activity arises in the case of *Doe v. Brainerd International Raceway, Inc.*¹²⁹ In *Brainerd*, a sixteen-year-old runaway entered the Brainerd raceway grounds

127. *Baldwin v. Omaha*, 607 N.W.2d 841, 850-51 (Neb. 2000) (holding that a mentally ill arrestee shot by police who disregarded standard operating procedures for dealing with persons with mental illness could claim comparative fault of plaintiff who failed to take his antipsychotic medication).

128. *Dobbs*, *supra* note 67, at 960-62 (formulating elements of a principle under which duty/risk analysis is appropriate after comparative fault when the plaintiff is "in a class of persons who cannot protect itself from the risk in question," the risk is "nonreciprocal," and the defendant has "knowledge or reason to know of the plaintiff's disability").

129. 514 N.W.2d 811 (Minn. Ct. App. 1994) [hereinafter *Brainerd I*].

using a pass obtained by another person. Once on the grounds, she ingested drugs and alcohol and participated in a wet T-shirt contest.¹³⁰ The wet T-shirt contest degenerated into a sexual performance that included complete nudity and digital and oral penetration of Doe and other women in front of a predominantly male crowd of more than two thousand people.¹³¹ The contest/performance lasted approximately one hour and was videotaped by spectators.¹³² Although the raceway and its security service had ample notice of raucous behavior including wet T-shirt contests and nudity at the raceway during previous Quaker State races and had a stated goal of preventing wet T-shirt contests, the raceway's security service did nothing to prevent, and possibly approved, that activity in advance.¹³³ Furthermore, although violent acts were common at the raceway, including "explosion of pipe bombs, the burning of cars, and sexual molestation—even of minors," security personnel did nothing to prevent this violence.¹³⁴ In fact, security personnel refused to enter the most dangerous area of the raceway, which they referred to as "the zoo," even to accompany paramedics.¹³⁵ Security officers simply warned paramedics that "they might be killed if they ventured into the area after dark."¹³⁶

After Doe's public sexual performance, which led to the criminal conviction of two organizers, Doe sued the raceway and the security service for negligence.¹³⁷ She argued that the defendants were guilty of negligence per se for violating Minnesota's statutory duty not to use a minor in a sexual performance.¹³⁸ In addition, she claimed that defendants breached their common law duty to use reasonable care to protect her from foreseeable criminal acts of third parties.¹³⁹ The Minnesota appellate court agreed with both of the plaintiff's theories.¹⁴⁰ Further, the court held that "there can be no contributory negligence as a matter of law," because the Minnesota statute banning sexual performances was intended "for the protection of a limited class of persons from their inability to protect themselves."¹⁴¹ That class

130. *Id.* at 814.

131. *Id.* at 815; *Doe v. Brainerd Int'l Raceway, Inc.*, 533 N.W.2d 617, 619 (Minn. 1995) [hereinafter *Brainerd II*].

132. *Brainerd I*, 514 N.W.2d at 815.

133. *Id.* at 815, 817 n.3.

134. *Id.* at 815.

135. *Id.*

136. *Id.*

137. *Brainerd II*, 533 N.W.2d at 620.

138. *Brainerd I*, 514 N.W.2d at 816.

139. *Id.* at 817.

140. *Id.* at 817-18.

141. *Id.* at 817 (quoting *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981)).

was to be protected from "their own inexperience, lack of judgment, inability to protect themselves or resist pressure, or tendency toward negligence."¹⁴²

On review, however, the Minnesota Supreme Court not only overruled the appellate court's decision that the raceway and security company had a duty that could not be limited by comparative fault, but also ruled that the defendants had no duty to the plaintiff.¹⁴³ The court's no-duty ruling for the defendants was based largely on the plaintiff's own contributory negligence. According to the court, the defendants did not have a duty to protect plaintiff "from the very harm that she actively created."¹⁴⁴

These appellate decisions represent two very different views of defendants' responsibility to minors who participate in adult activities. The appellate court's decision represents a more protective view of plaintiffs, even when their conduct is patently unreasonable,¹⁴⁵ while the Minnesota Supreme Court's decision takes a more judgmental stance toward minors who engage in unreasonable adult activities.

The protective view through which courts limit comparative-fault defenses when an immature plaintiff is involved in adult activity reflects a belief that the safety of children will be promoted by placing legal responsibility on the more mature and experienced party. Even if some people in the plaintiff's situation can take reasonable care for their safety, immature plaintiffs as a group cannot reliably do so in the way that a more experienced or mature defendant could.¹⁴⁶ For this reason, the defendant's obligation may be to take care for even a negligent plaintiff. In some ways, this exception parallels the draft *Restatement's* exception for children who engage in adult activities. When a child's engagement in adult activities risks harm to others, more care is required.¹⁴⁷ Conversely, when a child's engagement in

142. *Id.* at 817 (quoting *Zerby v. Warren*, 210 N.W.2d 58, 62 (Minn. 1973)).

143. *Brainerd II*, 533 N.W.2d at 622. At times, courts such as this one repackage plaintiff comparative-fault defenses as claims that the defendant had no duty or that the plaintiff was the superceding cause of the harm. See also *Stinespring v. Natorp Garden Stores, Inc.*, 711 N.E.2d 1104, 1107 (Ohio Ct. App. 1998) (stating that "[w]hat the trial court did, in the guise of causation, was to find that the children themselves were negligent," and holding that this reformulation was inappropriate).

144. *Brainerd II*, 533 N.W.2d at 622.

145. See *Stinespring*, 711 N.E.2d at 1107 ("Children of tender years, and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the perils that they may encounter.") (quoting *DiGildo v. Caponi*, 247 N.E.2d 732, 734 (Ohio 1969)).

146. See *N. Sec. Ins. Co. v. Perron*, 777 A.2d 151, 159-60 (Vt. 2001) (discussing ways in which the law protects minors from their own poor choices).

147. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 10(c).

adult activities risks the child's own safety, others owe a greater degree of care to her.

A number of courts have adopted the Minnesota appellate court's more protective view of minors in cases involving sexual relationships between adults and minors. Many courts have limited claims of child comparative fault in cases involving sexual relationships between children and clergy, teachers, or other trusted adults, even if the child took steps to maintain the abusive relationship over a period of years.¹⁴⁸ These limitations hold true even when the child is a teenager.¹⁴⁹ In these cases, defenses of child comparative fault are barred even when those defenses are raised by a third party, such as a church, not by the adult who had sex with the child.¹⁵⁰ Courts have also limited comparative-fault defenses when the young plaintiff was involved with a dangerous instrumentality rather than an adult activity.¹⁵¹

b. Education and Information Differentials

Courts have limited comparative-fault defenses in cases in which the defendant has superior information and training relative to the plaintiff. For example, in several professional malpractice contexts, courts limit plaintiff comparative-fault defenses on the basis

148. *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 231 (Colo. Ct. App. 1995) (rejecting church claim that boy who had been sexually abused could be expected to report instances of abuse in such situations), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1997); *Hutchison v. Luddy*, 763 A.2d 826, 847-49 (Pa. Super. Ct. 2001) (holding that a church that was negligent in hiring, supervising, and retaining sexually abusive priest could not claim comparative fault of boy for continuing to see priest despite ongoing abuse); *see also Dunlea v. Dappen*, 924 P.2d 196, 200 (Haw. 1996) (holding that in an incest case, father could not claim comparative fault of daughter). *But see Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 450-51 (7th Cir. 2000) (upholding assignment of forty-one percent of fault to teenage foreign exchange student from Germany who was repeatedly raped by the father of her host family).

149. *Landreneau v. Fruge*, 676 So. 2d 701, 707 (La. Ct. App. 1996) (holding that teacher/coach and bus driver could not claim that sixteen-year-old was at fault for molestation).

150. *DeBose*, 890 P.2d at 231.

151. *See In re Buss*, No. 95-CV-1587, 1999 WL 33246480, at *2-3 (Ill. Ct. Cl. 1999) (holding that a drunk driver could not claim, as a complete defense, comparative fault of underage passenger who knew that driver was drunk); *cf. Jarrett v. Woodward Bros., Inc.*, 751 A.2d 972, 985-87 (D.C. App. 2000) (holding that contributory negligence is not available as a defense to a violation of the Alcohol Beverage Control Act and that to hold otherwise would defeat the purpose of the statute); *Brainerd I*, 514 N.W.2d at 817 ("Types of statutes which would be exceptions to the general rule [allowing the defense of contributory negligence] include (1) child labor statutes; (2) statutes for the protection of intoxicated persons, and (3) statutes prohibiting sale of dangerous articles to minors.") (citing *Zerby*, 210 N.W.2d at 62); *Dobbs*, *supra* note 67, at 257 (providing, as an example, that comparative fault should not be allowed when a farmer allows a disabled adult to use farm machinery). This tort doctrine bears some similarity to the contract doctrine that minors have the capacity to enter into contracts concerning necessities, but not other contracts.

that the defendant professional is better able to protect the plaintiff's interests through the exercise of professional skill and judgment.¹⁵² A doctor is better situated than a patient to make decisions about the patient's health care.¹⁵³ Similarly, a lawyer can better safeguard a client's legal interests than the client herself.¹⁵⁴

The Wisconsin Supreme Court case of *Brown v. Dibbell* is illustrative.¹⁵⁵ In that case, the plaintiff, whose twin sister had died of breast cancer, had a prophylactic bilateral mastectomy.¹⁵⁶ The surgery turned out poorly, and the plaintiff was dissatisfied with her postoperative appearance and loss of sensation.¹⁵⁷ The plaintiff sued her doctors for failure to obtain informed consent.¹⁵⁸ She charged that the doctor should have accurately advised her of her postoperative appearance, of other treatment options, and of her risks of developing breast cancer.¹⁵⁹ In addition, plaintiff filed a medical malpractice claim for the doctors' negligent decision to perform the potentially unnecessary surgery.¹⁶⁰

In their defense, the doctors alleged that the patient was contributorily negligent.¹⁶¹ The doctors argued that the patient breached a "duty to exercise ordinary care for [her own] health and well-being" in three ways.¹⁶² First, the plaintiff did not provide truthful and accurate information about her personal and family medical history; in particular, she misrepresented that her mother had had breast cancer.¹⁶³ Second, plaintiff did not "ascertain the truth or completeness of the information presented by the doctor," "ask

152. *Gorski v. Smith*, 812 A.2d 683, 702 (Pa. Super. Ct. 2003) (permitting comparative-fault claims in attorney malpractice actions but listing several types of comparative-fault claims that would not be permitted).

153. *Brown v. Dibbell*, 595 N.W.2d 358, 369-70 (Wis. 1999) (holding that a woman who underwent potentially unnecessary mastectomy did not have affirmative duty to ascertain completeness of information furnished by doctor).

154. *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330-31 (Fla. Dist. Ct. App. 1998) (holding that an attorney who gave faulty advice about meaning of release clause in divorce settlement could not claim client's comparative fault in failing to understand language of release since clients can rely on attorney's expertise); see *infra* note 216; see also Larry Garrett, *Comparative Fault in Legal Malpractice and Insurance Bad Faith: An Argument for Symmetry*, 21 REV. LITIG. 663 (2002) (arguing that comparative fault should not be a defense to legal malpractice).

155. 595 N.W.2d 358 (Wis. 1999).

156. *Id.* at 363-64.

157. *Id.* at 364.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 361.

162. *Id.* at 367.

163. *Id.* at 368.

questions of the doctor,” or “independently seek information.”¹⁶⁴ Specifically, she “failed to ask for brochures about mastectomies or photographs showing what patients look like after this kind of surgery.”¹⁶⁵ Finally, plaintiff did not make a reasonable choice among alternative modes of medical treatment when she chose to have bilateral mastectomies rather than periodic mammograms.¹⁶⁶

Writing for the Wisconsin Supreme Court, Justice Abrahamson defined the patient’s duty of care for her own well-being. The court accepted the defendants’ argument that a patient “must tell the truth and give complete and accurate information about personal, family and medical histories to the doctor.”¹⁶⁷ However, in repudiation of the defendants’ argument, the court held that “a patient’s duty to exercise ordinary care does not impose on the patient an affirmative duty to ascertain the truth or completeness of the information presented by the doctor; nor does a patient have an affirmative duty to ask questions or independently seek information.”¹⁶⁸ Similarly, the court held that a patient is not guilty of contributory negligence when she chooses “a viable medical mode of treatment presented by a doctor.”¹⁶⁹

The court’s explanation for its acceptance of some of the doctor’s comparative-fault claims but not others primarily rested on the patient’s superior information with respect to her personal medical history and the doctor’s superior information with respect to medical treatment options and risks. As the court wrote, “[i]t is the doctor who possesses medical knowledge and skills,” while “a patient is not in a position to know treatment options and risks.”¹⁷⁰

A limit on plaintiff comparative-fault defenses in cases in which the defendant is better able to care for the plaintiff by virtue of special skill or training can be considered an entitlement to rely upon certain skilled professionals.¹⁷¹ Such an entitlement might serve to promote better decisions as the primary duty of care will rest with the person possessing the most skill and ability to choose the safest option to protect the plaintiff’s interests. Plaintiff’s entitlement can also be

164. *Id.* at 369.

165. *Id.*

166. *Id.* at 370.

167. *Id.* at 368.

168. *Id.* at 369.

169. *Id.* at 370.

170. *Id.* at 369-70.

171. *Id.* at 362 (“We conclude that a patient usually has the right to rely on the professional skills and knowledge of a doctor.”); see also *White v. Lawrence*, 975 S.W.2d 525, 530 (Tenn. 1998) (holding that an osteopathic physician cannot use a patient’s suicide as a defense if that suicide was a foreseeable risk of the osteopath’s advice to patient’s wife to add an alcohol-aversion drug to the patient’s diet secretly).

considered an entitlement not to be completely self-reliant, but rather to depend on others when making some decisions. A plaintiff need not acquire the medical, legal, financial, and other education required to challenge a professional's judgment.¹⁷² Without such an entitlement, the plaintiff would be required to second-guess the advice provided by learned professionals.¹⁷³ Moreover, even if the plaintiff possesses the education to challenge a professional's judgment, she may expect to have the work performed competently by a skilled professional hired for that purpose.¹⁷⁴ The plaintiff's legally recognized reliance interest might be considered part of an implicit contract between the parties.¹⁷⁵

As in *Brown*, limits on comparative-fault defenses in professional malpractice cases are generally confined to areas in which a professional is better situated to care for the plaintiff than is the plaintiff herself. In areas in which the plaintiff has better information than the professional, the plaintiff's conduct is generally open to scrutiny,¹⁷⁶ unless a reasonable person in the plaintiff's situation would not appreciate the importance of that information without professional advice or questioning.¹⁷⁷ In addition, a professional does

172. *Brown*, 595 N.W.2d at 370 (“[A] patient is not in a position to know treatment options and risks and, if unaided, is unable to make an informed decision.”); see also *Rowe v. Sisters of the Pallottine Missionary Soc’y*, 560 S.E.2d 491, 497 (W. Va. 2001) (“In the context of medical malpractice actions, courts usually place extreme limits upon a health care provider’s use of the defense of comparative negligence” because of the “disparity in medical knowledge between the patient and the physician” and because of the “patient’s justifiable reliance on the [physician’s] recommendations and care.”) (citing in part Madelynn R. Orr, *Defense of Patient’s Contribution to Fault in Medical Malpractice Actions*, 25 CREIGHTON L. REV. 665, 677 (1992)).

173. See *McCrystal v. Trumbull Mem’l Hosp.*, 684 N.E.2d 721, 725-26 (Ohio Ct. App. 1996) (holding that a nurse who negligently told a pregnant patient who called the office not to go to the hospital for bleeding could not claim comparative fault of patient for listening to nurse’s advice and not going to the hospital anyway).

174. See *KBF Assocs. v. Saul Ewing Remick & Saul*, 35 Pa. D. & C. 4th 1 (1998) (holding that in a legal malpractice case, the general partner of the firm issuing bonds was not contributorily negligent for failing to check the work conducted by the retained law firm).

175. *Brown*, 595 N.W.2d at 368 (“[T]he very patient-doctor relation assumes trust and confidence on the part of the patient . . .”).

176. See *id.* at 362 (noting three potential aspects of plaintiff’s duty, and accepting such a duty “to tell the truth and give complete and accurate information about personal, family and medical histories to a doctor to the extent possible in response to the doctor’s requests for information when the requested information is material to the doctor’s [prescribed duty]”); see also *Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone*, 563 N.W.2d 693, 703 (Mich. Ct. App. 1997) (allowing a law firm that did a poor job of drafting a school funding initiative to claim comparative fault of school client for failing to raise problems with ballot language because no special knowledge or expertise was required to identify problem); cf. *Carnival Cruise Lines, Inc. v. LeValley*, 786 So. 2d 18, 20 (Fla. Dist. Ct. App. 2001) (holding that a diving company that failed to supervise and instruct scuba divers adequately could claim comparative fault of woman who concealed the fact that she suffered from asthma).

177. See *Ponirakis v. Choi*, 546 S.E.2d 707, 711 (Va. 2001) (finding that the plaintiff patient was not contributorily negligent in failing to disclose prior episodes of blood and protein in his

not have to advise the plaintiff on matters for which no special training is required.¹⁷⁸ And a professional is not responsible for a plaintiff's failure to follow professional recommendations, unless the patient does not appreciate the importance of a failure to follow that advice.¹⁷⁹

Professionals are not only expected to make good choices for their patients and clients, but they are also required to provide accurate information. In many cases, professionals have been barred from asserting that the plaintiff was guilty of comparative negligence for failing to discover information that the professional should have provided.¹⁸⁰

Limits on comparative-fault defenses in cases involving information asymmetries are not confined to professional malpractice cases. For example, a seller who misled home buyers into thinking that previous fire damage had been properly repaired could not allege the comparative fault of the home buyers for failing to hire an independent inspector to open the walls.¹⁸¹

urine when asked if he suffered from any "serious diseases," because a reasonable person would not have understood such a condition to be a "serious" disease).

178. See *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998) (holding that defendant doctor had no duty to warn epileptic patient not to drive).

179. *Lyons v. Walker Reg'l Med. Ctr.*, 791 So. 2d 937, 944-45 (Ala. 2000) (refusing contributory-negligence defense for defendant medical center for plaintiff's uninformed refusal of medical treatment); *Smith v. Washington*, 734 N.E.2d 548, 551 (Ind. 2000) (holding that plaintiff's failure to take medication which may have contributed to the loss of an eye was not comparative fault); *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 972 (Me. 2000) (holding that plaintiff's failure to get prompt blood test was not comparative fault because plaintiff could not be expected to know why blood test was important).

180. *Aden v. Fortsh*, 776 A.2d 792, 802-03 (N.J. 2001) (denying comparative fault to insurance broker who negligently sold plaintiffs an insurance policy far below the value of their property's value for plaintiff's failure to read the policy or detect the broker's negligence); *In re Med. Review Panel*, 657 So. 2d 713, 723 (La. Ct. App. 1995) (holding that a doctor in a medical malpractice wrongful conception case who did not perform the planned tubal ligation during a Cesarean section without informing the patient could not claim that the patient had a duty to ascertain whether tubal ligation had been performed).

181. See *Greycas v. Proud*, 826 F.2d 1560, 1566 (7th Cir. 1987) (holding that the lender's attorney could trust borrower's attorney's representation that he had performed a lien search and that there were no liens on the property); *Dupree v. City of New Orleans*, 765 So. 2d 1002, 1015-16 (La. 2000) (holding that when the city failed to mark deep water on a road, there was no comparative fault when plaintiff drove through what she thought was a puddle); *Strom v. Logan*, 18 P.3d 1024, 1029 (Mont. 2001) (denying comparative-fault defense to seller, who misled home buyers into thinking that fire damage had been properly repaired, against owners for their failure to hire an independent inspector to open the walls). Situations in which the parties are in a differential position from which to collect information such as prior complaints, and injuries may also spawn limits on comparative-fault defenses. Cf. Anthony Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-13, 32-34 (1978) (noting both the distinction and symmetry between unilateral mistake and duties to disclose information in contract law).

c. Control Differentials

Structural safety cases also limit comparative-fault defenses initiated by defendants who have a greater ability to control systemic safety decisions. For example, in *Bell v. Jet Wheel Blast*, the plaintiff, an employee at the Vulcan foundry, worked with a shot blast machine manufactured and installed by the defendant.¹⁸² The plaintiff was injured “when his hand got caught in the chain and sprocket drive of the conveyor system of the machine.”¹⁸³ The plaintiff sued the defendant on theories of strict liability and negligence, and the jury agreed that the shot blast machine was defective in a way that had caused plaintiff’s injury.¹⁸⁴ The jury found that Jet Blast was negligent, but that the plaintiff was guilty of contributory negligence as well.¹⁸⁵ Nevertheless, the district court awarded the plaintiff the full \$150,000 of damages.¹⁸⁶ On review, the appellate court certified the following question to the Louisiana Supreme Court: “Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product . . . ?”¹⁸⁷

The Louisiana Supreme Court held that “the principle of comparative fault may be applied in some products cases.”¹⁸⁸ However, it also held that the principle of contributory or comparative fault could not be applied in this case, which involved “an industrial accident resulting in injury [] due to defective machinery and the employee’s ordinary contributory negligence.”¹⁸⁹ To determine whether to permit a comparative-fault defense to diminish the plaintiff’s recovery, the court focused on three factors: incentives to plaintiffs to engage in safer conduct, incentives to defendants to create safer products, and distribution of the burden of accidental injuries as a cost of production.¹⁹⁰ The court held that “[t]he recovery of a plaintiff who has been injured by a defective product should not be reduced [] in those types of cases in which it does not serve realistically to promote

182. 462 So. 2d 166, 167 (La. 1985). Although parts of this products-liability decision were superseded by statute, the court’s holding with respect to comparative fault has been followed even after that statute was enacted. See generally *Dumas v. State ex rel. Dep’t of Culture, Recreation & Tourism*, 828 So. 2d 530, 532-33 (La. 2002).

183. *Bell*, 462 So. 2d at 167.

184. *Id.*

185. *Id.*

186. *Id.* at 167-68.

187. *Id.* at 168.

188. *Id.* at 167.

189. *Id.* at 173.

190. *Id.* at 171.

careful product use or where it drastically reduces the manufacturer's incentive to make a safer product."¹⁹¹ Since the court believed that allowing the comparative-fault defense to diminish plaintiff's recovery in this case "would not serve to provide any greater incentive to an employee to guard against momentary neglect or inattention," would reduce "economic incentive for product quality control," and would force "the individual to underwrite the loss himself," the court chose not to allow reduced recovery based on the comparative-fault finding.¹⁹²

The Louisiana Supreme Court's focus on "realistically" evaluating whether comparative-fault defenses will promote worker safety represents a broader view that in some circumstances comparative-fault defenses may undermine safety when large differentials of power and control exist between parties such as product designers and product users or employers and employees.¹⁹³ When the plaintiff is unable to control overall structural factors, and the defendant is able to exercise that control, efforts to heighten plaintiff care through comparative-fault defenses may actually be counterproductive—by undermining the more important incentives for defendant care.¹⁹⁴ When defendants have greater control over safety, allocating the safety function entirely to them may be expected to yield safer environments and promote efficiency.¹⁹⁵

This outlook mirrors concerns found in regulatory safety systems such as the Occupational Safety and Health Act. Under that

191. *Id.* at 171-72.

192. *Id.* at 172.

193. See EPSTEIN, *supra* note 21, § 8.2, at 192 ("Oftentimes the asymmetrical positions of the parties suggest a differential capacity to avoid risk . . ."); Schwartz, *supra* note 86, at 720-21 (suggesting that in employment and products cases the defendant has even greater control over the plaintiff's unreasonable conduct than does the plaintiff himself).

194. In some cases "employers could institute system-wide precautions to protect workers against momentary fatigue or neglect that could prove fatal." EPSTEIN, *supra* note 21, § 8.2, at 193; cf. *Greycas, Inc. v. Proud*, 826 F.2d 1566, 1566 (7th Cir. 1987) (expressing concern about a shift from a superior form of accident avoidance to an inferior form of accident avoidance).

195. The industrial accident rate declined sharply in the years after the adoption of workers' compensation even though "the advent of workers' compensation should have occasioned a major outbreak of [employee] carelessness." Schwartz, *supra* note 86, at 719. Indeed, Professor Schwartz is not suggesting a causal relationship, but rather cautions against the assumption of a causal relationship between plaintiff recoveries and plaintiff care. *Id.* at 698-99. Workplace accident rates have continued to decline in recent years. Alan B. Krueger, *Fewer Workplace Injuries and Illness Are Adding up to Economic Strength*, N.Y. TIMES, Sept. 14, 2000, at C2 (stating that on-the-job injuries have been cut by twenty-five percent over an eight-year time period). And yet, no-fault insurance seems to be correlated with an increase in the number of accidents. Schwartz, *supra* note 86, at 698. Perhaps this difference is attributable to defendants' greater ability to control workplace factors, and plaintiffs' greater certainty of recovering under a no-fault insurance system than under a tort system even without a comparative-fault defense.

act, OSHA has promulgated a "Hierarchy-of-Controls Policy," which reflects a general preference for engineering controls before resorting to individualized employee safety measures.¹⁹⁶ With respect to environmental contaminants in the workplace, for example, a hierarchy-of-controls policy requires an employer to reduce airborne pollutants as far as feasible through structural methods, such as use of fewer toxic materials or better ventilation, before resorting to more individualized compliance-based safeguards such as asking employees to wear respirators.¹⁹⁷ The primary rationale for preferring engineering controls to individual worker controls is that engineering controls make protection "automatic," while more individualized controls "are dependant on use and constant attention and are subject to human error."¹⁹⁸ To the extent that defendants can shape an environment to make safety automatic for a large number of people, through engineering controls or work-practice controls,¹⁹⁹ greater incentives for defendants to take those sorts of precautions may promote both deterrence and accountability.²⁰⁰

Many courts have limited comparative-fault defenses in certain products liability cases in which the defendant controls the process of design and production.²⁰¹ Similarly, courts may limit comparative-

196. *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1267 (11th Cir. 1999).

197. *Id.*

198. *Id.* at 1269.

199. *See Am. Dental Ass'n v. Martin*, 984 F.2d 823, 825 (7th Cir. 1993) (noting that engineering controls for reducing workers' exposure to blood-borne contaminants like HIV and HBV include requirements about the location of sinks, while work-practice controls include specific standards of care for handling sharp objects such as needles); *see also Easton v. Chevron Indus., Inc.*, 602 So. 2d 1032, 1039 (La. Ct. App. 1992) (holding that a man crushed while trying to escape from crane that had overturned could not be charged with fault because he was doing exactly what his supervisor told him to do).

200. *Dobbs*, *supra* note 67, at 962 (asserting that principles of accountability support full recovery by a plaintiff when the defendant knows or should know of the "plaintiff's limited ability to achieve safety for himself").

201. *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 171-72 (La. 1985) (holding that the "recovery of a plaintiff . . . should not be reduced . . . in those types of cases in which it does not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safer product"); *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 426, 437-39 (Fla. 2001) (denying defendant charged with design-defect defense of plaintiff comparative fault for driving while under the influence); *Norton Co. v. Fergestrom*, No. 35719, 2001 WL 1628302, at *5 (Nev. Nov. 9 2001) ("[C]ontributory negligence is not a defense in a products liability action."); *Lewis v. Am. Cyanamid Co.*, 682 A.2d 724, 735 (N.J. Super. Ct. App. Div. 1996) (ordering retrial on the issue of comparative fault because the plaintiff could only be charged with comparative fault if he was specifically aware of product risk); *Hernandez v. Barbo Mach. Co.*, 957 P.2d 147, 154 (Ore. Ct. App. 1998) (holding that a plaintiff is not guilty of comparative fault when his injury resulted "in whole or in part, from an 'unobservant, inattentive, ignorant, or awkward' failure to discover or guard against alleged defects in the product"). *But see Smith v. Ingersoll-Rand Co.*, 14 P.3d 990, 994-96 (Alaska 2000) (holding that tort reform statute made plaintiff's negligence a defense to a products liability action). *See generally* RESTATEMENT OF THE

fault claims against employers who can take systemic precautions to avoid injuries.²⁰²

Courts may also limit comparative-fault defenses in other contexts in which defendants' relatively greater control suggests that structural safety precautions would be beneficial.²⁰³ For example, mental and penal institutions may be required to structure their environments and care around foreseeable hazards to patients and prisoners.²⁰⁴ Thus, a mental institution that fails to protect a depressed patient from committing suicide might be barred from invoking the patient's negligence as a defense.²⁰⁵ Other defendants

LAW: PRODUCTS LIABILITY § 17(d) (1997) (stating that the majority position is to permit plaintiff's failure to use reasonable care to be considered by the jury but cautioning that sufficient evidence of plaintiff fault must be introduced and that in general "a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it" and that momentary inattention in a workplace setting may not be negligent).

202. See *Lathan Roof Am., Inc. v. Hairston*, 828 So. 2d 262, 267-68 (Ala. 2002) (holding that comparative negligence is not an available defense under the state's Employer's Liability Act); *Nickels v. Napolilli*, 29 P.3d 242, 248-49 (Alaska 2001) (forbidding farmer charged with negligence toward worker who worked for benefits rather than cash from bringing comparative-fault claim against worker when the farmer had no worker's compensation insurance); *Fuches v. S.E.S. Co.*, 459 N.W.2d 642, 643, 644 (Iowa 1990) (rejecting employer claim that worker who assembled the scaffold from incompatible frames and boards could have recovery reduced as a result of his failure to inspect scaffold to see that it was secure); *Gepner v. Fujicolor Processing, Inc.*, 637 N.W.2d 681, 686 (N.D. 2001) (barring an uninsured employer from raising contributory-negligence defense in civil action concerning plaintiff's work injury); *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1209 (Ohio 1991) (finding defense of comparative fault inapplicable in suit against employer and manufacturer for injury sustained by front-end load operator in a fertilizer avalanche).

203. *Magna Trust Co. v. Ill. Cent. R.R.*, 728 N.E.2d 797, 809 (Ill. App. Ct. 2000) (holding comparative-fault defense to be an invalid claim under the Safety Appliances Act).

204. See *DOBBS*, *supra* note 7, § 200, at 501; *Myers v. County of Lake*, 30 F.3d 847, 852 (7th Cir. 1994); *cf. Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997) (stating that transsexual prisoner "is entitled to be protected by assignment to protective custody or otherwise, from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities").

205. *Sandborg v. Blue Earth County*, 615 N.W.2d 61, 62 (Minn. 2000) (holding that when plaintiff does not have the capacity to care for himself the jailer must use reasonable care to prevent his suicide); *Tomfour v. Mayo Found.*, 450 N.W.2d 121, 121 (Minn. 1990) (finding that a hospital caring for man with suicidal tendencies could not take advantage of comparative-fault defense against patient who intentionally killed himself); *Cowan v. Doering*, 545 A.2d 159, 164 (N.J. 1988) (noting that defendant had a duty to prevent patient's foreseeable self-inflicted harm, thus obviating the defense of contributory negligence); *Rodebush v. Okla. Nursing Homes, Ltd.*, 867 P.2d 1241, 1243 (Okla. 1993) (finding that a nurse who slapped combative patient could not maintain comparative-fault claim); *Jankee v. Clark County*, 612 N.W.2d 287, 325 (Wis. 2000) (Abrahamson, J., dissenting) (noting, in a case involving an involuntarily institutionalized patient, that "improper or inappropriate imposition of the defense of contributory negligence can lead to the dilution or diminution of a duty of care"); *Sarah Light, Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 400-09 (1999). *But see Jankee*, 612 N.W.2d at 324 (holding that a mental health patient was guilty of contributory negligence as a matter of law for injuries during escape attempt where

charged with safely structuring physical environments face similar bans.²⁰⁶

In the area of food and drug safety, the responsibility for furnishing a safe product sometimes is delegated entirely to the defendant. For instance, a pharmacist who negligently dispensed the wrong medication could not assert the defense that the patient should have known the name of the drug prescribed²⁰⁷ or should have known how it looked when the drug had been previously prescribed for the plaintiff but not taken.²⁰⁸ At times, providers of alcohol may also be treated as having a categorical advantage in ensuring safety.²⁰⁹

d. Combinations

A number of cases involve a combination of information, experience, and control differentials. In child labor cases, for example, comparative-fault defenses are often barred when the plaintiff has a limited capacity to protect herself both as a child and as a worker.²¹⁰ The same kind of limits may apply to an employee trainee,²¹¹ an employee who was harmed by a defendant's statutory violation,²¹² or a

hospitalization stemmed from patient's "failure to comply with a medication program that controlled his mental disability").

206. See *Rountree v. Manhattan & Bronx Surface Transit Operation Auth.*, 261 A.D.2d 324, 326-28 (N.Y. App. Div. 1999) (holding that a bus driver who stopped suddenly could not claim comparative fault of passenger who had been drinking and did not grip the handrail tightly); cf. *Kings Markets, Inc. v. Yeatts*, 307 S.E.2d 249, 254 (Va. 1983) (holding that in a contributory-negligence jurisdiction, a defendant who had inadequately salted his sidewalk could not maintain a defense of comparative fault for plaintiff's step onto an icy patch of ground).

207. *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 969-72 (Me. 2000) (holding that a pharmacy that misfilled a patient's chemotherapy prescription could not claim her comparative fault for failing to notice that the name of the prescription was not the same as the name of the drug her doctor had mentioned, failing to notify her doctor promptly of the medication's ill effects or of delay in receiving a blood test).

208. *Olson v. Walgreen Co.*, No. CX-92-528, 1992 WL 322054, at *3-4 (Minn. Ct. App. Nov. 10, 1992) (holding that a pharmacist who filled the wrong prescription could not argue comparative fault of patient who should have known how the medication looked because the patient should have but did not take medication on a prior occasion).

209. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 203 (Iowa 2002) (denying comparative fault as a defense to a dramshop action).

210. See *Strain v. Christians*, 483 N.W.2d 783, 787-89 (S.D. 1992) (holding that defendant farmer who violated child labor statute could not claim contributory negligence of child for operating a tractor which flipped over); *D.L. v. Huebner*, 329 N.W.2d 890, 919 (Wis. 1983) (denying contributory negligence as a defense to liability to defendant who employed minor injured plaintiff in contravention of state child labor law).

211. *Easton v. Chevron Indus., Inc.*, 602 So. 2d 1032, 1039 (La. Ct. App. 1992).

212. *Magna Trust Co. v. Ill. Cent. R.R.*, 728 N.E.2d 797, 809 (Ill. Ct. App. 2000) (barring a comparative-fault claim as a defense to Safety Appliances Act). *But see Nigreville v. Fed. Rural Elec. Ins. Co.*, 642 So. 2d 216, 220-21 (La. Ct. App. 1994) (permitting contributory negligence in assessing the amount of damages).

child who committed suicide while institutionalized.²¹³ Similarly, when a phone company locates its physical equipment in a way that enables children to climb over a fence and jump into a swimming pool, both systemic safety considerations and child inexperience may play a role in the resulting limitation.²¹⁴

3. Role Definition

Even when defendants are not better situated than plaintiffs to exercise care for the plaintiff's safety, courts may limit comparative-fault defenses so that defendants cannot litigate away contractual or social obligations to care for a negligent plaintiff.²¹⁵ The key difference between this category and the structural safety category is that although the defendant in this category may be the better care provider at a particular time, in a broader frame the defendant is not necessarily better able to safeguard the plaintiff's interests than is the plaintiff herself. Rather, in this category, limits are placed on defendants' (often professional helpers') use of comparative-fault defenses to set baseline levels of care owed to even negligent plaintiffs.

For example, in *DeMoss v. Hamilton*, a thirty-two-year-old man went to a hospital emergency room with chest pains.²¹⁶ The emergency room doctor conducted a number of tests and concluded that the problem was recurrent bronchitis.²¹⁷ The man was sent home with a prescription for antibiotics and instructions to check with the hospital a few days later if his condition did not improve.²¹⁸ By the next morning, he had died of a heart attack in his home.²¹⁹

The decedent's widow brought a medical malpractice action against the emergency room physician for failure to diagnose properly the plaintiff's heart condition, failure to conduct further medical tests and treatment, and failure to obtain an adequate medical history

213. *Myers v. County of Lake*, 30 F.3d 847, 852 (7th Cir. 1994) (holding that teenager's intentional suicide was no basis for comparative-fault defense to the juvenile center's failure to screen for suicidal tendencies).

214. *See Mt. Zion State Bank & Trust v. Consol. Communications*, 641 N.E.2d 1228, 1235-37 (Ill. Ct. App. 1994) (holding that a telephone company charged with negligently placing a pedestal near fence that allowed a child to climb into the pool area could not claim plaintiff fault), *rev'd*, 660 N.E.2d 863 (1995) (foreclosing imposition of liability because pool was open and obvious danger that company could reasonably expect a six-year-old boy to avoid).

215. DOBBS, *supra* note 7, § 200, at 500 ("[W]hat counts as contributory negligence is determined largely by the scope of the defendant's duty.").

216. 644 N.W.2d 302, 304 (Iowa 2002).

217. *Id.*

218. *Id.*

219. *Id.*

(which included a prior heart attack).²²⁰ In defense of his conduct, the physician asserted, among other defenses, the decedent's comparative fault.²²¹ Specifically, the doctor argued that after the decedent's last heart attack his previous physician had counseled him to "stop smoking and pursue an aggressive exercise regimen to lower his weight and cholesterol."²²² The decedent, however, had not taken these measures to reduce his risk of heart disease.²²³

After carefully examining the parties' arguments with respect to the comparative-fault defense, the Iowa Supreme Court subjected the defense to a tight relevance inquiry. The court noted that the doctor's alleged negligence concerned misdiagnosis and treatment, and then determined that the decedent's alleged fault was "simply irrelevant to the question of medical negligence underlying [the] cause of action."²²⁴ Because the decedent's negligence did not cause the defendant's negligence, the court held that the comparative-fault defense was inappropriate.²²⁵ According to the court, whether the decedent's "state of health resulted from poor lifestyle choices or bad genes," it would "make no difference."²²⁶ The court ultimately agreed with the plaintiff that, "even a patient who suffers a self-inflicted injury is entitled to non-negligent medical treatment."²²⁷

Judicial limits on comparative-fault defenses in cases such as *DeMoss* both define the defendant's role and the negligent plaintiff's entitlement. When a court prevents doctors from asserting plaintiffs' smoking or other poor health choices as a defense to alleged malpractice, the court defines doctors' obligation of care as an obligation to take reasonable care for all patients suffering from injury or disease, not merely for the patients suffering from diseases not caused by patient negligence. By excluding the defense of plaintiff's negligence, the court actively constructs the role of a doctor—to use reasonable care for a patient even when that patient has not used reasonable care for himself, which is, of course, unlike other defendants' usual obligation.²²⁸ Through this definition of defendants'

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 307.

225. *Id.*

226. *Id.*

227. *Id.* at 305.

228. See *Harding v. Deiss*, 3 P.3d 1286, 1289 (Mont. 2000) (rejecting comparative-fault claim brought by a doctor against a girl who triggered her asthma attack by horseback riding on the ground that the defense would lead to the "absurd result" that "the treating physician would not

obligation, the court also defines patients' entitlement to medical care—an entitlement to reasonable care from others that exists even when the plaintiff himself behaves unreasonably to create the medical problem.²²⁹

These decisions do not necessarily assign liability based on which party is better able to care for the plaintiff's physical well-being. In many cases, the patient could have cared for his health as well as or better than the doctor could have. For example, a patient's decision not to smoke might be as important in preventing an early cancer death as a doctor's prompt detection and treatment of the cancer.

To some extent, defining doctors' obligation to include care for negligent as well as nonnegligent patients reflects principles of both contract and tort law. Because doctors charge their patients the same fee for treatment regardless of the cause of the patients' injury or illness, doctors may be said to owe the same obligation to all patients. Moreover, because the doctor agrees to care for the patient after he has suffered the negligent injury or illness, the doctor's obligation to care for the negligent plaintiff is akin to an implicit indemnity contract. In an indemnity contract, the defendant has contracted to shoulder the risk when the other party is negligent.²³⁰

The care that even negligent patients are entitled to expect from doctors may stem from the social contract as well as an individual contract. Even if a doctor wanted to charge lower rates and to take less care for patients who had developed diseases through negligence, professional norms and ethics would likely prevent such a practice.

Many cases that preclude comparative-fault defenses because the defendant had a duty to care for a negligent plaintiff involve defendants who might be called professional helpers or rescuers. Moreover, many of these cases (though not all) outline the entitlement of a negligent person to receive subsequent aid. As illustrated, many courts do not allow doctors to bring comparative-fault claims against patients whose negligence led to their need for treatment.²³¹ Similarly,

be liable for negligent treatment" when "the patient was responsible for events that led to her hospitalization").

229. See *Rowe v. Sisters of the Pallotine Missionary Soc'y*, 560 S.E.2d 491, 497 (W. Va. 2001) ("Those patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent medical treatment . . .") (quoting *Fritts v. McKinne*, 934 P.2d 371, 374 (Okla. Ct. App. 1996)).

230. My thanks to Dan Dobbs for this thoughtful analogy.

231. See, e.g., *King v. Clark*, 709 N.E.2d 1043, 1049 (Ind. Ct. App. 1999) (Robb, J., dissenting) (arguing that plaintiff's initial delay in seeking treatment for breast lump should not be considered comparative negligence in her action against a doctor for doctor's subsequent failure to diagnose her breast cancer); *DeMoss*, 644 N.W.2d at 306-07; *Harding*, 3 P.3d at 1289; *Rowe*,

comparative-fault claims may be limited when negligent plaintiffs turn for assistance to tow truck drivers,²³² attorneys,²³³ or insurers.²³⁴

Police officers' duty to use reasonable care for even guilty criminals reflects similar themes. Courts have prevented police officers from raising comparative-fault defenses to support their use of excessive force.²³⁵ Consequently, police officers have obligations of reasonable care for even negligent (and intentional) tortfeasor plaintiffs.²³⁶ Courts have bound private security officers to similar standards.²³⁷

560 S.E.2d at 497; *cf.* *Ponirakis v. Choi*, 546 S.E.2d 707, 711 (Va. 2001) (reaching a similar ruling with respect to contributory negligence); DAVID M. HARNEY, *MEDICAL MALPRACTICE* § 24.1, at 564 (3d ed. 1993) (stating that contributory-negligence defense is inapplicable "where a patient's conduct provides the occasion for care or treatment that, later, is the subject of a malpractice claim, or where the patient's conduct contributes to an illness or condition for which the patient seeks the care or treatment on which a subsequent medical malpractice [claim] is based").

232. *Dyer v. Super. Ct. of L.A.*, 65 Cal. Rptr. 2d 85, 89 (Ct. App. 1997) (holding that a driver who negligently maintained car and occasioned accident had no duty to maintain car with respect to a tow truck driver injured while giving aid).

233. *Smith v. Mehaffy*, 30 P.3d 727, 731 (Colo. Ct. App. 2000) (holding that attorney who failed to advise client that first-class notice client had sent before initiating legal action would not be sufficient to establish legal claim could not claim comparative fault of client for mistake made prior to hiring attorney).

234. William Powers, Jr., *What a Comparative Bad Faith Defense Tells Us About Bad Faith Insurance Litigation*, 72 TEX. L. REV. 1571, 1575-76 (1994) (stating that "[a] plaintiff's negligence in causing the insurance-triggering event is similar to a plaintiff's conduct that helped cause an underlying condition in a medical malpractice case. We would not let the doctor claim that the patient negligently caused heart disease or an automobile accident that required medical treatment" and arguing that comparative-fault defenses should not be permitted in the bad faith context either).

235. *Mikel v. City of Rochester*, 695 N.Y.S.2d 462, 463 (App. Div. 1999) (holding that a police officer who negligently executed search warrant could not claim comparative fault of an injured plaintiff who was present in an apartment that was known to be used for the sale of drugs); *see also* *Fire Ins. Exch. v. Barrey*, 694 P.2d 191, 194 (Ariz. 1994) (suggesting that in a case involving the use of excessive force in self-defense, action might not sound in intentional tort but might in negligence).

236. *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 579 (10th Cir. 1998) (finding that "comparative fault doctrine was not available for the § 1983 claim"); *Jackson v. Hoffman*, No. 91-4054-RDR, 1994 WL 114007, at *1 (D. Kan. 1994) (noting that "comparative negligence is not applied in § 1983"); *LaBauve v. State*, 618 So. 2d 1187, 1196 (La. Ct. App. 1993) (Woodard, J., dissenting) (arguing that comparative fault should not apply in this negligence suit "for excessive use of force because the actions and conduct of the plaintiff/arrestee are considered in the initial determination of whether the force was reasonable under the circumstances"); *Baldwin v. City of Omaha*, 607 N.W.2d 841, 844, 851 (Neb. 2000) (psychotic football player could be charged with comparative fault for failure to take medication but could not be charged with comparative fault for failing to heed police warnings).

237. *Heiner v. Kmart Corp.*, 84 Cal. App. 4th 335, 339, 348 (Ct. App. 2000) (holding that a store security guard who used excessive force could not claim comparative fault of plaintiff who reached over the counter to find his receipt); *cf.* *Yasuna v. Big V Supermarkets, Inc.*, 725 N.Y.S.2d 656, 658 (App. Div. 2001) (permitting store security guard who tripped shoplifter while shoplifter was attempting to flee to allege shoplifter's comparative fault).

4. The Values of Process

When litigating plaintiff comparative-fault defenses itself creates problems, courts may also limit jury consideration of comparative-fault questions. Courts have limited plaintiff-fault defenses in cases that raise three distinct process-related concerns: comparative-fault defenses might traumatize participants, they might create expensive or unmanageable litigation issues, or they might provide a statement of relative fault when such relative statements are morally problematic.

a. Litigants' Welfare

A number of cases have limited comparative-fault defenses when such defenses might be expected to cause psychological harm to litigants. For example, even though young adults are considered capable of making some reasoned choices, many courts have not permitted findings of child comparative negligence in cases involving sexual assault, whether the plaintiff's claim was filed against the rapist or against a third party.²³⁸ While these limitations are based on a number of substantive grounds, they stem in part from concerns that a focus on the victim's fault may further traumatize the victim.²³⁹ This concern may be particularly acute in cases in which children testify. Along with concerns that child testimony might be traumatic,²⁴⁰ telling a child of his moral blameworthiness in the face of the child's victimization and suffering may revictimize him.²⁴¹

238. *Hutchison v. Luddy*, 763 A.2d 826, 846-47 (Pa. Super. Ct. 2001) (holding that a church that was negligent in hiring, supervising, and retaining a sexually abusive priest could not claim comparative fault of boy for continuing to see priest despite ongoing abuse); *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214, 231 (Colo. Ct. App. 1995) (rejecting church claim that boy who had been sexually abused could be expected to report instances of abuse), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1997); *Landreneau v. Fruge*, 676 So. 2d 701, 707 (La. Ct. App. 1996) (holding that teacher and bus driver could not claim that child was at fault for molestation); *see also Dunlea v. Dappen*, 924 P.2d 196, 200 (Haw. 1996) (denying comparative-fault defense against daughter by father in incest case). *But see Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 450-51 (7th Cir. 2000) (upholding assignment of forty-one percent of fault to teenage foreign exchange student from Germany who was repeatedly raped by the father of her host family).

239. *See DeBose*, 890 P.2d at 231 (taking care to reverse a plaintiff fault determination of just four percent).

240. *See L. Christine Brannon, The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439 (1994).

241. *See Mary P. Koss et al., A Cognitive Mediation Model of Rape Recovery: Preliminary Specification and Testing in Cross-Sectional Data*, J. CONSULTING & CLINICAL PSYCH., Aug. 2002, at 926-41; *Mary P. Koss & Aurelio J. Figueredo, A Cognitive Mediation Model of Rape Recovery: Constructive Replication and Validation of a Cross-Sectional Model in Longitudinal Data* (unpublished manuscript on file with author).

b. Administrative Ease

Courts also limit comparative-fault defenses when the defense would be too difficult or costly to litigate. For example, the traditional doctrine that the defendant takes the plaintiff as she finds him may stem in part from the court's desire not to litigate collateral questions. Litigating the plaintiff's fault for a prior injury in the plaintiff's current case against a defendant could create a trial within a trial, something that courts often try to prevent.²⁴² Such limits are created even though the plaintiff's fault may have been a cause of her harm. Such cases are not cases in which the plaintiff has not been negligent, but rather, they are entitlement cases (although the entitlement may be designed simply to benefit the legal system's process interest in avoiding litigation of stale issues).²⁴³

c. Absolute Judgments

Finally, courts may limit comparative-fault defenses when they believe that the tort language of relative fault (twenty-five to seventy-five percent, fifty-two to forty-eight percent, and so forth) will undermine rights that are thought to be absolute or in need of a clear delegation of responsibility.²⁴⁴ For example, courts may bar intentional tortfeasors from invoking the comparative fault of their victims because they affirmatively desire the all-or-nothing fault statements of the traditional rules—that intentional tortfeasors are solely responsible for the harms they cause.²⁴⁵ The right not to be murdered or battered (even if the plaintiff is foolish or careless) can be conveyed more forcefully by the moral absolutes of all-or-nothing

242. *Cf. McCabe v. R.A. Manning Constr. Co.*, 674 P.2d 699, 712 (Wyo. 1983) (upholding lower court's exclusion of testimony in contract action on the basis that the testimony would create a "trial within a trial").

243. *See Matsumoto v. Kaku*, 484 P.2d 147, 150 (Haw. 1971) ("[W]here the preexisting back ailment was not the result of any transaction involving other persons, we hold that such preexisting condition should be treated no differently than from a condition brought about by disease.").

244. *See Gary T. Schwartz, Feminist Approaches to Tort Law*, THEORETICAL INQUIRIES IN L., Jan. 2001, at 175 (arguing that no-duty rules allow the law to free ride on popular morality and affect norms).

245. *See Dunlea v. Dappen*, 924 P.2d 196, 200 n.6 (Haw. 1996) (referring to a comparative-fault defense to "incestuous rape of a minor" "frivolous," "repugnant," and sanctionable); *cf. Hutchison v. Luddy*, 763 A.2d 826, 848 (Pa. 2001) (denying comparative-fault defense brought by church against child sexual abuse victim of priest and explaining that allowing such a defense "would be the equivalent of characterizing the sexual molestation of children as a negligent act caused by being in the wrong place at the wrong time instead of characterizing it as an intentional act resulting from the repugnant conduct of the molester").

judgments than by partial tort verdicts, even when those verdicts would result in similar amounts of damage payments.²⁴⁶

Similarly, in a number of traffic accident cases, courts have refused to permit defendants who run red lights to claim that plaintiffs should have stopped on green. A finding that the defendant was only eighty percent at fault for failing to stop on red and that the plaintiff was twenty percent at fault for proceeding on green could undermine the normative clarity of the categorical rule that cars should obey traffic signals.²⁴⁷ To the extent that the percentage fault comparisons blur norms regarding entitlements, the law might not only lose its free ride on morality, but also alter that morality in ways that are not socially desirable.²⁴⁸

5. Fundamental Values

When the plaintiff has a constitutional or otherwise fundamental entitlement to engage in a particular activity, courts often hesitate to let juries decide on a case-by-case basis whether the exercise of that entitlement is reasonable.²⁴⁹ This hesitancy may reflect the belief that plaintiff's exercise of her entitlement is necessarily reasonable once normative values are factored into the risk-utility equation. Courts may also believe that even though the plaintiff's exercise of her entitlement poses an unreasonable risk, they should nevertheless be wary of permitting juries to burden the

246. See William McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641, 678-85 (1984) (discussing the policy reasons for disfavoring partial tort verdicts in intentional tort cases).

247. See *Olson v. Parchen*, 816 P.2d 423, 426-27 (Mont. 1991) (holding that a driver who failed to yield as required could not allege comparative fault of plaintiff for failure to watch and see if defendant was going to comply with right-of-way); *Springer v. Bohling*, 643 N.W.2d 386, 392-94 (Neb. 2002) (holding that a driver who failed to yield right-of-way and then hit a cyclist could not raise contributory-negligence defense based on cyclist's failure to keep a proper lookout); *Weitzenkamp v. Morgan*, No. A-99-281, 2000 WL 781374, at *4-6 (Neb. Ct. App. June 20, 2000) (holding that a driver who ran a stop sign and killed plaintiff could not claim plaintiff's fault for failing to keep a lookout and stop for defendant who disregarded the traffic signal); *Dutton v. Jensen*, No. 19010-9-11, 1997 WL 52941, at *2-3 (Wash. Ct. App. Feb. 7, 1997) (denying comparative-fault claim to a driver who turned without waiting for oncoming traffic against plaintiff for failing to realize that defendant was not going to yield, because plaintiff had a right to assume that the disfavored driver would yield the right-of-way).

248. For example, permitting comparative fault as a defense to the intentional tort of battery sanctions physical violence as an appropriate response to offensive speech. See, e.g., *Bonpua v. Fagan*, 602 A.2d 287, 289 (N.J. Super. Ct. App. Div. 1992) (finding that defendant convicted of aggravated assault sufficiently alleged comparative fault of plaintiff who called him a "faggot" in front of his girlfriend).

249. Cf. Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement* (Fourth of Torts), 50 UCLA L. REV. 585, 615 (2002) (providing five policy arguments for situations in which tort liability should be denied, including "important and trumping social values").

exercise of that entitlement. For example, in *Lovelace Medical Center v. Mendez*, the plaintiff had tubal ligation surgery.²⁵⁰ The physician who performed the operation “found and ligated only one of [plaintiff’s] two fallopian tubes and then failed to inform her of the unsuccessful outcome of the operation.”²⁵¹ When plaintiff used no birth control after the operation, she conceived and bore a son.²⁵² In her medical malpractice suit against the physician for the wrongful conception, the doctor denied responsibility for child-rearing expenses.²⁵³ The New Mexico Supreme Court held that the doctor was responsible and based its opinion on the appellate court’s analysis.²⁵⁴ In that analysis, the appellate court addressed whether the plaintiff was “required to mitigate damages by either having an abortion or placing the child up for adoption.”²⁵⁵ While recognizing that “both of these alternatives are available to and chosen by a certain number of families each year,” the court nevertheless held that neither course of action “may properly be required [of the plaintiff] in order to mitigate the financial consequences of the doctor’s negligence.”²⁵⁶ As such, the supreme court affirmed that “the trial shall not allow argument on this issue, nor instruct the jury concerning the requirement of mitigation,” (which is often considered a form of comparative fault) as a matter of law.²⁵⁷

Thus even when abortion or adoption are the least financially costly alternatives to an unwanted pregnancy, some courts have determined that plaintiffs who refuse to take those options cannot be labeled unreasonable or lose a part of their damage award based on their decision. The concern is not necessarily to ensure that plaintiffs who conceive unwanted children are compensated—as demonstrated by the fact that many courts deny recovery for all wrongful conception claims. Moreover, there is little reason to suspect that juries would be biased against persons who did not want to abort children or to give them up for adoption. But even if juries would often arrive at this same conclusion, courts want to make the decision categorically. One reason is that courts are concerned about limiting recovery based on

250. 805 P.2d 603, 604 (N.M. 1991).

251. *Id.* at 604-05.

252. *Id.* at 605.

253. *See id.* at 604-05.

254. *Id.* at 605 (“On the merits, we find ourselves in substantial agreement with Judge Alarid’s opinion and accordingly reproduce all of Part II of that opinion in the appendix.”).

255. *Id.* at 620.

256. *Id.* at 621.

257. *Id.*

the plaintiff's exercise of a protected choice or a fundamental right.²⁵⁸ Moreover, the lack of standards and consistency that would result from jury determinations would be more troubling when the right burdened is one that is constitutionally protected. In addition, a jury finding that continuing an unwanted pregnancy is negligent makes a normative statement that seems in tension with a government's stated preference for life.²⁵⁹ Thus, while a decision to have an abortion or give a child up for adoption might minimize the plaintiff's child-rearing damages in a wrongful conception case, courts have refused to allow juries to say that a reasonable person should have made that decision, because of the other important normative considerations beyond damage minimization.²⁶⁰

In some cases, courts do not permit the legal system to find comparative fault when a legislature would be prohibited from *ex ante* regulation of the plaintiff's conduct. For example, the legislature could not constitutionally prohibit women from living in first-floor apartments, and a court may be concerned about letting jurors reach such a conclusion.²⁶¹ In most cases, the concern is about conditioning a benefit (the plaintiff's lawsuit) on her willingness to forgo a legal right.²⁶² Building protection for plaintiff's fundamental values into the defendant's obligation may minimize the number of situations in

258. See *Williams v. Bright*, 632 N.Y.S.2d 760, 766 (Sup. Ct. 1995) ("If the Jehovah's Witness rejection of blood transfusion in surgery is deemed by a jury to be 'unreasonable,' then a judgment has been made as to the soundness of the religion The making of such a decision is clearly beyond the scope of what any agency of government may do.")

259. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (discussing the states' "profound interest in potential life").

260. See, e.g., *Lovelace Med. Ctr.*, 805 P.2d at 621 (holding "as a matter of law" that "neither abortion nor adoption . . . may properly be required in order to mitigate the financial consequences of the doctor's negligence"); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989) ("[I]n a 'wrongful pregnancy' action, the mother need not mitigate damages by abortion or adoption since a tort victim has no duty to make unreasonable efforts to diminish or avoid prospective damages"); see also Norman M. Block, Note, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 *FORDHAM L. REV.* 1107, 1119-20 (1985) (arguing that in failure-to-abort cases the jury should determine what a reasonably prudent person with the "religious, ethical and moral" beliefs of the plaintiff would have done).

261. *Jackson v. Post Props., Inc.*, 513 S.E.2d 259, 261-62 (Ga. Ct. App. 1999) (reversing trial court's summary judgment for defendant landlord against plaintiff first-floor resident on the grounds that the issue of plaintiff's contributory negligence in her rape by virtue of moving into a ground-floor apartment was not *per se* negligence and was therefore a question of fact for the jury).

262. Cf. *Velazquez v. Legal Servs. Corp.*, 531 U.S. 533, 548-49 (2001) (finding that conditioning money for legal services on attorneys' willingness not to challenge validity of welfare laws was unconstitutional viewpoint discrimination in violation of the First Amendment).

which plaintiffs are asked to trade fundamental values for protection of legal interests.²⁶³

There is a wide range of other cases in which courts recognize that plaintiff's fundamental interests can outweigh the safety purchase. Thus, even if tort law is thought to serve wealth maximization goals with some modification for other norms, there are norms that warrant disregarding cost-benefit calculations.²⁶⁴ Not only are courts unwilling to allow burdens on plaintiff choices to favor life in wrongful conception cases, but they also limit comparative-fault defenses when the plaintiff attempts to preserve another's life.²⁶⁵ In the context of reproductive interests, a plaintiff's desire to procreate has also been protected.²⁶⁶ And although the issue has not been directly decided, courts might well forbid a defendant in a wrongful death case to assert the plaintiff's comparative fault for magnifying financial damages by refusing to unplug a ward's life support.²⁶⁷

Courts have been particularly aggressive in protecting free speech from tort burdens.²⁶⁸ While most of these protections benefit

263. Martha Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 24 J. LEGAL STUD. 1005, 1017 (2000) (arguing that recognizing tragic choices "leads us to ask how the tragic situation might have been avoided by better social planning"); see also Schwartz, *supra* note 86, at 715-16 (stating that people take unreasonable risks because they misunderstand the probability or magnitude of risks or are accounting for other opposing values and that in these cases contributory negligence is problematic because it may not promote deterrence).

264. Richard Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1173-74 (2000) (stating that some conflicts "do not yield to cost-benefit analysis however generously construed" and providing an example of tradeoffs between equality and market value in the context of improved education for girls living in Third World countries).

265. *Oulette v. Carde*, 612 A.2d 687, 689-90 (R.I. 1992) (holding that in a rescue situation, a plaintiff's recovery will be reduced only by a showing of recklessness); see, e.g., *Cords v. Anderson*, 259 N.W.2d 672, 674 (Wis. 1977) (finding that a rescuer was absolved of his own fault because the sight of another in danger prompts rescue even if obviously dangerous).

266. See *DOBBS*, *supra* note 7, at 48 (Supp. 2002) (stating that "it seems plausible to say that a woman cannot be charged with fault for seeking to bear children, even if she knows that, because of a physician's negligence, it is risky to do so"; discussing *Lynch v. Scheininger*, 744 A.2d 113, 130 (N.J. 2000), a case in which the court partially recognized this principle when it wrote: "We would not characterize the Lynches' election to conceive a child as fault-based because the decision to procreate is so fundamentally subjective, and no standard of objective reasonableness adequately could inform a decision about whether the determination to assume the risks of conception was a reasonable one"; and yet noting that *Lynch* partially undermined its conclusion by holding that the decision to conceive might count as a failure to minimize damages).

267. See *Flenory v. Eagle's Nest Apartments*, 22 P.3d 613, 614 (Kan. Ct. App. 2001) (permitting wrongful death claim in a case in which a guardian refused to withdraw life support but in which comparative fault and failure to mitigate do not appear to have been raised).

268. See, e.g., *Profl Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 55-56 (1993) (shielding objectively reasonable efforts to use judicial processes from antitrust liability);

defendants, plaintiffs enjoy such protections as well. For example, filing a lawsuit that costs more money to litigate than the plaintiff can possibly recover through the litigation may not constitute unreasonable conduct for the purpose of mitigation of damages.²⁶⁹ Furthermore, a plaintiff would likely be protected from comparative fault for certain kinds of petitioning activity such as filing a police report.²⁷⁰

In addition, courts have limited comparative-fault defenses to protect plaintiffs' equality interests. So a defendant could not assert the plaintiff's comparative fault on the ground that she lived alone in a first-floor apartment or rode the subway alone at night (at least not because she was a woman who did such things).²⁷¹ Courts have also limited comparative-fault defenses that would penalize individuals based on physical disability.²⁷²

Courts are divided on the question of whether a plaintiff must use reasonable care when that care violates plaintiff's religious scruples. However, some courts have limited plaintiff-fault defenses in these circumstances.²⁷³ For example, a New York court held that a Jehovah's Witness plaintiff did not have a duty to mitigate damages by receiving a blood transfusion, even though her decision coupled with the defendant's negligence caused her to become bedridden and wheelchair bound.²⁷⁴ A persuasive case has been made that exceptions might also be made for certain cultural practices as well.²⁷⁵

Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) (holding that imposing tort damages on defendant newspaper for publishing minor rape victim's name would violate the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (holding that "libel . . . must be measured by standards that satisfy the First Amendment").

269. O'Brien v. Isaacs, 116 N.W.2d 246, 267 (Wis. 1962).

270. DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 274 (4th ed. 2000) (modifying the *Brandon Teena* case to create a hypothetical in which a plaintiff reports an attack to police and in which the report creates a greater risk of harm to herself).

271. Metro. Atlanta Rapid Transit Auth. v. Allen, 374 S.E.2d 761, 766 (Ga. 1988) (rejecting argument that a woman raped in the transit authority parking lot was contributorily negligent for riding the subway alone at night); Jackson v. Post Props., Inc., 513 S.E.2d 259, 262-63 (Ga. Ct. App. 1999) (calling the comparative-fault argument "untenable" but nevertheless holding that "a jury must determine whether [plaintiffs] move to a ground floor apartment was a failure to exercise ordinary care for her own safety").

272. The take-the-plaintiff-as-you-find-her cases might be listed as cases in which the plaintiff is not negligent because she had no reasonable alternative or can be viewed as entitlement cases—a plaintiff has no obligation to stay home and out of the potential for traffic accidents just because she has brittle bones, for example.

273. Williams v. Bright, 632 N.Y.S.2d 760, 761 (Sup. Ct. 1995) (questioning reasonableness of a Jehovah's witness's refusal to get a blood transfusion after a car accident denies her right to religious beliefs).

274. *Id.* at 768-69.

275. Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 5-9 (2000) (observing that indigenous

Courts have also limited comparative-fault defenses that would restrict a plaintiff's property rights. In the contributory-negligence context, the classic case limiting that defense based on property rights is *Leroy Fibre*, wherein the railroad could not claim that the plaintiff was negligent for storing flax on his property, even if the flax was dangerously close to the railroad tracks.²⁷⁶ Though dated, the case has modern analogs in comparative fault. For example, a negligent golfer could not defend on the basis that the plaintiff was negligent for living so close to the golf course.²⁷⁷ The limit has been placed on defenses of comparative fault to personal property as well as to real property. For example, a landlord and neighbor who put plaintiff's property outside without plaintiff's knowledge, where the property was destroyed by rain, could not defend based on the plaintiff's bad character that arguably warranted his ouster from the apartment or for plaintiff's failure to move his property out of the rain quickly enough.²⁷⁸

Similarly, the comparative-fault defense has been limited where it would undermine constitutional due process guarantees. For example, a property owner whose property was demolished without due process had no duty to the city to make it easier for the city to notify him in advance.²⁷⁹ Many of these limits on comparative-fault defenses prevent defendants from obtaining greater property rights through unreasonable conduct than they would be permitted to obtain through reasonable conduct. Therefore, if a defendant could not obtain a free easement over the plaintiff's property through reasonable conduct, his negligence would not afford him a greater measure of rights to use that property.²⁸⁰

peoples for whom fish is central to their culture should not be considered at fault for eating fish known to have been contaminated by others' pollution).

276. *LeRoy Fibre Co. v. Chic. Milwaukee & St. Paul Ry.*, 232 U.S. 340, 348-52 (1914).

277. See *Hennessey v. Pyne*, 694 A.2d 691, 693 (R.I. 1997). *But see Haydel v. Hercules*, 645 So. 2d 418, 430 (La. Ct. App. 1995) (finding no manifest error in jury allocation of ten percent fault to plaintiff who "panicked" and ran out of her house when ammonia cloud intentionally released from truck seeped onto her property and through her windows and she feared for the lives of herself and her children, as fleeing subjected her to greater exposure to ammonia).

278. *Jacobs v. Westgate*, 766 So. 2d 1175, 1180 (Fla. Dist. Ct. App. 2000) (holding that a landlord and neighbor who put plaintiff's property outside without plaintiff's knowledge before it started to rain could not claim plaintiff's fault for bad character or for failing to move property out of the rain quickly enough).

279. *Kline v. City of Spokane*, No. 95-2-03940-0, 2001 WL 111753, at *2 (Wash. Ct. App. Feb. 6, 2001) (holding that a property owner whose property was demolished without due process had no duty to the city to effect notice upon himself and that what he may or may not have done to make things easier for the city to notify him was irrelevant to suit).

280. EPSTEIN, *supra* note 21, § 8.2.1, at 190 ("The sticking point is that the farmer receives no direct compensation from the railroad for his loss of use even if he garners some indirect benefit in the form of lower rates.").

Courts have not only drawn limits based on concerns about a plaintiff's individual constitutional rights, but they have also given latitude where structural constitutional issues are involved as well. The long-recognized limitation on comparative-fault defenses in cases in which the defendant violated a statute reflects separation of powers principles. Of course, courts follow state dictates about conduct that is not to be considered for comparative-fault purposes. For example, courts routinely follow legislation that bars plaintiff's failure to wear a seat belt from being considered comparative fault.²⁸¹ But concern for preserving legislative enactments may animate court decisions even where limitations are less explicit. For example, a desire to further a legislative scheme to afford recovery may convince a court to bar comparative fault as a defense to a violation of a statutory child labor law but nevertheless to permit that defense in response to an equivalent common law claim.²⁸²

Other fundamental values that courts have considered in limiting comparative-fault defenses include law compliance.²⁸³ Additionally, just as military interests encroach on other constitutional values, they also have been the basis for limits on comparative-fault defenses. For example, courts have held that sailors are not chargeable with comparative fault in certain circumstances in which they simply follow the chain of command.²⁸⁴

6. Autonomy and Self-Risk Judgment

At times courts restrict comparative-fault defenses as a matter of law when a jury could consider the plaintiff's choice to be unreasonable, but the choice is one that risks harm to the plaintiff alone, involves an aspect of plaintiff liberty or autonomy, and is not

281. See Roselyn Bonanti & Nancy Marcus, *Seat Belt Defense Legislation*, *ADVOCATE*, June 2001, at 1 (reporting that forty-two jurisdictions "prohibit using seat belt evidence to prove comparative or contributory negligence" and that thirty-two jurisdictions "prohibit using a seat belt defense to mitigate or reduce damages"); see, e.g., *Rogean v. Hyundai*, 805 So. 2d 147, 155 (La. 2002) (holding that failure to wear a seatbelt cannot be raised as comparative negligence in a product liability case).

282. See *Sauter v. Ryan Props., Inc.*, No. C-8-96-326, 1996 WL 653954, at *5 (Minn. Ct. App. 1996) (permitting comparative negligence defense to negligence per se claim because statute is being adopted by the common law for use, not legislative direction of powers).

283. See *State Farm Mut. Auto. Ins. Co. v. Hill*, 775 A.2d 476, 481 (Md. Ct. Spec. App. 2001) (holding that a negligent driver who was evading police could not claim comparative fault of police for getting in front of his car and slamming on the brakes).

284. See *Simeonoff v. Hiner*, 249 F.3d 883, 890 (9th Cir. 2001) ("[A] seaman may not be held contributorily negligent for carrying out orders that result in injury, even if the seaman recognizes possible danger and does not delay to consider a safer alternative.").

reckless.²⁸⁵ In these cases, even when reasonable juries could differ as to whether the plaintiff's risk to herself was reasonable, courts may leave those decisions to the plaintiff's autonomous choice rather than to a jury decision.

For example, in *Thompson v. Michael*, a seventeen-year-old girl was a passenger in a sports car driven by her sixteen-year-old friend.²⁸⁶ The friend drove at fifty-five to sixty miles-per-hour on a curving road with a thirty-five mile-per-hour speed limit, lost control of the car, crossed the center lane, and caused a head-on collision.²⁸⁷ Both driver and passenger were seriously injured, and another young passenger was killed.²⁸⁸ In a suit brought by the seventeen-year-old passenger's family against the driver's family, the trial court granted summary judgment to the passenger.²⁸⁹ The defendant driver appealed on the ground that there was a triable issue as to the passenger's comparative fault.²⁹⁰ Among his claims, the driver argued that the passenger was negligent when she "rode with an inexperienced driver" who was operating the car on an unfamiliar, winding road.²⁹¹ The South Carolina Supreme Court quickly dismissed this claim of comparative fault.²⁹² "The fact that [the passenger] knew [the driver] had been driving only a short time is not evidence of contributory negligence. In the absence of any fact or circumstance indicating the driver is *incompetent* or *careless*, an occupant of a vehicle is not required to anticipate negligence on the part of the driver."²⁹³

The court's rejection of the defense of passenger comparative fault cannot be justified in simple risk terms. Data suggest that young drivers are at a higher risk of car accidents, particularly when they

285. One might imagine, however, that under ordinary negligence standards, if the plaintiff could have made a decision either way, the plaintiff's conduct would not have been negligent. However, juries are generally given latitude to evaluate the reasonableness of the plaintiff's conduct unless no reasonable jury could have found the conduct negligent. Thus, under ordinary standards, a judge would not prevent a defense from being presented to a jury whenever a reasonable plaintiff could have engaged in the conduct, but rather only in cases in which reasonable minds could not differ as to the reasonableness of plaintiff's conduct—a standard that exempts plaintiff's conduct from jury scrutiny in a narrower range of cases.

286. 433 S.E.2d 853, 854 (S.C. 1993).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 855.

293. *Id.* at 854 (emphasis added).

are driving with friends.²⁹⁴ This is why several states have adopted graduated licensing requirements that prevent new drivers from engaging in precisely this activity.²⁹⁵ Riding with a young friend is therefore a statistically greater risk, and if the passenger had an alternate choice—driving with a parent or not driving at all—a jury cost-benefit analysis might conclude that the conduct was unreasonable.

Nevertheless, several rationales support this type of limit. One is a desire to protect at least some measure of plaintiff autonomy.²⁹⁶ If the *Restatement* draft truly intends to suggest that all risks of self-harm be subject to jury cost-benefit analysis, juries could determine questions like whether the plaintiff should have exercised four times a week, refrained from sex after being diagnosed with a heart condition, eaten fewer candy bars and more peas, or driven to work early before the rain.²⁹⁷ Jury scrutiny of the risks to self that accompany every decision from whether to have surgery to whether to cross the street raise significant autonomy issues, although these are not necessarily libertarian concerns.²⁹⁸ The potential for infringing on autonomy may be greater with respect to risks to self, because such risks include a potentially more expansive and intimate category of conduct. Moreover, autonomy concerns of evaluating risks to self are exacerbated by the prospect that plaintiff's duty is owed to the world at large.²⁹⁹

In light of this potential for limitless jury scrutiny of plaintiff choices, some courts have created limits that leave choices to individual rather than to jury decision. This concern for protection of

294. Laura M. Rojas, *Curbing Teenage Vehicular Freedom: The Brady-Jared Teen Driver Safety Act of 1997*, 29 MCGEORGE L. REV. 687, 691 (1997).

295. See, e.g., CAL. VEH. CODE §§ 12509, 12513-14 (West 2000).

296. See Schwartz, *supra* note 86, at 718 n.96 (citing C. FRIED, AN ANATOMY OF VALUES 179-80 (1970) (“[I]n light of appreciable risk, driving to store for trivial purpose could be called unreasonable, but this would unduly disparage man’s capacity for enjoying life’s trivial pleasures.”)).

297. Joe Burchell, *Rain Plus Tucson Drivers Is a Formula for More Crashes*, ARIZ. DAILY STAR, Dec. 7, 1997, at 1B (“[A]uto insurance agents say their accident claims escalate twenty-five percent to fifty percent on rainy days.”).

298. EPSTEIN, *supra* note 21, § 8.2, at 189 (“So long as P’s careless acts could increase the liability of another person, efforts to control her conduct cannot be dismissed as misguided paternalism. The defense is designed to reduce the burdens that careless actions impose on other individuals.”). Requiring defendants to take reasonable care only for persons with few or no liberties, but not others, does have libertarian implications.

299. See Baldwin v. City of Omaha, 607 N.W.2d 841, 855 (Neb. 2000) (holding that a mentally ill arrestee shot by police who disregarded standard operating procedures for dealing with person with mental illness could claim comparative fault of the arrestee plaintiff who failed to take his antipsychotic medication, as plaintiff had a duty to the general public, if not himself, to take his medication).

individual decisionmaking parallels the concerns that surround the tort of negligent supervision by parents. Many courts have either been reluctant to adopt a reasonable-parent standard, or have adopted that standard only while making clear that not all parental decisions will be required to undergo jury scrutiny, because of a concern that parents' child-rearing decisions need not be uniform or in conformance with majority views.³⁰⁰ In negligent supervision cases, courts want to give individuals some sphere of autonomy in which decisions are left to individual decisionmakers, not to jury cost-benefit calculations. It is somewhat ironic that the plaintiff's unlimited duty proffered in the draft *Restatement* would leave plaintiffs with more ability to make decisions for their children than for themselves without jury interference.

Courts have found a number of ways to create a partial zone of autonomy around plaintiff decisions that risk self-harm. One approach has been to hold that plaintiffs need not anticipate defendants' negligence.³⁰¹ Another approach is to hold that plaintiffs are guilty of comparative negligence only when they actually knew of a risk, not when they knew or should have known of that risk.³⁰² A third possibility in cases in which the plaintiff's conduct risked only self-harm would be to permit juries to consider plaintiff comparative fault only if the plaintiff was reckless. A more lenient standard of review than the standard of reasonable care has been embraced in other tort and nontort contexts.³⁰³ More lenient standards allow for review, but also give deference to actors delegated primary decisionmaking responsibility. They provide a little more room for decisionmaking than the ordinary negligence standard.

300. See, e.g., *Broadbent v. Broadbent*, 907 P.2d 43, 51 (Ariz. 1995) (Feldman, C.J., concurring) (stating that "there are areas of broad discretion in which only parents have authority to make decisions" and adding that in these areas, which include deciding whether to enroll a two-year-old in swim lessons, parents' conduct must be shown to be "palpably unreasonable"); *Rider v. Speaker*, 692 N.Y.S.2d 920, 923 (Sup. Ct. 1999) (holding that babysitter did not enjoy parental immunity, which is based on the importance of parental autonomy in making decisions for the child, an interest the sitter did not have).

301. *Rountree v. Manhattan & Bronx Surface Transit Operation Auth.*, 261 A.D.2d 324, 326-28 (N.Y. App. Div. 1999) (holding that a bus driver who stopped suddenly could not claim comparative fault of passenger who had been drinking and did not grip the handrail tightly).

302. *Lewis v. Am. Cyanamid Co.*, 682 A.2d 724, 735-36 (N.J. Super. Ct. App. Div. 1996) (ordering retrial on the issue of comparative fault because plaintiff could only be charged with comparative fault if he were specifically aware of product risk); *Kugler v. Tangiapahoa Parish Sch. Bd.*, 752 So. 2d 375, 379 (La. Ct. App. 2000) (barring comparative fault to janitor who helped parent move unstable cart as she did not know risk of danger of moving it).

303. See Melvin A. Eisenberg, *Divergence of Standards of Conduct and Review*, 62 *FORDHAM L. REV.* 437, 442 (1993) (arguing that the business judgment rule gives corporations room to make decisions respecting the corporation's affairs without the need to defend the reasonableness of every corporate decision to a jury).

A number of cases have limited comparative-fault defenses when plaintiff conduct involved a significant autonomy interest. In some cases, the plaintiff's interest entails the freedom not to act. For example, in *Valinet v. Eskew*, the plaintiff was injured when a dead tree fell onto her car as she was driving down the highway during a storm.³⁰⁴ The plaintiff claimed that the property owner was negligent for failing to inspect and to remove the tree when it had been "dead for three to five years and it had been showing signs of decay for eight to twelve years."³⁰⁵ The defendant property owner alleged the plaintiff's comparative negligence on the ground that plaintiff "drove by the tree every day on her way to work and was just as capable of noticing it as [the defendant], but continued to take the route regardless of the risks involved."³⁰⁶ The Indiana Supreme Court disagreed and held that, as a matter of law, while "a possessor of land in an urban area has a duty to exercise reasonable care in inspecting and maintaining trees on his land, a passing motorist has no such corresponding duty."³⁰⁷ This opinion seems to reflect the autonomy of nonownership of land.

Similarly, courts have held that a passenger in a car has the autonomy not to pay attention to the road or warn of road hazards but rather may let the driver assume that entire responsibility.³⁰⁸ Likewise, a bystander has the autonomy not to react to a nearby altercation even if he could have safely fled the area.³⁰⁹ In addition, a wife may have no obligation to ensure that her husband follows a reasonable diet and exercise.³¹⁰ A few courts have suggested that the plaintiff has a physical autonomy interest in electing not to undergo invasive procedures like a mastectomy³¹¹ or a tubal ligation,³¹² particularly when a medical procedure, even if likely to benefit the plaintiff, involves a nontrivial risk of death.³¹³ And it has been held

304. 574 N.E.2d 283, 284 (Ind. 1991).

305. *Id.* at 285.

306. *Id.* at 287.

307. *Id.*

308. See *Boomer v. Frank*, 993 P.2d 456, 460 (Ariz. Ct. App. 1999) (holding that "a passenger or guest is not required to keep a lookout except in exceptional circumstances").

309. *Foster v. Ankrum*, 636 N.W.2d 104, 107 (Iowa 2001) (holding that a bystander who was injured while watching an altercation was not negligent for failing to flee).

310. *DeMoss v. Hamilton*, 644 N.W.2d 302, 307 (Iowa 2002) (holding that decedent and his wife were not contributorily negligent in malpractice case due to decedent's failure to follow a reasonable diet and exercise plan).

311. See *King v. Clark*, 709 N.E.2d 1043, 1052-55 (Ind. Ct. App. 1999) (Robb, J., dissenting) (arguing that a woman's choice not to get a mastectomy implicates her autonomy and cannot be considered comparative fault).

312. *Hall v. Dumitru*, 620 N.E.2d 668, 673 (Ill. Ct. App. 1993) (holding that plaintiff did not have to get a second tubal ligation surgery to mitigate damages).

313. *Id.*

that a plaintiff is not required to perform physical therapy exercises in perpetuity.³¹⁴

At times courts have limited comparative-fault defenses when the plaintiff conduct at issue involved a central interest such as employment,³¹⁵ even when that employment was at a high-risk job or time of day.³¹⁶ But courts have also limited comparative-fault defenses when the plaintiff's autonomous choice involved more trivial liberties. For example, a man could not be charged with comparative fault for swimming in the ocean after he had previously experienced heart trouble.³¹⁷ And a woman was not at fault for riding public transportation by herself.³¹⁸

Overall, courts have carved out a number of limits on comparative-fault defenses. In light of these myriad individual limits, courts should carefully consider broader issues of principle and policy that justify barring comparative-fault defenses.

IV. LIMITS BASED ON PRINCIPLE OR POLICY: PLAINTIFF NO-DUTY DETERMINATIONS

Limits on comparative-fault defenses are inevitable. There must be some baseline entitlements of a person who is entitled to the reasonable care of others. For example, that person is entitled to breathe air, walk on the public streets, and participate in society.

A number of scholars have urged that limits on comparative-fault defenses be explicitly acknowledged.³¹⁹ The *Restatement Third* encourages courts to set these explicit limits through plaintiff no-duty determinations. The draft recognizes that "[j]ust as special problems of policy may support a no-duty determination for a defendant, similar concerns may support a no-duty determination for plaintiff negligence."³²⁰

314. *Greenwood v. Mitchell*, 621 N.W.2d 200, 206 (Iowa 2001).

315. *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 173 (La. 1985) (Watson, J., concurring) ("An employee who is at his proper post using machinery furnished by the employer is not ordinarily guilty of contributory negligence because he has no choice other than to work or quit . . .").

316. See *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 469 (Tex. App. 1991) (implying that a teenaged service station employee's comparative fault might be an appropriate question for evidentiary consideration, but finding no evidence that plaintiff had a better employment option).

317. *Richwalt v. Richfield Lakes Corp.*, 633 N.W.2d 418, 424-25 (Mich. Ct. App. 2001).

318. *Metro. Atlanta Rapid Transit Auth. v. Allen*, 374 S.E.2d 761, 766 (Ga. Ct. App. 1988).

319. One of the most thoughtful early articles advocating such limits is Schwartz, *supra* note 86, at 718 ("[S]ome of this conduct [termed contributory negligence] perhaps should not be deterred after all, despite its appearance of 'unreasonableness' . . .").

320. RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 7 note h.

Even though courts have devised principle and policy limits on comparative-fault defenses without a formal element for recognizing these limits, an explicit no-duty doctrine, like the one proposed in the latest *Restatement*, offers a number of advantages. In particular, the doctrine would allow courts to articulate categorical reasons for denying comparative-fault defenses more forthrightly, thereby ensuring greater consistency between similar cases and giving judges a firmer understanding of their legitimate role in defining and protecting both the plaintiff's and the defendant's interests.³²¹ These no-duty determinations are particularly important in light of the potential for broad plaintiff-fault defenses, which stem in part from changes in tort systems such as comparative apportionment.³²² Furthermore, judicial limits on duty may be more important for plaintiffs than defendants because one might expect more frivolous contributory-negligence defenses than negligence claims, given the relative ease of filing a defense.³²³

In the absence of an explicit doctrine for limiting comparative-fault defenses in light of principle or policy, some courts may not realize their important role in setting these limits. Thus far, courts have sent a number of problematic comparative-fault claims to juries without addressing or perhaps even recognizing other options.³²⁴ For example, while traditional tort doctrine provides that "we would not let the doctor claim that the patient negligently caused heart

321. Cf. Wex S. Malone, *Some Ruminations on Contributory Negligence*, 65 UTAH L. REV. 91, 94-95 (1981) (lamenting that the search for values in negligence and contributory negligence is obscured by doctrinal approach rather than illuminated by deliberate and thoughtful examination of relevant policy considerations).

322. For example, refusing to compare intentional and negligent torts prevented intentional tortfeasor defendants from taking advantage of plaintiff-fault defenses.

323. Adopting plaintiff no-duty rules may save administrative costs because judicially enforced limits will prevent marginal comparative negligence defenses from being litigated. However, these rules will inject an additional issue—whether the jury should be permitted to evaluate the plaintiff's negligence. The more that courts are able to define plaintiff no-duty concept through concrete rules, the greater the administrative cost savings are likely to be.

324. *Doe v. Prudential Ins. Co.*, 860 F. Supp. 243, 249 (D. Md. 1993) (holding that sharing needles was contributory negligence to an insurance company's nondisclosure to applicant of positive AIDS test); *Mills v. Smith*, 673 P.2d 117, 121-22 (Kan. Ct. App. 1983) (permitting imputed comparative-fault defense in case in which a twenty-one-month-old child was bitten by the defendant's pet African lion); *Haydel v. Hercules Transport, Inc.*, 645 So. 2d 418, 431 (La. Ct. App. 1995) (finding no manifest error in jury allocation of ten percent fault to plaintiff who "panicked" and feared for her and her children's lives when she saw ammonia cloud); *Klinge v. Versatile Corp.*, 606 N.Y.S.2d 71, 72-73 (App. Div. 1993) (holding that a plaintiff who failed to stop eating a sandwich covered in oven degreaser after noticing it tasted funny could be charged with comparative fault); *McCrystal v. Trumbull Mem'l Hosp.*, 684 N.E.2d 721, 725-26 (Ohio Ct. App. 1996) (holding that a pregnant woman can be held comparatively negligent for following nurse's advice not to go to the hospital for bleeding).

disease,"³²⁵ a number of recent cases have allowed that defense to be resolved by the jury.³²⁶

It may be argued that the *Restatement* should limit plaintiff-fault defenses more fundamentally. Some scholars argue that comparative fault ought to be abolished in its entirety.³²⁷ All questions of plaintiff comparative fault can be resolved through the scope of the defendant's duty and were resolved in that manner for many years.³²⁸ Contributory negligence "throws on the individual the primary burden of protecting his own interest," and the justifications for the doctrine, which have been labeled *ex post* rationalizations, have been considered too individualistic.³²⁹

Even if one accepts the doctrine of comparative fault, broader limits on the defense might be advocated. For example, instead of encouraging judges to carve out exceptions to a broad rule of plaintiff obligation, the *Restatement* could narrow the definition of plaintiffs' obligation of care as an original matter. No duty could be regarded as the baseline for plaintiffs and defendants, with duties to self and others limited and articulated.³³⁰ In the alternative, plaintiffs' obligation of reasonable care might be limited to harm to *others*, not to self as well.³³¹

Each of these alternatives has merit. But many of the concerns that underlie them can be taken into account through rules that permit exceptions based on principle or policy. Moreover, it would be equally difficult to build all of the diverse policy and principle concerns that warrant limits on comparative-fault defenses into general rules of defendant duty and plaintiff obligation.

325. Powers, *supra* note 234, at 1575.

326. See, e.g., Magee v. Pittman, 761 So. 2d 731, 742-43 (La. Ct. App. 2000) (upholding jury determination of comparative fault in plaintiff's case against doctor for emergency room malpractice in part because "[t]he evidence reveals Mr. Magee smoked cigarettes regularly, and that smoking is a risk factor of coronary artery disease"); Elkins v. Ferencz, 694 N.Y.S.2d 27, 28 (App. Div. 1999) (permitting comparative-fault defense to dentist who failed to diagnosis patient's periodontal disease because of the patient's overuse of prescription drugs, smoking, failure to furnish a complete medical history, and delay in receiving treatment).

327. MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); Schwartz, *supra* note 86, at 699 ("England's most interesting tort scholar has proposed the complete elimination of the defense in all personal injury negligence cases."); Bar-Gill & Shahar, *supra* note 92 (questioning the efficiency basis for a comparative-negligence rule).

328. EPSTEIN, *supra* note 21; SHAPO, *supra* note 49, ¶ 31.01, at 127.

329. Bohlen, *supra* note 88, at 253.

330. Goldberg & Zipursky, *supra* note 8, at 661 (criticizing the *Restatement's* attempt to "downplay" the role of duty in tort law); see also John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1825-47 (1998) (advocating the use of "the relational conception of duty" in negligence cases).

331. Wright, *supra* note 12, at 1191-92.

If courts limit plaintiff obligations through principle and policy analysis, as the *Restatement* suggests, important issues arise as to how to draw these limits. One issue is terminology. The *Restatement of Apportionment* and some courts and commentators have called these principle- and policy-based limits plaintiff “no duty” rules.³³² As purists will hasten to note, plaintiff no-duty terminology is technically incorrect.³³³ With one exception,³³⁴ plaintiffs’ obligation is not a duty if we mean that the plaintiff can be sued for a breach of that obligation.³³⁵ In general, the plaintiff does not owe herself a duty to protect herself. Rather, she owes the defendant a duty to minimize the scope of liability should [the defendant] take actions that could harm [the plaintiff].³³⁶ Thus the plaintiff’s duty is akin to a “duty” to mitigate the defendant’s liability for damages.

The plaintiff no-duty terminology is potentially unhelpful because its implicit suggestion that plaintiffs and defendants receive similar treatment obscures some differences between the obligations of plaintiff and defendant. In practical terms, for example, no-duty rules always protect defendants. If the defendant has no duty, he also has no liability. However, if a court determines that a plaintiff has “no duty,” the plaintiff may be more or less likely to recover a judgment from the defendant. When a court determines that the plaintiff has no duty, that determination is rarely tantamount to a finding that the defendant is liable to the plaintiff.

332. RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 3d cmt. d; *see also* Hutchison v. Luddy, 763 A.2d 826 (Pa. Super. Ct. 2001); Brown v. Dibbell, 595 N.W.2d 358 (Wis. 1999); Bullick, *supra* note 70, at 1417.

333. DOBBS & HAYDEN, *supra* note 270, at 273 (“The no duty language is infelicitous in one respect, since “duty” refers to an obligation enforceable by suit.”); *see also* Law v. Superior Court, 755 P.2d 1135, 1141-42 (Ariz. 1988) (noting that while “in all but the rarest situation nonuse of a seatbelt presents no foreseeable danger to others, it is probably incorrect to conceptualize the seatbelt defense in terms of duty” but then characterizing the need for plaintiff to wear a seatbelt as “part of the [plaintiff’s] related obligation to conduct oneself reasonably to minimize damages and avoid foreseeable harm to oneself”).

334. In one circumstance the plaintiff might truly be said to have no duty. The draft *Restatement’s* negligence rule previously provided that “[a]n actor who negligently causes physical harm is subject to liability for that harm,” and included unreasonable risks to self in the definition of negligence. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 6. Accordingly, this provision seems to permit a plaintiff who negligently causes physical harm to herself to sue herself. Although a plaintiff would not ordinarily be expected to sue herself for negligence, such a possibility could come to fruition if the plaintiff had insurance that might cover such suits, or if such a suit might make a difference in an apportionment calculation. A rule that would prevent a plaintiff from suing herself for her own negligently created risks to self would be, in earnest, a plaintiff no-duty rule.

335. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 23-114 (1978) (categorizing legal relationships).

336. EPSTEIN, *supra* note 21, § 8.2.1, at 189. The plaintiff’s unreasonable conduct often risks others’ financial interests rather than their physical safety.

Nevertheless, the plaintiff no-duty terminology provides an analogy to a commonly understood group of categorical rules that limit defendants' liability. "[T]he point of using no duty language . . . is to draw attention to a parallel set of rules that relieve defendants of liability for negligent conduct."³³⁷ Thus, despite the inadequacies of the term, the no-duty language seems more helpful than any other term.

The *Restatement's* black-letter no-duty provisions should be helpful to courts. The current provisions, which have evolved to take fuller account of limits on comparative negligence as well as negligence, provide a clear and potentially strong mechanism for courts to delineate categorical limits. Even so, additional enhancements might be suggested.

As for black-letter provisions, the *Restatement* text could be even clearer. As written, the black-letter provision of section 7 proceeds in neutral terms with respect to plaintiffs and defendants, but then outlines only what happens to the defendant's liability in the case of a no-duty determination. To be clearer, the provision might specify what a court should do in the case of a plaintiff no-duty determination—for example, strike the defense, limit evidence related to it, and issue special instructions to the jury that the plaintiff has special principle and policy rights for which it should not account in its decisionmaking process.

In addition, it would be helpful for *Restatement* illustrations to include more plaintiff no-duty cases alongside its many defendant no-duty examples. The *Restatement's* categories of defendant no-duty cases all have similar plaintiff no-duty analogues. For example, the *Restatement* discusses limits on defendant property owners' duty to plaintiffs injured while trespassing on the owner's property.³³⁸ Alongside this case, the *Restatement* could cite a case that limits a negligent *plaintiff* property owner's duty to a trespasser. For example, it might cite *Mondry v. City of South St. Paul*.³³⁹ In that case, the plaintiff, walking on his property in the dark after he had a few drinks, walked into a nine-foot by five-foot orange snowplow bucket left on his property by the defendant.³⁴⁰ Despite the plaintiff's carelessness, the court held that a contributory-negligence defense was inappropriate because the plaintiff was "on his own property" and

337. DOBBS & HAYDEN, *supra* note 270, at 273.

338. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. a.

339. No. C4-01-1845, 2002 WL 554360 (Minn. Ct. App. 16, 2002).

340. *Id.* at *1.

the trespassing city “had no legal right to place its equipment on his property where [plaintiff] could walk into it.”³⁴¹

The *Restatement* also suggests that dramshop and social host liability may be areas in which judges may choose to develop defendant no-duty analysis—for example, in the case of social hosts based on social norms.³⁴² Similarly, when courts assign dramshop liability to defendants, they may determine that with respect to at least some plaintiffs, the plaintiff’s comparative fault cannot be used as a defense.³⁴³

The *Restatement* also provides illustrations of cases in which defendants’ duties are limited to a class of persons. As an example, the *Restatement* provides the fireman’s rule—the rule that a defendant who negligently triggers the need for public protection services need not respond in damages to a professional rescuer.³⁴⁴ Such a defendant no-duty case finds its complement in cases in which a plaintiff who negligently triggers a need for protective services is not subject to a defense of comparative fault based on his conduct when police respond with excessive force.³⁴⁵ In both sets of cases the actor can be said to owe no duty to law enforcement personnel not to trigger a need for their reasonable protective services.

Not only does the *Restatement* suggest that a defendant’s duty may have certain relational limits, but it also suggests that it may be limited to a lower level of care or to particular negligence claims.³⁴⁶ The *Restatement* provides an illustration of a product manufacturer that may not have a duty to warn of obvious risks but that still has a duty to design a reasonably careful product. For the point that the

341. *Id.* at *3; see also *LeRoy Fibre Co. v. Chic. Milwaukee & St. Paul Ry.*, 232 U.S. 340, 348-52 (1914) (finding plaintiff company not contributorily negligent for destruction of their flax straw on its property adjacent to defendant’s railroad track when the railroad negligently emitted sparks igniting the straw on the grounds that the plaintiff was under no duty to prevent damage from the railroad’s “wrongful operation”); *Gordon v. Nat’l R.R. Passenger Corp.*, No. Civ. A. 10753, 2002 WL 550472, at *16 (Del. Ch. 2002) (holding that plaintiff owners of a landfill were not guilty of contributory negligence for failing to test fill for contaminants before depositing it in their landfill because “they were under no legal duty to anticipate that [defendant] would violate the terms of the license”).

342. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 7 cmt. c reporter’s note.

343. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 203 (Iowa 2002) (holding that “comparative fault does not play a role in a dramshop action”).

344. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. e reporter’s note (citing *Krause v. U.S. Truck Co.*, 787 S.W.2d 708 (Mo. 1990)).

345. *Mikel v. City of Rochester*, 695 N.Y.S.2d 462, 463 (App. Div. 1999) (denying claim of comparative fault to police officer who negligently executed search warrant against injured plaintiff for engaging in criminal activity).

346. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. a.

plaintiff's duty might be similarly limited, the court might cite *Greycas v. Proud*, a case in which the plaintiff lawyer had a duty of reasonable care but did not need to assume that opposing counsel was careless or dishonest.³⁴⁷ To show that plaintiffs at times have a limited duty not to be reckless, the *Restatement* might refer to the circumstance of a rescuer.³⁴⁸

Reporters' note cases, like comment illustrations, also have plaintiff no-duty corollaries. The reporter's notes mention defendant no-duty rules that prevent a defendant from being held liable for failing to follow a robber's demand to hand over money to prevent a customer from being killed.³⁴⁹ In a similar vein, a plaintiff might have no duty to hand her keys to a carjacker.³⁵⁰

The reporter's note citation concluding that Magic Johnson had no duty to reveal his prior high-risk sexual behavior to his partners based on his privacy concerns³⁵¹ may be contrasted with a case that found a plaintiff did have a duty to reveal that she was a diabetic to her sexual partner.³⁵² In addition, while an employer might have no duty to retrofit its equipment with new safety devices,³⁵³ an employee might have no duty to quit that unsafe job.³⁵⁴

Just as *Restatement* illustrations of no duty should include cases involving plaintiffs, the *Restatement's* illustrations of nonnegligence should also include examples of plaintiff and defendant nonnegligence. For example, *Restatement* section 3f suggests that a court could find no defendant negligence in a case in which the defendant city failed to adopt an aggressive program to determine if

347. *Greycas v. Proud*, 826 F.2d 1560, 1565-66 (7th Cir. 1987).

348. See, e.g., N.Y. PATTERN JURY INSTR.—CIVIL 2:41 ("The law will not view an attempt to preserve life as negligent unless the attempt, under the circumstances, was reckless.").

349. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. c reporter's note (citing *Ky. Fried Chicken v. Superior Court*, 927 P.2d 1260 (Cal. 1997)).

350. *Dye v. Schwegman Giant Supermks., Inc.*, 599 So. 2d 412, 417 (La. Ct. App. 1992) (barring comparative-fault defense against victim who actively resisted carjacker despite testimony that this response to a carjacking was inappropriate).

351. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. c reporter's note (citing *Doe v. Johnson*, 817 F. Supp. 1382 (W.D. Mich. 1993)).

352. *Gross v. Werling*, No. 2-99-06, 1999 WL 1015072, at *1-2 (Ohio Ct. App. Sept. 30, 1999).

353. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 2, *supra* note 9, § 7 cmt. c reporter's note (citing *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279 (Haw. 1997)).

354. See, e.g., *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 173 (La. 1985) (Watson, J., concurring) ("An employee who is at his proper post of employment using machinery furnished by the employer is not ordinarily guilty of contributory negligence because he has no choice other than to work or quit . . .").

its trees had defects that posed a hazard to people or property.³⁵⁵ Alongside that illustration, the court might cite *Valinet v. Eskew*, a case in which the Indiana Supreme Court held that a driver who traveled a certain route each day was not guilty of comparative negligence for failing to notice that the tree by the roadside had been dead for a number of years.³⁵⁶

Similarly, *Restatement* section 3, comment g cites a line of cases in which the defendant is not negligent because he has no knowledge and “no means of knowledge” of the danger absent “great inconvenience.” Specifically, the *Restatement* discusses a case in which a carrier delivered a package that contained dynamite but had no way of knowing the contents of the package short of opening every package it delivered.³⁵⁷ A parallel plaintiff case would be *Strom v. Logan*, in which the plaintiff was injured in a home fire, but had no way of knowing that a prior home repair had been faulty without inspecting work that had been done behind the walls.³⁵⁸

The *Restatement*, as it has evolved, has recognized the importance of equal consideration of problems of principle or policy warranting categorical rules to remove reasonableness questions from jury decisions—for both plaintiffs and defendants. Parallel clarifications and illustrations of plaintiff no-duty cases would make the *Restatement* no-duty principles easier to understand and to apply in the context of plaintiffs, where courts are less practiced in recognizing limits through the no-duty element.

Moreover, in the *Restatement* and in state courts, it would be helpful to clarify proximate cause limits on the category of people to whom plaintiffs owe a duty—for example, only those defendants who are negligent (rather than reckless or intentional) and whose negligence was known to the plaintiff, or at least reasonably foreseeable.³⁵⁹

Even if further clarifications and illustrations are not built directly into the *Restatement* text, courts can certainly apply these parallels to the cases before them. The assembled individual

355. RESTATEMENT OF LIABILITY FOR PHYSICAL HARM, DRAFT 1, *supra* note 3, § 3 cmt. f (examining the case of a plaintiff who was driving on a street during a windstorm when a tree on city property fell on her car).

356. 574 N.E.2d 283, 287 (Ind. 1991).

357. *The Nitroglycerin Case*, 82 U.S. 524, 534-35 (1872).

358. 18 P.3d 1024, 1029 (Mont. 2001).

359. The plaintiff's obligation may be defined not as a duty in the air owed to everyone, but rather as a duty owed to only some defendants and not to others. See, e.g., *Palsgraf v. Long Island R.R.*, 248 N.E. 339, 341 (N.Y. 1928) (“Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do.”) (internal citations omitted).

exceptions courts have crafted in cases alleging plaintiffs' comparative fault reveal an impressive forest of principles and policies.

V. CONCLUSION

It may seem unusual to discuss limits on plaintiffs' duties now. Comparative fault was meant to decrease the role of judges and give more cases to the jury for compromise solutions, and it undoubtedly has done so. Yet there are a number of reasons to reexamine legal limits at this juncture.

Looking past the tort law to other legal trends sheds some light. At the same moment at which tort law is leaving an increasing number of issues to jury decision, criminal law, tort's historical cousin, is taking precisely the opposite course. Federal criminal courts have dramatically limited sentencing (and now charging) authority by enacting elaborate grids and guidelines to ensure more rule-based consistency and less discretion.³⁶⁰ These changes were designed to make sentencing decisions more transparent, reviewable, and subject to legal controls. Perhaps increased transparency and consistency are the aims toward which legal limits on comparative-fault and fault defenses are aspiring.

Despite the importance of consistency and transparency,³⁶¹ those goals increasingly are threatened by current trends in tort law. Tort law continues to shift toward jury process and away from defined legal rules. In particular, the advent of comparative apportionment with its mixed determinations of cause and fault threatens to give juries unreviewable authority.³⁶²

The need to limit comparative-fault defenses also stems from other shifts in tort doctrine—in particular, the shift away from the doctrine of assumption of risk and toward comparative fault.³⁶³ Years ago, defendants sought to invoke broad assumption-of-risk defenses to minimize their obligations. Scholars criticized these broad defenses so

360. See U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-85 (2000) (finding unconstitutional a state statute allowing judge to enhance a sentence beyond the statutory range on grounds that it contravenes the jury's fact-finding duties). One might argue that this limit on judicial sentencing authority is consistent with tort law jury delegation in that both trends remove decisionmaking power from judges.

361. Transparency and consistency may be particularly important to both criminal and tort law in light of public disaffection and pressure for change. In public policy disputes marked by anecdotal evidence, it is difficult to defend a legal system for which rules and penalties cannot be articulated clearly.

362. See RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 8 (enumerating factors used for assigning shares of responsibility).

363. EPSTEIN, *supra* note 21, § 8.6.2, at 200.

successfully that the most recent *Restatement* has abolished implied assumption of risk in its entirety.³⁶⁴ Yet these same overbroad defenses simply have been transformed into overbroad defenses of comparative fault.³⁶⁵ As such, the substantive concerns raised by scholars who criticized assumption of risk's erosion of defendants' duty are softened but not eliminated within comparative fault. Not only have old assumption-of-risk arguments been repackaged as comparative-fault defenses, but new plaintiff-fault arguments are also beginning to appear. Comparative-fault defenses that could not have surmounted the all-or-nothing hurdle of assumption of risk are easier to mount when the argument need only shave a few percentage points off the defendant's liability.

Another internal pressure to limit comparative-fault defenses stems from legislative tort reform and its restrictions on liability. Torts statesman Wex Malone opined that New York courts had established contributory negligence years ago, because the courts felt that defendants' negligence liability was fixed by statute at too high a level.³⁶⁶ Now that many courts and commentators regard defendants' liability as fixed by statute at too low a level—due to damage caps, abolition of joint and several liability, and modified comparative fault among other limits—limiting plaintiff comparative-fault defenses may be one way to ameliorate the harshness of those doctrines.³⁶⁷ While the effect of limiting comparative-fault defenses remains unclear, such limits apparently would increase defendant care because most states have modified comparative-fault systems, which already eliminate plaintiff recovery in cases with strong components of plaintiff fault. Judicial limits on comparative-fault defenses may result in more defendant care by affording full damages in cases with low plaintiff

364. See RESTATEMENT OF APPORTIONMENT, *supra* note 4, § 2 cmt. i reporter's note.

365. For an example of this shift from defendants employing assumption of risk to comparative fault as a defense, compare *Rickey v. Boden*, 421 A.2d 539, 543 (R.I. 1980), with *Morrocco v. Piccardi*, 713 A.2d 250, 253 (R.I. 1998). See also SHAPO, *supra* note 49, ¶ 32.01, at 131 ("Some analysts believe it would be wise to chalk up most 'assumption of risk' defenses under the contributory negligence rubric.")

366. Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 155, 162, 166-69 (1946) (stating that nineteenth-century judges' "seething, although somewhat covert, dissatisfaction" with juries in railroad crossing accident cases alongside a definition of fault "frozen by the legislature" prompted judges to exert greater controls on juries through contributory negligence).

367. Some of the most "thoughtful commentators" believe that pure comparative negligence is the most fair system. DOBBS, *supra* note 7, § 201, at 505. Most legislatures, however, have enacted modified comparative-fault systems. RESTATEMENT OF APPORTIONMENT, *supra* note 4, tbl.

comparative fault—a result that better approximates the pure comparative-fault system that most scholars consider optimal.³⁶⁸

Other possible influences can be cited. With the rise of mass corporations and repeat tortfeasors, courts may endorse systemic rather than individual controls to enhance safety.³⁶⁹ Moreover, plaintiff comparative-fault defenses may expand as defendants' tort obligations expand.³⁷⁰ Limits on plaintiff-fault defenses may also be seen as another attempt to commandeer the tort law to promote particular interests.³⁷¹

Whatever the forces that propel renewed interest in tort law standards, the time has come for considering standards in the area of comparative fault. Courts could leave *all* issues of defendant negligence to jurors to resolve as a question of risk and utility; however configured, they do not do so. Courts limit defendants' negligence liability in both case-specific and categorical ways.³⁷² Similarly, courts could leave all questions of plaintiff comparative fault for juror risk-utility determination. Here too, courts endorse numerous fact-specific and categorical restrictions.³⁷³ The *Restatement*

368. Hayden, *supra* note 73, at 919, 945 (arguing that courts that retain pure comparative fault use plaintiff's fault as superseding cause or as a "relief valve" to eliminate some plaintiff claims).

369. EPSTEIN, *supra* note 21, § 8.1, at 189 ("The impulse behind the strong version of the contributory negligence defense has both moral and economic overtones, congenial to an individualistic age."); Prosser, *supra* note 4, at 4 ("Probably the true explanation [of comparative fault as a defense] lies merely in the highly individualistic attitude of the common law of the early nineteenth century.").

370. EPSTEIN, *supra* note 21, § 8.6.1, at 198 (noting that there was not much defendant liability to which claims of plaintiff assumption of risk were raised before industrialization). It has been argued that contributory negligence itself arose against a backdrop in which "the social duties of one citizen to another became enormously enlarged." Bohlen, *supra* note 88, at 254.

371. No-duty rules for both defendants and plaintiffs may be a way for special interests to commandeer the tort process. Justice Feldman of the Arizona Supreme Court forewarns that after the court's acceptance of the state legislature's creation of governmental immunity,

[w]hat may come next is of serious concern. Human nature, particularly that of the bureaucracy, is such that it is unlikely that any public entity will approach the legislature with a request that it be held responsible, as are common folk, for its misdeeds or those of its employees. What I fear we will hear, instead, is the need for immunity of all kinds because otherwise the agency is underfunded, unable to meet its obligations, its employees are concerned about liability and therefore unable to perform their duties, its budget will not allow for the cost of risk management or paying the bills for its misdeeds, the judicial system is unworkable, juries can not be trusted, and so on, *ad infinitum*.

Clouse v. State, 16 P.3d 757, 776 (2001) (Feldman, J., dissenting).

372. See, e.g., DOBBS, *supra* note 7, § 149, at 355-59 (outlining the role of the judge in taking cases away from the jury for categorical and case-specific reasons), § 225, at 575-77 (addressing the concepts of immunity and limited duty).

373. Some recent state supreme court decisions have limited defenses alleging plaintiff comparative fault. See, e.g., Greenwood v. Mitchell, 621 N.W.2d 200, 205 (Iowa 2001) (holding that the lower court erred in submitting the issue of accident victim's failure to perform physical

of Liability for Physical Harm at last gives judges the discretion to recognize the contours and validity of these limits in tandem.

therapy exercises “in perpetuity” to the jury on the question of mitigation of damages); *Walter v. Wal-Mart Stores*, 748 A.2d 961, 971-72 (Me. 2000) (finding that the lower court did not err in refusing to instruct the jury on comparative fault in a pharmacist malpractice case in which the patient did not know the name of the chemotherapy drug being prescribed and delayed in reporting the drug’s side effects to her doctor); *see also* *Strom v. Logan*, 18 P.3d 1024, 1029 (Mont. 2001) (holding in a negligent misrepresentation case that the home purchaser’s failure to inspect latent defects concealed behind walls and ceilings “[did] not amount to contributory negligence”).

Resolving the Patent-Antitrust Paradox Through Tripartite Innovation

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The issues presented by the intersection of the patent system and the antitrust laws have never been as pressing as they are today. The number of issued patents is skyrocketing. Companies are more frequently entering into arrangements with competitors not only to recover their investment from creating patented products but also to avoid the patent landmines that line the path of innovation. They form patent pools for laser eye surgery, MPEG-2 video compression technology, and DVD formatting; enter into alliances, mergers, and settlements in the biopharmaceutical industry; refuse to license their patented products in various industries; and cross-license their patents in the semiconductor industry.

But the need for collaborative and exclusionary conduct under the patent system is matched by the heightened suspicion of the antitrust laws. Antitrust looks at these patent-based activities and sees lessened competition, increased price, and reduced output. And it pays scant attention to the benefits of the activity in promoting innovation or the justification for the activity based on the patent system.

This Article resolves the patent-antitrust paradox in three steps. First, it offers innovation as the common denominator of the patent and antitrust laws. Second, it proposes a new explanation that firms can offer in defense of the challenged activity: that it is reasonably necessary to attain tripartite innovation. Tripartite innovation denotes the three temporal stages of innovation: the creation of the product, the recovery of the investment incurred in creating the product, and the circumvention of patent bottlenecks that block the path of innovation. Third, it carves out a greater role for the justification in all aspects of antitrust activity, including mergers, joint ventures, patent pools, licensing, and refusals to license. The approach offered by this Article thus prescribes a more prominent and lasting role in antitrust analysis for the patent system and for the multiple components of innovation.