No. 42502-5-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SUE ANN GORMAN,

Plaintiff/Respondent/Cross-Appellant,

vs.

PIERCE COUNTY,

Defendant/Appellant/Cross-Respondent.

RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF

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I. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW ON APPEAL

With the exception of the issues raised in Ms. Gorman's cross-appeal, the trial court did not err regarding the failure to enforce exception to the public duty doctrine, jury instructions, or admission of evidence, and the verdict against Pierce County should be affirmed.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

A. The trial court erred in denying Ms. Gorman's motion for directed verdict regarding comparative or contributory negligence.

B. The trial court erred in denying Ms. Gorman's motion for judgment notwithstanding the verdict regarding comparative or contributory negligence.

C. The trial court erred in instructing the jury on comparative or contributory negligence, including instruction nos. 7, 8, 11, 22, portions of instruction no. 5, and the special verdict form (see appendices).

D. Alternatively, the trial court erred in denying Ms. Gorman's request for a jury instruction on the emergency doctrine.

III. ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

1. Did the trial court err in allowing the jury to consider Ms. Gorman's comparative or contributory negligence when Ms. Gorman violated no duty of care in leaving her sliding door open at night for

ventilation and to allow her pets to enter and exit; Ms. Gorman's actions were reasonable, given that she had been leaving her sliding door open at night for approximately five years without incident, some of her neighbors also left their sliding doors open at night, putting a nail in the door frame to stop the sliding door from opening further would not have been effective to keep the pit bulls out, and Ms. Gorman had never before seen the subject pit bulls roaming loose in morning hours; Ms. Gorman was faced with an emergency once the pit bull attack began; and no evidence that Ms. Gorman's alleged comparative negligence was the proximate cause of her injuries was presented to the jury? (Assignments of Error A-D)

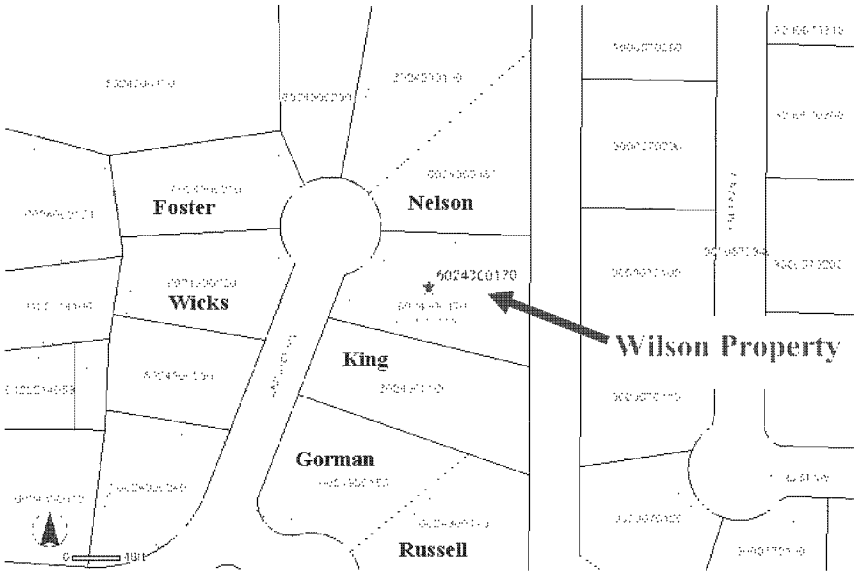
2. Alternatively, did the trial court err in failing to give a jury instruction on the emergency doctrine when Ms. Gorman did nothing to cause the pit bull attack, and once the attack had commenced, she did not have the opportunity to make a reasoned choice between alternative courses of action? (Assignment of Error D)

IV. COUNTER-STATEMENT OF THE CASE

A. FACTUAL HISTORY RELATING TO PIERCE COUNTY'S APPEAL

1. Pierce County had multiple notices of Ms. Wilson's irresponsibility as a dog owner and animal control violations by the pit bulls in her care.

On August 21, 2007, at approximately 8:22 a.m., Sue Gorman was awakened in her bed by the sound of two vicious pit bulls snarling at her from her bedroom doorway. RP 406-07. Known as "Betty" and "Tank," the pit bulls were supposed to be on the property of Defendant Shellie Wilson and her son, Zach Martin. RP 407; RP 405; RP 1177-78; Ex. 71 (shown below with Wilson's property identified).



However, Betty and Tank had left Ms. Wilson's property and boldly entered Sue's home through a "pet door" consisting of a hole cut in a sliding screen door and a sliding glass door that was left slightly ajar in the kitchen area. RP 409; RP 1400-1403.

Betty and Tank commenced attacking Sue, tearing at her flesh and ultimately inflicting 20-30 bite wounds to her arms, hands, face, and breasts over a 20- to 30-minute period. RP 407-17; RP 330; RP 287.

This was not the first time that dogs in Ms. Wilson's care had caused trouble in the neighborhood.

Ex. 41 (shown above); RP 299-303.

According to Pierce County's own records,[1] between 2000 and 2006 there had been ten prior complaints involving dogs (other than Betty and Tank) owned by Ms. Wilson. RP 616. Three of these prior complaints involved reports that Ms. Wilson's dogs had attempted to

[1] Prior to January 1, 2005, the Tacoma-Pierce County Humane Society was under contract with Pierce County to provide animal control services. RP 957-58. After January 1, 2005, the Pierce County Sheriff took over animal control, and the Humane Society's animal control records were available to Pierce County officers. RP 531; RP 599; RP 763-64. In 2006, animal control responsibilities were transferred to the Pierce County Auditor. RP 764.

attack humans. RP 1018-19. The prior reports were significant because they could have prompted a quicker response by animal control officers on subsequent complaints:

> Q Would you agree with me that – and I think you even testified under your direct – previous complaints about a dog owner's other dogs who were loose but didn't bite anybody is not substantial evidence to prove that a new dog is potentially dangerous?
>
> A Correct. We look at all evidence for the history with regard to, for example, if somebody had a dog declared potentially dangerous once and maybe they gave that dog up, they got another dog and that dog is creating similar type of nuisance. We would see that perhaps that individual had a history with us, and so we would be pretty quick to declare that dog, and, you based on prior history.
>
> Q So an officer might exercise their discretion quicker and take the harder action against a dog that meets the criteria based on the past history of that dog owner?
>
> A Correct.

RP 989 (testimony of Denise McVicker).

On August 31, 2006, Pierce County received a 911 call reporting an attack where two pit bulls (Betty and Tank) had barked and lunged at a neighbor who was inside his own garage. Ex. 11; RP 439-44; RP 490-91. Pierce County animal control officer Tim Anderson was dispatched to the scene. RP 714-15.

Unfortunately, at the time he investigated the report, Officer Anderson was unaware of the ten prior complaints against Ms. Wilson. RP 729. This was because the computerized complaint-tracking system used by the Pierce County Sheriff, known as "CAD," was not compatible with the computerized complaint-tracking system used by the Pierce County Auditor, "CALI." RP 738. Also, the records kept by the Tacoma-Pierce County Humane Society, including electronic records from its computerized complaint-tracking system, "Chameleon," had never been input into CALI. RP 531-32.

At the conclusion of his investigation of the August 31, 2006 attack report, Officer Anderson merely issued an infraction to Ms. Wilson for "animals at large" and "license required." Ex. 11. Animal control expert Denise McVicker, deputy director of the Tacoma-Pierce County Humane Society, testified that Officer Anderson could have issued a declaration of "potentially dangerous dog" based on the pit bulls' aggressive behavior during this incident. RP 972-73.

On the evening of February 10, 2007, Sue Gorman called 911 to report an attack where Betty chased her and her service dog, Misty, as Sue and Misty tried to get from Sue's car into the house. Ex. 12; RP 1262-64. After getting inside, Sue waited 15 or 20 minutes for Betty to leave, then went back outside to try and get her groceries from the car. RP 1264-65.

Betty was still on Sue's property, and immediately backed Sue up to the house, snarling and growling. *Id.* Betty bit Sue's pant leg. *Id.* Sue managed to fight Betty off with a stick and get back inside, where she called 911. *Id.*

The incident was investigated by Pierce County Sheriff Deputy Allen Myron, who arrived on scene nearly 1 ½ hours after the attack occurred. RP 1266. No infraction or paperwork relating to Betty being a "potentially dangerous dog" was issued. Ex. 12. But because Betty had been involved in a prior incident of threatening behavior, and because Ms. Wilson had a long history of being an "irresponsible dog owner," Denise McVicker opined that a declaration of potentially dangerous dog should have been issued after the February 10, 2007 incident. RP 728; RP 974.

On February 22, 2007, Pierce County animal control received another attack report where two pit bulls (Betty and Tank) had been loose in the neighborhood and had chased a 10-year-old boy who was rollerblading in the street. Ex. 13; RP 1251-52. The boy's father made a second call to Pierce County animal control on February 23, and Pierce County animal control officer Brian Boman followed up with him on that day. Ex. 13; RP 474; RP 570; RP 585; RP 587.

After speaking with the boy's father about the attack, Officer Boman went to Ms. Wilson's residence and left a "notice of violation,"

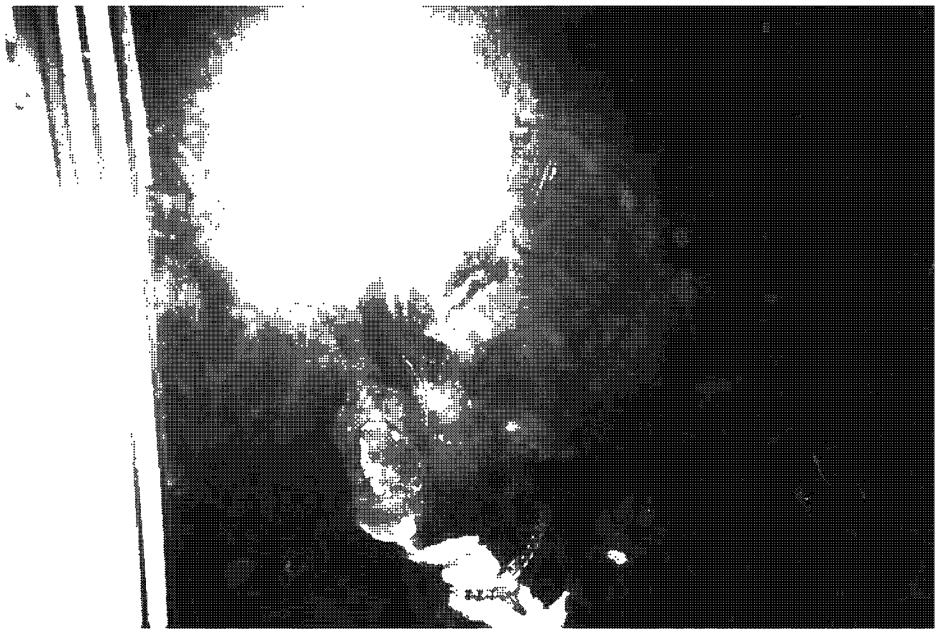
which instructed Ms. Wilson was to contact Pierce County animal control. RP 588. Ms. Wilson did not make contact, and Officer Boman did not follow up with her or speak with any of the neighbors. RP 590-91. Officer Boman was not aware of the incident that Sue Gorman had called in on February 10, 2007, or of the incident that occurred on August 31, 2006. RP 593; RP 596. **Although he agreed that he could have issued a declaration of potentially dangerous dog at that point, he did not do so**. *Id.*

Denise McVicker testified that because of the prior history of dogs in Ms. Wilson's care, and because of the recent history of incidents involving the pit bulls in question, a declaration of potentially dangerous dog should have been issued after the February 22-23 reports. RP 974-75.

On March 1, 2007, Sue Gorman again called 911 to report that Betty was outside her home, trying to break through the window and sliding glass door of her house to attack her and Misty. Ex. 14; RP 1269-70. Betty had jumped at the windows before, but this time she was using greater force, and Sue became afraid. *Id.* Pierce County Sheriff's Deputy Chad Redinbo responded at approximately 7:54 p.m. RP 1270-71; RP 796; RP 806. *See also* Ex. 76 (shown below); RP 1276.

Officer Redinbo looked for Betty but did not find her. RP 796. At the time of his investigation, Officer Redinbo was not aware of the prior

incidents that occurred on February 22-23 or February 10. RP 797-98.



Officer Redinbo did not know what a "potentially dangerous dog" was, and did not have any training regarding potentially dangerous dogs. RP 799-800. He did talk to Defendant Zach Martin (Defendant Shellie Wilson's son, a minor at the time), who came over and spoke to Sue. RP 1271-1272. Officer Redinbo then instructed Sue that if she had any further problems, she was to contact Mr. Martin directly. RP 1272. No declaration of potentially dangerous dog was issued. Ex. 14.

Again, Denise McVicker testified that because of the prior history of dogs in Ms. Wilson's care, and the more recent history with Betty and Tank, a declaration of potentially dangerous dog should have been issued after the March 1, 2007 incident. RP 976-77.

2. Pierce County was required to classify, seize, and impound potentially dangerous dogs.

Pierce County Code ("PCC") § 6.07.010 A (2007)[2] states in pertinent part:

> The County or the County's designee shall classify potentially dangerous dogs.[3] The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause[4] to believe that the animal falls within the definitions set forth in Section 6.02.010 Q [sic]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it

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[2] Pierce County amended its animal control ordinances in 2008. The ordinances admitted as Ex. 58 were the ordinances in effect at the time of Sue's August 21, 2007 attack.

[3] PCC § 6.02.010 T (2007) defines "potentially dangerous dog" as

> any dog that when unprovoked: . . .
>
> (b) Chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or
>
> (c) Any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.

See Ex. 58.

[4] Officer Boman defined "probable cause":

> Q What does the term "probable cause" mean in that statute [PCC § 6.07.010 A (2007)]?
>
> A I believe it's 51 percent knowing that – 51 percent of what happened almost guarantees a case.

RP 645.

to fall within the definition of Section 6.02.010 Q [sic]; or

2. Dog bite reports filed with the County or the County's designee; or

3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or

4. Other substantial evidence.

Ex. 58.

Expert witness Denise McVicker, deputy director and 33 ½-year employee of the Tacoma-Pierce County Humane Society, explained how the "shall" and "may" clauses in PCC § 6.07.010 A (2007) were put into practice:

Q Ms. McVicker, you were asked about discretion earlier, and you were asked about the – this provision of the ordinance. And when we talk about discretion, are we talking about the fact that if there's substantial evidence like you've just testified to for all these incidents and that substantial evidence establishes in the mind of the committee that the dog is potentially dangerous, then does the animal control officer have the discretion not to classify the dog as potentially dangerous when the evidence is substantial?

A I believe they have the discretion to consider whether the evidence meets the criteria, but they do not have the discretion to ignore any of the previous information or evidence that came in.

Q And if the evidence meets the criteria and it's substantial evidence, they have to declare the dog potentially dangerous, don't they?

A Yes, if it meets the criteria.

Q Just as if there was a dog bite report, that would qualify and they can't ignore that; they should declare the dog potentially dangerous, should they not?

A Correct. They could do that. It would be based on facts because whether it's unprovoked or provoked, again, meeting the criteria with regard to the ordinance.

Q Sure. And if it meets the criteria as you have stated for us, then they shall classify the dog as potentially dangerous, right?

A Correct.

RP 1007-08.

Pierce County animal control officers Brian Boman and Tim Anderson both agreed with Ms. McVicker's analysis:

Q When it says, "The County or the County's designee shall classify potentially dangerous dogs," what's that mean? What's the definition of that statement, based on your experience as an animal control officer?

A To me, that would be that Animal Control is responsible for doing the investigation and classifying the animals as potentially dangerous.

RP 643 (testimony of Brian Boman).

Q So the statute says, "The County or the County's designee shall classify potentially dangerous dogs," period. "The County or the County designee may find and declare an animal potentially dangerous if an animal control officer has probable cause to believe . . ." and then there's some other stuff.

> Explain for the jury in your own words the mandatory and discretionary responsibilities of an animal control officer based on this statute. . . .
>
> A **I would take the "shall" as for the agency that is in charge of that, it's their duty for making those determinations**. So when you go down to the next part where it says "may find," that's at the discretion of the animal control officer or the investigator to make that determination whether or not that animal is potentially dangerous.

RP 743-44 (emphasis added) (testimony of Tim Anderson).

Pierce County Auditor Patrice A. McCarthy also agreed that the ordinance placed responsibility on Pierce County's animal control officers:

> Q Would you agree with me that Pierce County is responsible for controlling potentially dangerous dogs within the county jurisdiction? . . .
>
> A I would agree that Pierce County Animal Control officers have responsibility over animal related incidents that happen in our county.

Ex. 82 (Deposition of Patrice A. McCarthy) at 31:22 – 32:3.

Another of Pierce County's animal control ordinances provided that once a potentially dangerous dog declaration was issued, the dog owner was not permitted to allow the dog to remain unconfined or go beyond the owner's premises without a leash and muzzle. PCC § 6.07.030 (2007) (Ex. 58). Significantly, these requirements were enforced even if the owner of a dog that had been declared potentially dangerous appealed

the declaration. Ex. 55; RP 545-47; RP 707-09. Pierce County was required to seize and impound any potentially dangerous dog found in violation of these and other potentially dangerous dog requirements:

> Provided, that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 of this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, **shall be seized and impounded**. . . .

PCC § 6.07.040 (2007) (Ex. 58) (emphasis added).

B. FACTUAL HISTORY RELATING TO MS. GORMAN'S CROSS-APPEAL

1. Sue acted reasonably in leaving her pet door open.

On August 21, 2007, Betty and Tank got into Sue's house through a "pet door." RP 409; RP 1400-1403. Sue made the pet door herself approximately five years before the subject pit bull attack. RP 1401. She cut a hole in a sliding screen door and inserted a plastic doggie door that she purchased from the store. RP 1400. The screen was not heavy enough to support the doggie door, so the doggie door fell out a couple of months later and just the hole in the screen remained. RP 1400-01. The hole was approximately the size of a sheet of paper. RP 1401. Sue used the pet door to allow her service dog, Misty, her two cats, and a neighbor's dog ("Romeo") to enter and exit. RP 1401-02. She also used the open sliding door for ventilation, as she did not have air conditioning. RP 1347.

Later, Sue drilled a hole in the frame of her sliding glass door so she could insert a nail into the hole.[5] RP 1402. She thought that by inserting the nail she could keep the sliding glass door from opening beyond the nail. *Id.*

When she went to bed in the early morning before the August 21, 2007 attack, Sue did not put the nail in the sliding door. RP 1403. Although Betty and Tank had come into her house once before, Sue had never seen Betty or Tank running loose in the morning; she had only seen them loose in the late afternoon and evening. RP 1274-75; RP 1406; RP 1435. In addition, early in the summer of 2007, some neighborhood boys were able to force their way in through the sliding door even though the nail was in position. RP 1315. Because the boys were able to "cram[] their body in," Sue believed that Betty and Tank would have been able to enter her home even if she had put the nail in place. *Id.*; RP 1404.

Sue felt safe leaving the pet door open most of the time (except for when she saw Betty), because she lived in a safe neighborhood. RP 409. Sue's neighbors also felt safe leaving their doors open: Rick Russell, Sue's next-door neighbor and owner of Romeo, testified that his sliding glass door was usually open six to eight inches so Romeo could come and

[5] She could not have inserted a dowel into the frame because the frame had been installed backwards. *Id.*

go. RP 469. Defendant Zach Martin testified that the back slider at his house was typically open for Betty. RP 887.

2. Once the pit bull attack began, Sue was faced with an emergency.

Once Betty and Tank entered Sue's bedroom on August 21, 2007, they positioned themselves between her and the doorway, so Sue's only exit was blocked. RP 1316; RP 1317-18; RP 1319; RP 1333-34; Ex. 62 (shown below). Significantly, there was absolutely no evidence presented

that Sue could have escaped via some route other than the bedroom doorway.

On the morning of the attack, Sue had a neighbor's dog, Romeo,

sleeping with her in her bed. RP 408-09. Romeo liked to come to Sue's house around 5:00 a.m., when his owner, Rick Russell, went to work. RP 409.

Betty and Tank began their attack by jumping on the bed and biting Sue's arm, but shortly afterwards Romeo got out from under the covers and jumped off the bed. RP 410; Ex. 62 (shown below). At that point, Betty and Tank turned their attention to Romeo, inflicting injuries

so severe that he ultimately died as a result of his wounds. RP 410-11; RP 417. Sue got out of bed and tried to get Romeo to a safe place, but

couldn't because Betty and Tank were biting her hands. RP 411-412; Ex. 62 (shown above).

Sue was later asked about her attempts to save Romeo and the extent of her injuries:

Q Would you agree with me that when you first saw those two pit bulls on the morning of the attack –

A Yes.

Q – and Misty had gone out the door, if you had got up and run out the door first, you would have fewer injuries than you ended up having?

A I wouldn't be able to get out the door.

Q You couldn't get past these two pit bulls?

A No, the room was too small. . . .

RP 1316.

Q Are you telling me and the jury that there's no way you can – you couldn't have pushed your way through these pit bulls and out the door like Misty did?

A No. They were vicious. They started attacking me when I was laying in bed.

Q Even if they bit your legs or something, you could have headed out the door before they started doing the 20-minute attack that they did?

A No. I couldn't have got past them because they were between me and the door, and there wasn't that much room in my bedroom. . . .

Q All right. Would you agree that your injuries were greater because you were defending Romeo than if you had just tried to make it out the door?

A The injuries I sustained when I was defending Romeo were the more slight injuries. I didn't have any stitches in any of the injuries where I was defending Romeo.

RP 1318.

Q If you would have spent five or ten minutes to bull dog your way through that door and out the door and away from those dogs instead of 20 minutes in the room as part of the attack, do you think your injuries would have been less?

A Well, I couldn't get past them.

RP 1319.

C. PROCEDURAL HISTORY

1. Procedural facts relating to Pierce County's appeal

(a) The trial court properly admitted relevant evidence of prior complaints.

From the outset, the trial court made it clear that evidence of prior complaints made against Ms. Wilson's other dogs (not Betty or Tank) would be kept extremely limited. *See, e.g.*, RP 97-98. After Ms. Gorman brought deposition testimony to the trial court's attention showing that prior owner conduct **was** relevant to declaring a different dog potentially dangerous, the trial court still would not allow the reports of the prior complaints or their details to be admitted under ER 904. RP 151-60. After further argument regarding the proffered deposition testimony, the trial court allowed Ms. Gorman to ask two witnesses, Officers Tim Anderson and Brian Boman, whether the prior complaints would have affected their actions when they investigated subsequent incidents involving Betty and Tank.[6] RP 162. The trial court denied Ms. Gorman's request to pre-admit illustrative charts showing that there had been prior complaints. RP 196-99; RP 203-04.

Subsequently, after the trial court reviewed the reports of the prior

[6] Ms. Gorman's animal control expert, Denise McVicker, was also asked if an owner's history with other dogs had an effect on the decision to declare the owner's current dogs potentially dangerous, and she indicated that an officer would "exercise their discretion quicker and take the harder action" in that situation. RP 989.

complaints (Ex. 1-15) at Ms. Gorman's request, Ms. Gorman renewed her motion to be permitted to discuss the prior complaints during testimony. RP 237-48. At that point, the trial court permitted Ms. Gorman to reference the fact that there were prior complaints against dogs at Ms. Wilson's address, but Ms. Gorman was not permitted to go into the details of the prior incidents. RP 248. Ms. Gorman was allowed to modify a Powerpoint presentation that would be used in opening argument to reflect that there had been prior incidents. RP 256-57; RP 275; Ex. 69-A. But consistent with the trial court's ruling, certain witnesses that Ms. Gorman had intended to call to testify regarding the specific details of the prior incidents were excluded. RP 377-404; CP 1538-41; CP 1545.

During the testimony of Brian Boman, Pierce County objected when the prior complaints were mentioned. RP 600. At that point the trial court clarified its earlier ruling, but allowed Ms. Gorman to solicit testimony confirming that there had been prior complaints. RP 610-11. Ms. Gorman complied with the trial court's ruling, and Officer Brian Boman testified that there had been ten complaints against Ms. Wilson's other dogs between 2000-2006. RP 616. He was not asked to delve into the facts of each incident. *Id.* Based on the trial court's clarified ruling, Ms. Gorman was permitted to modify her illustrative chart (Ex. 78) to reflect the existence of prior complaints. RP 686-88.

The trial court re-emphasized its order regarding the specific facts of the prior complaints before and during the testimony of Officer Tim Anderson. RP 695-96; RP 725. The trial court did not alter its ruling on prior complaints until the following exchange took place between animal control expert Denise McVicker and Pierce County's trial counsel:

> Q And are you aware – did you say that you reviewed the testimony of Patrice Aarhaus,[7] one of your animal control officers?
>
> A Yes, I did.
>
> Q Did you notice in her testimony why there wasn't sufficient evidence to declare those dogs potentially dangerous?
>
> A The biggest issue is those were potentially leash law violations, dogs running at large. They were not all dogs chasing individuals or anything of that nature. A few of the incidents were the owners leaving the dogs unattended over a weekend, perhaps, without food and water. So they were barking and causing a ruckus for the neighbors. . . .
>
> Q So you would agree with me, would you not that a history of a dog owner who had previous complaints of leash law violations is not a sufficient basis to declare a different dog potentially dangerous based on the action of a dog some other time?
>
> A Correct.

[7] Ms. Aarhaus was an employee of the Tacoma-Pierce County Humane Society who had investigated one of the prior complaints against Ms. Wilson's dogs. RP 990. Although Ms. Aarhaus was listed as one of Ms. Gorman's witnesses, she was excluded when the trial court ruled it would not allow testimony regarding the details of the prior complaints. RP 248; RP 386-387; CP 1538-41; CP 1545.

RP 990-91.

After this testimony, Ms. Gorman moved for permission to obtain testimony to rebut the inference that Ms. Wilson's prior complaints were all leash law violations. RP 995-96. The trial court ruled:

> Okay. I do think that to a limited extent there has been testimony with respect to the prior complaints that may leave the jurors with the impression that these were basically loose dogs.
>
> To the extent that you can inquire on redirect of her, if there were complaints that were beyond simply dogs running loose, I'm going to allow that. I'm still going to stick by my prior ruling, though, that the incident reports are not admissible; that we're not going to get into mini trials, but you can redirect her as to whether there was something else that happened.

RP 996. *See also* RP 1013-16. Based on that ruling, Ms. McVicker testified that on three prior occasions, complaints were made that Ms. Wilson's other dogs (not Betty or Tank) attempted to attack humans. RP 1017.

(b) The trial court did not commit prejudicial error in instructing the jury on Ms. Gorman's claims and burden of proof (instruction nos. 5 and 11).

Pierce County took exception to portions of instruction no. 5, the summary of the parties' issues and claims, arguing that it contained a misstatement of the law. RP 1356. *See also* WPI 20.01; WPI 20.05.

However, Pierce County agreed that Ms. Gorman's first numbered claim in that instruction ("failing to classify and control a potentially dangerous dog") was a correct statement of the law. *Id.*

During oral argument on Pierce County's CR 50 motion, the trial court agreed that the County had no duty to any specific individual to establish an effective animal control system, and granted the County's motion on that issue. RP 1456-57. This issue was then deleted from jury instruction no. 5. CP 881; RP 1457. The trial court found that the failure to enforce exception to the public duty doctrine applied to Ms. Gorman's remaining claims, and denied the remainder of Pierce County's motion. RP 1456.

With regard to jury instruction no. 11, the trial court was very concerned that the jury not be confused by the distinction between negligence and strict liability. RP 1479; RP 1483-85. To alleviate the trial court's concerns, Pierce County proposed new language to be included in the instruction:

> MR. WILLIAMS: Starting on Instruction No. 11 . . .
>
> > Fourth would be that the Plaintiff –
> >
> > "That the negligence of Pierce County and/or the fault of the other defendants was a proximate cause of the injury to the plaintiff," and then in a special verdict form, so we do not confuse them, we do it as I proposed; we make separate questions for each.

RP 1486-87 (emphasis added). Pierce County's proposed language was added to the instruction without objection from Pierce County. RP 1488-89.

2. Procedural facts relating to Ms. Gorman's cross-appeal

After working through the parties' proposed jury instructions, the trial court queried whether an emergency doctrine instruction should be given, based on Ms. Gorman's testimony of what occurred during the August 21, 2007 attack. RP 1380-82. Ms. Gorman's trial counsel argued that an emergency doctrine instruction should be given, since Ms. Gorman had no choice of alternative courses of action after the pit bull attack commenced. RP 1466; RP 1472. *See also* WPI 12.02. After hearing discussion from all parties, the trial court ultimately decided not to give an emergency doctrine instruction, and Ms. Gorman took exception. RP 1466-73. Ms. Gorman also took exception to the other jury instructions given on comparative or contributory negligence, including the special verdict form. RP 1351-53.

At the close of the evidence, Ms. Gorman moved for a directed verdict on the issue of comparative or contributory negligence. CP 1427-51. The motion was denied. RP 1463-66.

In its verdict, the jury assessed 1% comparative negligence to Sue

Gorman. CP 902-04.

After the verdict was entered, Ms. Gorman moved for judgment notwithstanding the verdict on the issue of her comparative negligence, asking that the jury's determination of 1% fault be stricken. CP 1467-94. Ms. Gorman argued specifically that she was under no statutory or common law duty to keep her pet door closed, and that her actions once the pit bull attack commenced were reasonable. *Id.*; 9/15/11 RP 5-14. The trial court denied the motion. CP 1532-34; 9/15/11 RP 26-30. The trial court simply refused to rule on the purely legal issue of Ms. Gorman's duty:

> I will tell you that I find a lot of what Mr. McKasy says about leaving the door open rather compelling, not the – but it's not for this Court to decide policy decisions.

9/15/11 RP 27 (emphasis added).

V. ARGUMENT AGAINST PIERCE COUNTY'S APPEAL

A. THE PUBLIC DUTY DOCTRINE IS INCONSISTENT WITH PRIOR WASHINGTON LAW AND SHOULD NOT HAVE BEEN APPLIED IN THIS CASE.

The public duty doctrine began as a nineteenth-century common law concept first recognized by the United States Supreme Court in *South v. Maryland*, 59 U.S. 396, 402-03, 18 How. 396, 15 L.Ed. 433 (1855). The doctrine springs from the archaic notion that "the king can do no wrong." *Kelso v. City of Tacoma*, 63 Wn.2d 913, 914, 390 P.2d 2 (1964).

Forty years after *South*, the framers of the Washington constitution implicitly recognized the doctrine in article II, § 26: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Thus, in Washington it has always been understood that the legislature has the power to alter the common law doctrine of sovereign immunity. *See, e.g., Billings v. State,* 27 Wn. 288, 290-91, 67 P. 583 (1902).

Prior to 1961, in order for a claim against the state to lie, the claimant had to present clear evidence that the legislature intended to waive the state's sovereign immunity. This proved to be a significant challenge, and in two cases the Washington Supreme Court found that the legislature's authorization of a right to "begin an action" against the state was not sufficient to avoid sovereign immunity. *Billings,* 27 Wn. at 292-93; *Riddock v. State,* 68 Wn. 329, 332-40, 123 P. 450 (1912). The liability of local governmental entities was even less clear, with immunity often turning on the particular nature of the entity. Counties and school districts were often found immune, whereas cities and towns were treated differently because of their independent corporate status. Debra L. Stephens and Bryan P. Harnetiaux, "The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability," 30 SEATTLE L. REV. 35, 38 (Fall 2006).

But in 1961, the legislature enacted a clear, unambiguous, and complete waiver of the state's sovereign immunity:

> The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: *Provided*, That this section shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state.

RCW 4.92.090 (1961).[8]

Significantly, the Washington Supreme Court recognized the passage of this waiver as a shift in public policy and determined that the waiver should also extend to local governmental entities. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964).

> A review of cases and legal literature dealing with the governmental immunity defense in the intervening years offers convincing evidence of a growing demand for *legislation* that would require municipal corporations, if not the state itself, to bear the same responsibility for their negligence as do private corporations; but it is generally recognized, as we indicated in the Hagerman case, supra, that the rule of governmental immunity has become so firmly fixed as a part of the law of municipal corporations that it is not to be disregarded by the courts until the legislature announces a change in public policy.'
>
> The legislature made this announcement of a

[8] The current version of the statute reads: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

> change in the public policy of Washington by enacting Laws of 1961, chapter 136, § 1 (codified as RCW 4.92.090). . . .
>
> The legislature has clearly indicated its intention to change the public policy of the state. The doctrine of governmental immunity was not preserved to the municipal branches of government. The city of Tacoma was liable for its tortious conduct, if any, at the time of the automobile collision in which the plaintiff was injured.

Kelso, 63 Wn.2d at 915-19 (emphasis in original). *See also Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965) (holding that the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity in this state).

The legislature validated the *Kelso* decision in 1967 when it passed a statutory waiver of sovereign immunity for local government entities:

> All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: Provided, That the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

RCW 4.96.010 (1967).[9]

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[9] The current version of the statute reads:

> (1) All local governmental entities, whether acting in a governmental or

Within four years of passage of the state's waiver of sovereign immunity, courts perceived a need to place limits on governmental liability. In *Evangelical United Brethren Church of Adna v. State,* 67 Wn.2d 246, 407 P.2d 440 (1965), the Washington Supreme Court opined that the statutes abrogating sovereign immunity should

> not render the state liable for every harm that may flow from governmental action. . . . [T]here must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability. . . .

Evangelical, 67 Wn.2d at 253-54. The Washington Supreme Court formulated a four-part test:

> [I]t would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be

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> proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.
>
> (2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.
>
> (3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

> concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

Id. at 255. Under this test, if a governmental act were determined to be "ministerial" (done at the operational level) rather than "discretionary," then the governmental entity was not immune from suit and a court could proceed with a traditional tort law analysis of liability. *Id.* at 259-60.

The *Evangelical* test was further refined in *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974). There, the Washington Supreme Court examined in more detail what "discretionary" governmental acts were. The Court held:

> In further refining what process must be entered

> into by the court in determining whether an act is discretionary or not, the court in Johnson v. State, 69 Cal.2d 782, 788, 790, 793, 794, 73 Cal.Rptr. 240, 245, 246, 248, 248-249, 447 P.2d 352, 357, 358, 360, 360-361, (1968), rejected a semantic inquiry into the meaning of 'discretionary' inasmuch as "(I)t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." The court recognized that "Since obviously no mechanical separation of all activities in which public officials may engage as being either discretionary or ministerial is possible, the determination of the category into which a particular activity falls should be guided by the purpose of the discretionary immunity doctrine." It stressed that judicial abstention should be assured in areas in which the responsibility for 'basic policy decisions has been committed to coordinate branches of government.' The court directed those seeking to determine whether an act is discretionary or not to 'find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.'
>
> Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision.

King, 84 Wn.2d at 245-46.

In spite of the precedent set forth in *Evangelical* and *King,* the Washington Supreme Court took a radical departure in *Campbell v. City of*

Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975). In a case involving negligent enforcement of a city's electrical code, the Court did not follow the four-part *Evangelical* test. *Campbell*, 85 Wn.2d at 12. Instead, it adopted with virtually no analysis a rule borrowed from New York common law:

> The City relies principally upon cases from the State of New York, from whence our statutes, RCW 4.92.0906 and RCW 4.96.010, abrogating sovereign immunity were drawn. . . .
>
> **We have no particular quarrel at this time with the general premise on which the cases relied upon by the City stand, i.e. negligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public.** Nevertheless, we note that running either explicitly or implicitly through some of the leading cases cited by the City is the thread of an exception to the general rule they espouse, i.e., where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons, then tort liability may arise.[10]

Id. at 9-10 (emphasis added). Thus, Washington's public duty doctrine was born.

Since *Campbell*, the public duty doctrine has been the subject of ongoing criticism by Washington jurists. "The public duty doctrine is in reality merely a not so subtle and limited form of sovereign immunity."

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[10] Note that even in this seminal case, the Court declined to do a "straight" application of the public duty doctrine. The Court instead adopted and applied what is now known as the special relationship exception. *Id.* at 10-13.

Chambers-Castanes v. King County, 100 Wn.2d 275, 291, 669 P.2d 451 (1983) (Utter, J., concurring in result).

> The modern public duty doctrine ignores Washington's legislative waiver of sovereign immunity by creating a backdoor version of government immunity unintended by the legislature. It directs this court's attention away from its proper considerations of policy, foreseeability, and proximate cause in favor of a mechanistic test that will inevitably lead us to absurd results. The public duty doctrine undercuts legislative intent, is harmful, and should either be abandoned or restored to its original limited function.
>
> Although it began its life with a legitimate purpose, the public duty doctrine is now regularly misunderstood and misapplied. Its original function was a focusing tool that helped determine to whom a governmental duty was owed. It was not designed to be the tool that determined the actual duty.

Cummins v. Lewis County, 156 Wn.2d 844, 861, 133 P.3d 458 (2006) (Chambers, J., concurring).

Sue Gorman respectfully submits that the public duty doctrine is inconsistent and incompatible with RCW 4.92.090, RCW 4.96.010, *Evangelical,* and *King*, is not needed to determine governmental liability in this case, and should be abolished. If this case had been analyzed using the four-part *Evangelical* test, the trial court would have concluded that Pierce County's duty to classify potentially dangerous dogs was ministerial in nature, as the animal control officers' and sheriff deputies' actions in making potentially dangerous dog determinations did not

implicate higher-level policy-making decisions. *See Evangelical,* 67 Wn.2d at 255; *King,* 84 Wn.2d at 245-46. Pierce County would still be liable for Sue's injuries, because after 14 prior complaints regarding Ms. Wilson's animal control violations (four of which related to Betty and/or Tank, and two of which were reported by Sue herself) Sue would have been an entirely foreseeable plaintiff. Thus, the trial court's rulings regarding Pierce County's duty could be affirmed on alternative grounds.

B. THE TRIAL COURT CORRECTLY RULED THAT THE FAILURE TO ENFORCE EXCEPTION APPLIED TO SUE'S CLAIMS AND CORRECTLY DENIED THE COUNTY'S CR 50 MOTION.

If the public duty doctrine is not to be abolished, then the trial court did not err in finding that the failure to enforce exception applied.

The failure to enforce exception imposes a duty of care upon the governmental entity where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, they fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks,* 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). This exception has been applied specifically in cases involving dangerous and potentially dangerous dogs, and the failure to enforce animal control ordinances. *See, e.g., King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999); *Livingston v.*

City of Everett, 50 Wn. App. 655, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988).

Here, there is no dispute that the elements requiring actual knowledge and the failure to take corrective action were met. Pierce County had available in its own records reports of 14 complaints before August 21, 2007 regarding dogs in Ms. Wilson's care, including three prior reports that dogs other than Betty and Tank had attempted to attack humans, and four prior reports that Betty and/or Tank had attempted to attack humans. According to Ms. McVicker, knowledge of the prior complaints could have prompted a quicker and more harsh response by Pierce County's designated agents upon continued violations by Ms. Wilson, had Pierce County's agents actually reviewed the records. Yet there is no question that Pierce County did nothing to review prior records, declare Betty and Tank potentially dangerous, or to seize and impound the dogs. Pierce County's animal control agents were not aware of the prior complaints, did not understand the criteria for declaring a dog potentially dangerous, and sometimes did not even know what a potentially dangerous dog was.

With regard to the duty to take corrective action, there is no question that Pierce County was required to classify, seize, and impound

potentially dangerous dogs.[11] "The same rules of construction apply to interpretations of municipal ordinances as to state statutes." *Stegriy v. King County Bd. of Appeals,* 39 Wn. App. 346, 353, 693 P.2d 183 (1984). Washington courts have consistently held that the term "shall" is synonymous with the term "must." *City of Wenatchee v. Owens,* 145 Wn. App. 196, 204, 185 P.3d 1218 (2008), *rev. denied* 165 Wn.2d 1021 (2009). Generally, the use of the word "shall" in a legislative enactment is presumptively mandatory, thus creating a duty. *Eugster v. City of Spokane,* 118 Wn. App. 383, 407, 76 P.3d 741 (2003), *rev. denied* 151 Wn.2d 1027 (2004).

> Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings. Especially is this true where 'shall' and 'may' are used in close juxtaposition in a statutory provision, under circumstances that would indicate that a different treatment is intended for the predicates following them.

State ex rel. Beck v. Carter, 2 Wn. App. 974, 978, 471 P.2d 127 (1970). *See also Stegriy,* 39 Wn. App. at 353-54 ("When different words are used in the same statute or ordinance, it is presumed that a different meaning

[11] Pierce County was required under RCW 16.08.090(2) to regulate potentially dangerous dogs. The statute states in pertinent part: "Potentially dangerous dogs **shall** be regulated only by local, municipal, and county ordinances. Nothing in this section limits restrictions local jurisdictions may place on owners of potentially dangerous dogs." (Emphasis added.)

was intended to attach to each word.").

Under the above rules, the words "shall" and "may" contained in PCC § 6.07.010 A (2007) are given their ordinary, yet different, meanings. As Ms. McVicker testified, the word "shall" created a mandatory duty to "classify" potentially dangerous dogs which could not be ignored when evidence from one of the four enumerated sources was present.[12] PCC § 6.07.010 A (2007); PCC § 6.02.010 T (2007); RP 1007-08. *See also* RP 643; RP 743-44. The use of the word "may" later in the same ordinance did not cancel this duty or render it discretionary—the discretion only applied to the later clause regarding an officer's consideration of the evidence gathered.[13] *Id.* Use of the word "shall" in PCC § 6.07.040 (2007) also created a mandatory duty for Pierce County to take corrective action—to seize and impound—if a potentially dangerous dog was found in violation of the potentially dangerous dog requirements (*e.g.*, unlicensed, unconfined on the owner's premises, or off the owner's

[12] Officers only had to be "51 percent sure" to have sufficient probable cause to make a potentially dangerous dog declaration. RP 645.

[13] Interestingly, PCC § 6.02.020 (2007) states: "Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff." Ex. 58. If Pierce County had not intended for PCC § 6.07.010 and 6.07.040 to create actual legal duties, PCC § 6.02.020 would make no sense. An ordinance should be construed to make it effective and to avoid a strained, unreasonable, or illogical result. *Stegriy*, 39 Wn. App. at 353. The "duty" language was not deleted from the amended version of the ordinance. *See* PCC § 6.02.020 (2008).

premises without a leash and muzzle). The trial court did not err in finding that Pierce County had mandatory duties under these ordinances.

Turning to the final element of the failure to enforce exception, Sue and her neighbors were within the class of individuals that Pierce County's animal control ordinances were intended to protect. "[A] governmental officer's knowledge of an actual violation creates a duty of care to all persons and property who come within the ambit of the risk created by the officer's negligent conduct." *Livingston v. City of Everett,* 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), quoting *Bailey v. Town of Forks,* 108 Wn.2d 262, 737 P.2d 1257 (1987). All of the complaints against Ms. Wilson were centered around the properties in and adjacent to the cul de sac where she lived. Sue, just two doors away from the Wilson property and having called in two of the four prior complaints regarding Betty, was within the "ambit of risk." Ex. 71. Sue was a member of the protected class.

Based on the evidence presented, the trial court did not err in finding that the failure to enforce exception applied in the present case or in denying Pierce County's CR 50 motion.

The case of *Livingston v. City of Everett,* 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), is instructive. There, a four-year-old boy was attacked and bitten by a group of dogs, and

his mother sued the City of Everett, claiming that the City failed to enforce its animal control ordinances. *Id.* at 656-68. Prior to the attack on the boy, there had been five complaints against the dogs reported to the City's animal control department within a five-week period. *Id.* at 657. The City had impounded the dogs, but then released them back to their owner. *Id.* Approximately three weeks after being released, the dogs attacked the boy. *Id.*

The City's ordinance governing the release of impounded animals read as follows:

> Any impounded animal **shall** be released to the owner or his authorized representative upon payment of impoundment, care and license fees **if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.**

Id. at 658 (emphasis added). Significantly, even though the ordinance granted some discretion to the City's animal control officer, the appellate court found that the City had a mandatory duty to exercise its discretion. *Id.* at 659. The court held that based on the evidence presented, the plaintiff had satisfied all elements of the failure to enforce exception. *Id.*

In the present case, PCC § 6.07.010 (2007) contains a clear and unambiguous directive—Pierce County "shall classify" potentially dangerous dogs. As *Livingston* teaches, the fact that officers are given discretion to consider various types of evidence when performing their

required classification does not render the duty to classify discretionary. *Id. See also King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974) ("(I)t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."). Similarly, the mandatory directive in PCC § 6.07.040 (2007), requiring that potentially dangerous dogs found in violation of potentially dangerous dog requirements be seized and impounded, is not rendered discretionary by use of the word "may" in one provision of PCC § 6.07.010 (2007).

The case of *King v. Hutson*, 97 Wn. App. 590, 987 P.2d 655 (1999), is also comparable. In that case, the Kings brought negligence claims against Stevens County based on Chapter 16.08 RCW (governing dangerous dogs). The Kings claimed that Stevens County should have confiscated the dog in question prior to its attack on Mrs. King, relying on RCW 16.08.100(1), which stated that the animal control authority of a county "shall . . . immediately confiscate" "any dangerous dog" if the dog is found in violation of dangerous dog requirements. *Id.* at 594-95. Finding that there was no evidence that the Kings notified the Stevens County sheriff of the dog's alleged prior attacks on the Kings' animals, the Court of Appeals found that the dog was not dangerous and affirmed dismissal of that portion of the Kings' lawsuit. *Id.* at 595.

Nevertheless, the Court of Appeals reinstated the Kings' claim for damages that occurred after the dog attacked Mrs. King. *Id.* at 596. The Court reasoned:

> We hold Mr. King's earlier reports to the sheriff's office about the threatening behavior of his neighbors' dogs, and evidence that Timmy was part of that pack, create a reasonable inference that Timmy also engaged in that behavior. The inference is sufficient to support a trier of fact finding he was a "potentially dangerous" dog that qualified as "dangerous" when he attacked Mrs. King in February 1997. That is, **his prior behavior made him "potentially dangerous**," so he did not have to inflict a severe injury on Mrs. King in 1997 to be deemed "dangerous." It was sufficient that he engaged in an unprovoked attack that threatened her safety. **Evidence Mr. King reported the attack on his wife to the sheriff, and evidence the County did not confiscate Timmy, raise material issues concerning the County's liability to the Kings under the failure to enforce exception to the public duty doctrine.**

Id. at 596 (emphasis added).

In the present case, Denise McVicker testified that the August 31, 2006 incident where Betty and Tank tried to attack a neighbor in his garage could have resulted in a potentially dangerous dog declaration. Ms. McVicker testified that after the second incident (Betty's February 10, 2007 attempt to bite Sue), Betty should have been declared potentially dangerous. Again, after the third incident (Betty and Tank's attempt to attack the rollerblading boy), Betty and Tank both should have been declared potentially dangerous. Yet again, after the fourth incident

(Betty's March 1, 2007 attempt to break in through Sue's window), Betty should have been declared potentially dangerous. Thus, Betty and Tank had a prior history which should have resulted in a potentially dangerous dog classification no later than February 10, 2007. This would have invoked the requirements that Betty and Tank be properly confined when on Ms. Wilson's property, and leashed and muzzled when off her property. PCC § 6.07.020 and 6.07.030 (2007). These restrictions would have gone into effect even if Ms. Wilson had decided to challenge the potentially dangerous dog declaration. Ex. 55; RP 545-47; RP 707-09.

Moreover, after the third incident where Betty and Tank tried to attack the boy on the rollerblades on February 22, 2007, Pierce County should have found that Betty and Tank were in violation of the potentially dangerous dog requirements and seized and impounded the dogs. PCC § 6.07.040 (2007). However, like Stevens County in *King,* Pierce County did not seize or impound Betty or Tank, or take any other action to ensure that Ms. Wilson complied with the potentially dangerous dog requirements. Consequently, Betty and Tank continued to behave aggressively and Sue was attacked on August 21, 2007. The trial court did not err in finding that the failure to enforce exception applied in this case.

Pierce County points to post-attack amendments to its animal control ordinances as support for its argument that it had no mandatory

duty to classify, seize, or impound Betty and Tank. Pierce County's Opening Brief at 28. Yet the amended version of PCC § 6.07.010 A is even more similar to the ordinance discussed in *Livingston v. City of Everett*, 50 Wn. App. 655, 659, 751 P.2d 1199 (1988), *rev. denied* 110 Wn.2d 1028 (1988), than the 2007 version. *See id.* at Appendix B. Although the second clause grants discretion with respect to the existence of probable cause, the first clause still uses the mandatory "shall" when describing the duty to declare animals potentially dangerous when probable cause is present.[14] *Id.* Again, under *Livingston*, the inclusion of a discretionary clause in one section of an ordinance does not cancel or modify a mandatory clause in another section of the ordinance. *Id. See also Stegriy v. King County Bd. of Appeals*, 39 Wn. App. 346, 353-54, 693 P.2d 183 (1984); *State ex rel. Beck v. Carter*, 2 Wn. App. 974, 978, 471 P.2d 127 (1970). Rather, the Court is required to give each word its ordinary meaning. *Id.* The amended version of PCC § 6.07.010 actually undercuts the County's interpretation of the "shall" and "may" language used in the 2007 ordinance.

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[14] PCC § 6.02.020 (2008) states, "Wherever a power is granted to **or a duty imposed** upon the Sheriff, the power may be exercised or **the duty may be performed** by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff. . . ." (Emphasis added.) If Pierce County had not intended for PCC § 6.07.010 (2008) to create an actual legal duty, PCC § 6.02.020 (2008) would be superfluous. An ordinance should be construed to make it effective and to avoid a strained, unreasonable, or illogical result. *Stegriy*, 39 Wn. App. at 353.

Pierce County relies on *Pierce v. Yakima County,* 161 Wn. App 791, 251 P.3d 270 (2011), as support for its argument that the duties created by PCC § 6.07.010 (2007) and 6.07.040 (2007) are discretionary. However, the case is easily distinguishable. First, *Pierce* has nothing to do with animal control. Second, Yakima County adopted building standards which did not require the County to take specific corrective action, but merely stated that the County "shall have the authority" and "is authorized" to take corrective action. *Id.* at 799. The appellate court found that the building standards conferred discretion, but did not create a mandatory duty. *Id.* at 801.

The language in *Pierce* stands in stark contrast to the language used by Pierce County in its animal control ordinances: "shall classify" and "shall be seized and impounded" are clear, specific directives requiring Pierce County to take corrective action. PCC § 6.07.010 (2007) and 6.07.040 (2007). The trial court correctly held that the ordinances created mandatory duties.

Pierce County also relies on *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.,* 115 Wn.2d 506, 531, 799 P.2d 250 (1990). However, the Washington Supreme Court did not reach any issues of statutory construction in that case because it found that the plaintiffs had failed to satisfy the "actual knowledge" element of the

failure to enforce exception. *Id.* The case is not helpful here, where there is no question that Pierce County had actual knowledge of 14 prior complaints against Ms. Wilson and dogs in her custody.

The case of *Ravenscroft v. Washington Power Co.*, 87 Wn. App. 402, 942 P.2d 991 (1997), *rev. on other grounds* 136 Wn.2d 911, 969 P.2d 75 (1999), is also distinguishable. There, certain administrative regulations directed governmental agents to establish various programs for safety and educational purposes, but no regulations required that direct corrective action take place. *Id.* at 416. The appellate court found that the failure to enforce exception did not apply in that circumstance. *Id.*

The language in *Ravenscroft* is unlike the language in Pierce County's animal control ordinances, which state that Pierce County "shall classify" potentially dangerous dogs and that potentially dangerous dogs found in violation "shall be seized and impounded." PCC § 6.07.010 (2007) and 6.07.040 (2007). Again, the trial court did not err in finding that the ordinances created mandatory duties.

The remainder of Pierce County's cited cases are too dissimilar to be helpful. *See* Pierce County's Opening Brief at 27-28. Specifically, in *McKasson v. State of Washington,* 55 Wn. App. 18, 25, 776 P.2d 971 (1989), and *Halleran v. Nu West, Inc.,* 123 Wn. App. 701, 716, 98 P.3d 52 (2004), the Securities Act made use of the term "may" rather than "shall."

In *Forest v. State of Washington,* 62 Wn. App. 363, 814 P.2d 1181 (1991), the relevant statute provided that parole officers "may" arrest for parole violations, but did not require arrest. *Id.* at 370. In *Smith v. City of Kelso,* 112 Wn. App. 277, 48 P.3d 372 (2002), the ordinance in question required the city engineer to prepare design and construction standards, but did not require enforcement. *Id.* at 375. In *Donahoe v. State of Washington,* 135 Wn. App. 824, 142 P.3d 654 (2006), DSHS had a mandatory duty to take corrective action when a nursing home was out of compliance with certain regulations, but at the time the plaintiff's claim arose, the nursing home was in compliance. *Id.* at 849. Finally, in *Fishburn v. Pierce County,* 161 Wn. App. 452, 250 P.3d 146 (2011), the statute in question stated that "[d]iscretionary judgment will be made in implementing corrections." *Id.* at 469 n.13. Not surprisingly, this Court held that the County's duty there was discretionary. *Id.* at 469.

None of Pierce County's foregoing cases require this Court to reverse the trial court's finding that the failure to enforce exception applies, or the trial court's denial of Pierce County's CR 50 motion. Accordingly, Ms. Gorman asks that the Court affirm the trial court on those issues.

C. THERE WAS NO PREJUDICIAL ERROR CREATED BY THE JURY INSTRUCTIONS.

1. Pierce County has waived its objections to jury instruction no. 11 and portions of instruction no. 5.

CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." The failure to object, before the jury is instructed in order to enable the trial court to avoid error, violates CR 51(f). *Peterson v. Littlejohn,* 56 Wn. App. 1, 11, 781 P.2d 1329 (1989). This Court can refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); *Ryder's Estate v. Kelly-Springfield Tire Co.,* 91 Wn.2d 111, 114, 587 P.2d 160 (1978) (where exception is not taken, the alleged error will not be considered on appeal).

Here, Pierce County argues that the trial court's instruction no. 11 (burden of proof) resulted in prejudicial error. *See* Pierce County's Opening Brief at 34-36. However, Pierce County's trial counsel proposed the language complained of, and did not take exception when the trial court incorporated Pierce County's proposed language into the instruction. RP 1483-89. Pierce County failed to object to instruction no. 11 before it was read to the jury, and must therefore be deemed to have waived its objections on appeal.

Pierce County also argues that instruction no. 5 (summary of the parties' claims) resulted in prejudicial error. *See* Pierce County's Opening Brief at 31-34. But Pierce County's trial counsel conceded that Ms. Gorman's first numbered claim, "failing to classify and control a potentially dangerous dog," was a correct statement of the law. RP 1356. Because Pierce County did not object to this language before it was read to the jury, Pierce County has waived its objection to this language on appeal.

2. Any remaining error in instruction no. 5 was harmless.

"Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hudson v. United Parcel Service, Inc.,* 163 Wn. App. 254, 261, 258 P.3d 87 (2011). The trial court has considerable discretion regarding the wording of instructions and how many instructions are necessary to present each litigant's theories fairly, and the Court reviews these matters for an abuse of discretion. *State v. Reay,* 61 Wn. App. 141, 146, 810 P.2d 512 (1991), *rev. denied* 117 Wn.2d 1012 (1991).

Even if a jury instruction is misleading, the burden is on the objecting party to establish consequential prejudice. *Griffin v. West RS,*

Inc., 143 Wn.2d 81, 91-92, 18 P.3d 558 (2001) (jury concluded that defendant breached its duty of care but found no proximate cause, so instruction on duty of care was not prejudicial). In a multitheory case, a defendant cannot claim prejudice on one theory if he did not propose a special verdict form that segregates the theories. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (because defendant proposed a special verdict form in a multitheory case, remand was required when one of the theories was found invalid and jury had used a general verdict form); *McCluskey v. Handorff-Sherman,* 125 Wn.2d 1, 10-11, 882 P.2d 157 (1994) (court rejected defendant's argument that one theory of liability was improperly before the jury, where defendant did not propose a special verdict form segregating the plaintiff's theories and conceded that there was no way to determine on which theory the jury found liability).

Pierce County argues that Ms. Gorman's second and third numbered claims in instruction no. 5 were prejudicial. *See* Pierce County's Opening Brief at 32; CP 881. Even *assuming arguendo* that these two claims were misleading to the jury, the jury could still have found that Pierce County breached its duty under Ms. Gorman's first numbered claim ("failing to classify and control a potentially dangerous dog"). Significantly, Pierce County conceded that the first numbered

claim correctly stated the law and offered no objection to its submission to the jury. CP 881; RP 1356. Pierce County did not propose a verdict form that segregated the various theories submitted by Ms. Gorman. CP 757-59. *See Davis*, 149 Wn.2d at 539-40; *McCluskey*, 125 Wn.2d at 10-11. The jury did in fact find that Pierce County breached its duty of care, although the specific theory on which the jury based its finding cannot be determined. CP 902. Under the circumstances, Pierce County's arguments regarding the second and third claims must be rejected. The jury's consideration of Ms. Gorman's second and third claims was not prejudicial. *Griffin*, 143 Wn.2d at 91-92.

Ms. Gorman would also submit that her second and third claims were not misleading under the circumstances. Given the testimony regarding Pierce County's failure to bridge the records gap between CAD, CALI, and Chameleon; sheriff's deputies' and animal control officers' lack of knowledge and/or understanding of the potentially dangerous dog ordinances; and the failure to seize and impound dogs that should have been declared potentially dangerous long before Sue Gorman was attacked, the trial court was well within its discretion to word the second and third numbered claims as it did.

Furthermore, the jury received a specific instruction (no. 14) on Pierce County's duty, to which Pierce County offered no objection. The

jury was also instructed on negligence (instruction no. 6), proximate cause (instruction no. 9), PCC § 6.07.010 (2007) and 6.07.040 (2007) and related definitions (instruction nos. 15-18), and damages (instruction no. 19). CP 883-97. Thus, the jury was fully instructed on common law negligence. CP 891; RP 1357-58. Read as a whole, the jury instructions properly stated the parties' claims and applicable law, allowed Ms. Gorman to argue her various theories of the case, and were not misleading. *See State v. Reay,* 61 Wn. App. 141, 146, 810 P.2d 512 (1991), *rev. denied* 117 Wn.2d 1012 (1991) (the test of sufficiency is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law). The trial court did not abuse its discretion and there was no prejudicial error as a result of the jury instructions, so the jury's verdict against Pierce County should be affirmed.

D. THE TRIAL COURT CORRECTLY RULED THAT EVIDENCE OF PRIOR COMPLAINTS WAS RELEVANT AND ADMISSIBLE.

Under the "invited error" doctrine, a party may not set up an error at trial and then complain of it on appeal. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004). The doctrine applies when a party takes an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal. *Id.*

When a party introduces evidence that would be inadmissible if offered by the opposing party, the party "opens the door" to explanation or contradiction of that evidence. *State v. Ortega,* 134 Wn. App. 617, 626, 142 P.3d 175 (2006), *rev. denied* 160 Wn.2d 1016 (2007). A trial court's decision to allow testimony under the open-door rule is reviewed for abuse of discretion. *Id.*

Here, the trial court consistently ruled that evidence of the specific details of the ten prior complaints which did not involve Betty and Tank would not be admitted. RP 97-98; RP 151-60; RP 196-99; RP 203-04; RP 248; RP 610-11; RP 695-96; RP 725. The trial court did not change its mind on that issue until Pierce County's trial counsel violated the trial court's prior rulings, making a specific reference to the details of one prior complaint (investigated by Ms. Aarhaus) and soliciting testimony from Ms. McVicker which inferred that all of the prior complaints were mere "leash law" violations. RP 990-91. Only after Pierce County's trial counsel "opened the door" did the trial court allow rebuttal testimony to inform the jury that three of the prior complaints involved attempted attacks on humans. RP 996; RP 1013-19.

Pierce County's violation of the trial court's prior rulings was an "affirmative and voluntary action" which required the trial court to allow

Ms. Gorman to offer rebuttal testimony.[15] Thus, Pierce County invited the error that it now complains of on appeal. Pierce County solicited testimony on a subject that had previously been ruled inadmissible, so the trial court acted well within its discretion in allowing rebuttal testimony under the "open-door rule."

The trial court also did not abuse its discretion in admitting evidence of the fact of the prior complaints (*i.e.*, the number of prior complaints and the range of dates over which they occurred). All "relevant" evidence is admissible. ER 402. "Relevant" evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence. ER 401.

Here, evidence of the fact of the prior complaints was relevant to the issues of notice to Pierce County, Pierce County's actual knowledge of prior violations, and whether Pierce County's investigations of the complaints against Ms. Wilson, Betty, and Tank and failure to declare the dogs potentially dangerous were reasonable under the circumstances. Ms. McVicker testified:

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[15] Had the trial court not allowed Ms. Gorman to solicit rebuttal testimony, it would have been unfairly prejudicial to Ms. Gorman because the witnesses she had intended to call regarding details of the prior complaints, such as Ms. Aarhaus and Mr. Foster, had been excluded. RP 377-404; CP 1538-41; CP 1545.

Q Would you agree with me that – and I think you even testified under your direct – previous complaints about a dog owner's other dogs who were loose but didn't bite anybody is not substantial evidence to prove that a new dog is potentially dangerous?

A Correct. We look at all evidence for the history with regard to, for example, if somebody had a dog declared potentially dangerous once and maybe they gave that dog up, they got another dog and that dog is creating similar type of nuisance. We would see that perhaps that individual had a history with us, and so we would be pretty quick to declare that dog, and, you based on prior history.

Q So an officer might exercise their discretion quicker and take the harder action against a dog that meets the criteria based on the past history of that dog owner?

A Correct.

RP 989. The testimony of Officer Anderson also supported the trial court's determination that the evidence of prior complaints was relevant and admissible:

Q . . . It may not have been the same dogs, but it's the same owner, is it not?

A It's the same owner, yes.

Q And to the extent that you would consult that report [Ex. 10] or have that before you, it would have helped in August of '06; is that correct?

A I would have been – at that point, I would have been aware that there were some prior contacts with her; that she was an irresponsible pet owner, I guess.

That would have helped that much. . . .

RP 728. *See also* RP 701; RP 712. Pierce County Auditor Patrice A. McCarthy believed that "more information is better than less." Ex. 82 (Deposition of Patrice A. McCarthy) at 15:12-23.

The trial court did not abuse its discretion in admitting evidence of the fact that there were ten prior complaints against dogs (other than Betty and Tank) in Ms. Wilson's care during the years 2000-2006. The testimony by Ms. McVicker established that prior complaints against Ms. Wilson's other dogs should have had an effect on the County's response to the current complaints against Betty and Tank. Consequently, there was no prejudice to Pierce County as a result of the trial court's admission of this evidence. Ms. Gorman respectfully requests that the Court affirm the jury's verdict against Pierce County.

VI. ARGUMENT SUPPORTING MS. GORMAN'S CROSS-APPEAL

A. THE TRIAL COURT ERRED IN FAILING TO FIND THAT MS. GORMAN HAD NO DUTY TO SHUT HERSELF IN HER HOME INDEFINITELY TO PROTECT HERSELF FROM MARAUDING PIT BULLS.

This Court reviews a trial court's rulings on motions for directed verdicts and judgment notwithstanding the verdict *de novo*, viewing the facts in a light most favorable to the non-moving party. *Davis v.*

Microsoft Corp., 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003) (judgment as a matter of law at the close of plaintiff's case); *Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 767 n.12, 162 P.3d 1153 (2007) (judgment notwithstanding the verdict).

A showing of negligence requires proof of the following elements: (1) existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach and (4) proximate cause. *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). The existence of a legal duty is a question of law and "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Id.* at 67. Ms. Gorman could find no Washington case directly discussing the duty to keep one's door closed to protect oneself from marauding dogs; it appears that this is a case of first impression.

In criminal law, it has long been recognized that a person's home is her "castle." This rule has its basis in the Washington Constitution, article I, § 7, which provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." *See also State v. Young*, 76 Wn.2d 212, 214, 455 P.2d 595 (1969) ("It would unduly extend this opinion and serve no useful purpose to discuss the historical background and development of the doctrine, 'A man's home is his castle'—as embodied in the federal and state constitution and statutory

provisions quoted supra."). As Justice Cardozo once explained: "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat." 2 William L. Burdick, *The Law of Crime,* § 436h (1946). Most jurisdictions adhere to the concept that there is no duty to retreat in one's home, even if the attacker is a spouse, invitee, or member of the family. *Cannon v. State,* 464 So.2d 149, 150 (D. Ct. App. Fla. 1985), *rev. denied* 471 So.2d 44 (Fla. 1985).

A similar respect for private property rights exists in the civil context. Under RCW 64.04.030, a fee simple owner of land receives a covenant of "quiet and peaceable possession" of the premises. A landowner who believes that the "use and enjoyment" of her property has been interfered with has a common law cause of action for nuisance. *See, e.g., Vance v. XXXL Development, LLC,* 150 Wn. App. 39, 42, 206 P.3d 679 (2009).

Common law also provides that a property owner has no duty to fence his or her property to protect against trespassing domestic animals unless there is a statutory requirement to do so.[16] RESTATEMENT (SECOND) OF TORTS § 504 (1977); RESTATEMENT (FIRST) OF TORTS § 504

[16] Sue Gorman was under no statutory requirement to fence her back yard. *See* Gig Harbor Municipal Code § 17.01.080(B) ("Conformance required—Fence or shrub height").

(1938). *See also Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911) ("If for his own protection [the landowner] would be required to fence at all, he would only be required to fence against cattle running at large upon public highways, the public domain, or uninclosed private lands."). *Accord, Rayner v. Lowe,* 572 N.E.2d 245, 247 (Ct. App. Ohio 1989) (state statute construed to mean that a person has no duty to fence his land in order to protect it from a trespassing animal, and is not contributorily negligent if he fails to protect his property); *Ricca v. Bojorquez,* 473 P.2d 812, 813 (Ct. App. Ariz. 1970) ("In a no-fence district an owner of land is not required to fence out trespassing livestock in order to recover the damage they cause; rather, as at common law, the owner of the livestock has a duty to prevent their trespass . . .."); *Tate v. Ogg,* 195 S.E. 496, 498 (S. Ct. Va. 1938) ("As a general principle of law, every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another. This rule applies to acts of trespass by domestic animals, unless some provision of law requires the landowner to actually fence out such animals.").

Where a duty to protect oneself from harm is contrary to public policy, the Washington Supreme Court has found that the defense of comparative negligence is not available. *See, e.g., Gregoire v. City of Oak*

Harbor, 170 Wn.2d 628, 641, 244 P.3d 924 (2010) (duty of jail to protect inmates includes duty to protect inmate from self-inflicted harm, so defense of contributory negligence not available); *Christensen,* 156 Wn.2d at 67 (as a matter of public policy, student does not have a duty to protect herself from sexual abuse at school by her teacher).

At trial, the Defendants presented absolutely no legal authority supporting the position that Ms. Gorman was required by statute, common law, or otherwise to keep her sliding door closed or to flee her home to protect herself from marauding pit bulls. Ms. Gorman respectfully submits that she had no duty to keep her door closed or to flee her home, as such a duty would violate public policy.

To hold that Ms. Gorman had a duty to keep her door shut while she was inside her home would be inconsistent with her duty in other circumstances. For example, if Ms. Gorman had been attacked while doing yard work on her own property, she would not have had a duty to protect herself with a fence. *Kobayashi v. Strangeway,* 64 Wn. 36, 40, 116 P. 461 (1911). Similarly, if Ms. Gorman had been attacked while walking down her driveway to get to her mailbox, she would not have had a duty to protect herself with a fence or other barrier. *Id.* If Ms. Gorman had been attacked while walking on a public street or in a public park, she would not have had a duty to maintain barriers around herself as she

walked. If another human had attacked Ms. Gorman inside her house, Ms. Gorman would not have had a duty to flee. If no duty arises in the above situations, how then could a duty to protect herself from marauding pit bulls arise when Ms. Gorman was inside her house, asleep in her own bed?

Finding that Ms. Gorman had a duty to keep her door closed would also be problematic because the scope of the duty would be impossible to define. For example, when would Ms. Gorman's duty to keep her door closed have begun—back in 2000 when the first complaint against Ms. Wilson was reported? In 2006 when the first complaint against Betty and Tank was reported? How long would Ms. Gorman be required to keep her door closed to satisfy her duty? A few hours a day? All day? As long as Betty lived on the Wilson property? Forever? Would she ever be permitted to leave her door open? Would she also be required to keep her windows closed? Would the duty be different if Ms. Gorman were awake? How long would Ms. Gorman be required to assume that Ms. Wilson would continue violating animal control ordinances? How long would Ms. Gorman be required to assume that Pierce County would not enforce its animal control ordinances? Would Ms. Gorman be held to a higher standard of care because she had pets inside her house? Would Ms. Gorman be held to a higher standard of care because she was disabled? At

what point would Ms. Gorman's duty to keep her door closed infringe on her constitutional rights to liberty and the pursuit of happiness? *See, e.g.,* Ellen M. Bublick, "Comparative Fault to the Limits," 56 VANDERBILT L. REV. 977, 1029-33 (May 2003) (some courts have restricted comparative fault defenses where there is infringement on personal autonomy); Ellen M. Bublick, "Citizen No-Duty Rules: Rape Victims and Comparative Fault," 99 COLUM. L. REV. 1413, 1484-85 (Oct. 1999) (author argues that courts should be reluctant to permit comparative fault defenses where rape victim "fault" alleged is an activity that involves significant citizenship interests).

The trial court should have ruled as a matter of law that just as Ms. Gorman had no legal duty to fence her yard, she also had no legal duty to keep her sliding door closed. Because there was no duty for her to breach, Ms. Gorman could not have been negligent, and the issue of comparative or contributory negligence should never have gone to the jury. Ms. Gorman respectfully requests that the Court reverse the denial of Ms. Gorman's motions for directed verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury.

B. THE TRIAL COURT ERRED IN FAILING TO FIND THAT ONCE THE PIT BULL ATTACK COMMENCED, MS. GORMAN WAS FACED WITH AN EMERGENCY.

"The sudden emergency doctrine recognizes that when placed in a

position of danger, one does not always act as prudently as one might have had there been time for deliberation." *Kappelman v. Lutz,* 167 Wn.2d 1, 9, 217 P.3d 286 (2009). The doctrine comprehends the availability of and a possible choice between courses of action after the peril arises. *Id.* at 10. The doctrine holds that a person who is suddenly confronted by an emergency through no fault of her own and chooses a damaging course of action in order to avoid the emergency is not liable for negligence although the particular act might constitute negligence had no emergency been present. *Id.* Even where there is conflicting evidence, the emergency instruction may be proper. *Id.*

Here, if the Court concludes that the jury should have been instructed on comparative negligence, then the trial court erred in failing to find that Ms. Gorman was faced with a sudden emergency once the pit bull attack commenced. The undisputed evidence was that Ms. Gorman was asleep in her bed when Betty and Tank entered her bedroom, and the dogs began their attack by jumping up on Ms. Gorman's bed and biting her. Ms. Gorman was placed in a position of danger through no fault of her own.[17] Assuming, as the Defendants argued, that Ms. Gorman had a

[17] Prior to trial, the trial court had granted Ms. Gorman's motion for partial summary judgment on the affirmative defense of provocation. RP 976-89. There was also insufficient evidence presented that established Ms. Gorman acted unreasonably or that her actions were a proximate cause of her injuries. *See* Parts C-D below.

choice between fleeing the room and staying to defend Romeo, the fact that she had a choice between possible courses of action meant that the emergency doctrine applied. *Kappelman,* 167 Wn.2d at 9. The trial court should have given an emergency doctrine instruction and erred in declining to do so. *See* WPI 12.02.

Because the jury was not properly instructed on Ms. Gorman's duty during an emergency, the trial court's error was prejudicial. The jury evaluated Ms. Gorman's conduct using the ordinary comparative or contributory negligence standard, and Ms. Gorman was ultimately found 1% at fault. Ms. Gorman respectfully requests that the Court strike the jury's finding of comparative fault against Ms. Gorman.

C. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THERE WAS INSUFFICIENT EVIDENCE OF A BREACH OF A DUTY.

The Defendants carried the burden of proving that Sue was comparatively or contributorily negligent. WPI 21.03. The Defendants were therefore required to establish not only that Sue owed a duty to exercise reasonable care for her own safety, but also that she failed to exercise such care. *Alston v. Blythe,* 88 Wn. App. 26, 31-32, 943 P.2d 692 (1997). Here, even if the Court is not persuaded by Ms. Gorman's arguments regarding the duty and the emergency doctrine, the Defendants failed to present sufficient evidence of a "breach" at trial.

> A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct, when so judged, appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.
>
> This is not only the rule applicable generally to contributory negligence, but it has peculiar force and application to conditions which are the creations of a defendant relying upon the contributory negligence of the injured person to escape responsibility, when such conditions would naturally influence the action of the person charged with contributory negligence.

Hines v. Chicago, M. & St. P. Ry. Co., 105 Wn. 178, 184-85, 177 P. 795 (1918).

The undisputed evidence at trial was that Sue's neighborhood was safe enough for people to leave their sliding doors open at night, and her neighbors, including Rick Russell and Defendant Zachary Martin, did leave their doors open. Sue had been able to leave her pet door open during the five years prior to the August 21, 2007 attack without incident. Because Sue had never seen Betty or Tank roaming loose in the morning hours, she did not expect Betty and Tank to enter her home in the morning. Although Sue did not put a nail in the frame of the sliding door when she went to bed in the early morning hours before the attack, she testified that the pit bulls would probably have been able to push their way through even with the nail in place, because some neighborhood boys had

done the same thing.

The evidence also established that Sue was asleep in bed when Betty and Tank entered her bedroom, and that Sue began trying to defend herself immediately by raising her arm as Betty and Tank blocked her escape through the bedroom door. The Defendants presented no evidence suggesting that Sue had some other escape route available or that she could have gotten past the pit bulls. To the contrary, Sue stated that she felt herself getting weaker during the attack and that her first chance to get out of the house was when Betty and Tank turned from her to kill Romeo. RP 415-17; RP 1313-14; RP 1319-20.

Viewing the attack from the circumstances surrounding Sue at the time she was being attacked, there is not "substantial" evidence to support a finding of comparative negligence. At best, there is only a "scintilla" of evidence, which is not enough to support a verdict. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). The trial court should have granted judgment notwithstanding the verdict on this issue.

This conclusion is supported by comparable cases involving allegations of contributory or comparative negligence. In *Amrine v. Murray*, 28 Wn. App. 650, 626 P.2d 24 (1981), a case in which a guest passenger brought a personal injury action against a host driver, the Court of Appeals discussed what would constitute contributory negligence by a

passenger:

> Evidence of plaintiff's contributory negligence in failing to warn defendant that his wheel was about the leave the highway surface was clearly insufficient to present that theory to the jury. A passenger is not required to maintain the same degree of attention as is a driver. [citations omitted] **Nor is a passenger required to anticipate negligent acts on the part of the driver.** [citation omitted] In the absence of circumstances that would serve to put him on alert, a passenger is not required to keep a constant lookout for dangers or pay attention to ordinary road or traffic conditions. Id. He cannot be charged with contributory negligence unless, when the accident became imminent, there was something he might have done that he failed to do. [citation omitted] If knowledge of peril comes too late to warn the driver and avoid the accident, failure to communicate cannot constitute contributory negligence.

Id. at 656-57 (emphasis added). Like the passenger in *Amrine*, Sue should not have been required to anticipate that her neighbors would allow Betty and Tank to leave their property without supervision in the early morning hours on August 21, 2007. In leaving her pet door open the night before, she acted as reasonably as Rick Russell, her neighbor. She was not negligent.

In *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499 (2009), *rev. denied* 166 Wn.2d 1025, 217 P.3d 336 (2009), the Court of Appeals found that passengers on a bus were not contributorily negligent for their actions prior to an assault:

> Metro argues an instruction on contributory

> negligence was justified by the following evidence: Rollins and Hendershott did not alert the driver of their fears about the other passengers, did not move to the front of the bus, did not call for assistance, and did not get off the bus.
>
> We see no material issue of fact on contributory negligence on this evidence. It is undisputed that Rollins and Hendershott tried to avoid confrontation with the group, that their companion tried to alert the driver to the fight in the bus, which generated a violent response from the teens and no apparent reaction from the driver. There is no evidence that Hendershott and Rollins could have moved forward, which would have required making their way through the majority of the intimidating crowd. Nor is there evidence that moving forward would have kept them safe. Finally, even if it would have been reasonable for the teenagers to disembark and walk along Rainier Avenue late at night, Metro fails to explain how that constituted an avenue of escape, for it was when Hendershott and Rollins tried to leave the bus that the assault began in earnest. We agree with the trial court that the evidence leaves no doubt that Rollins and Hendershott acted reasonably under the circumstances. The evidence did not merit an instruction on contributory negligence.

Id. at 382-83. Like Metro in *Rollins,* the Defendants herein failed to present evidence supporting their alleged defense. The Defendants failed to show on a more probable than not basis that having the nail in Sue's door would have kept Betty and Tank out; that Sue had an available escape route other than her bedroom door; that Sue could have fought her way past the pit bulls that blocked the way to the bedroom door; that Sue would not have sustained further injury if she had tried to run away from the pit bulls; or that Sue would have sustained fewer injuries if she had not

tried to protect Romeo.[18] The Defendants' allegations of contributory negligence do not rise above speculation, and should not have gone to the jury.

In *Zukowsky v. Brown,* 1 Wn. App. 94, 459 P.2d 964 (1969), *rev. granted* 77 Wn.2d 961 (1970), *remanded* 79 Wn.2d 586, 488 P.2d 269 (1971), a guest passenger on a boat was injured when the helm seat on which she was sitting collapsed. *Id.* at 96. At the time of the collapse, the plaintiff was trying to swivel the seat around to look behind her. *Id.* at 97-98. The defendant argued that this constituted contributory negligence. The Court of Appeals disagreed:

> Not every action by a plaintiff, even though it be a cause of the mishap, can be characterized as negligent action. . . .
>
> There was neither substantial evidence nor circumstance in the record to support a conclusion that Mrs. Zukowsky's conduct under existing circumstances fell below the standard to which she should have conformed for her own protection. The instructions on contributory and comparative negligence should not have been given, and it was error to have submitted those issues to the jury.

Id. at 99-100. Here, Sue's act of leaving the pet door open did not fall below the standard to which she should have conformed for her own

[18] The undisputed testimony is that Sue was only able to escape her bedroom when Betty turned away from her to join Tank, who had managed to open the bedroom closet door and get Romeo. RP 415-17; RP 1313-14; RP 1319-20. Had Ms. Gorman not tried to save Romeo, he would not have been in the closet and the pit bulls may not have turned their attention away from Ms. Gorman to attack him. Thus, Ms. Gorman's attempts to

protection; her neighbors testified that they left their doors open at night, so there is no reason that Sue should not have been permitted to do the same. Similarly, Sue's act of trying to protect Romeo from attack did not fall below the standard to which she should have conformed for her own protection. The evidence established that the only reason Betty turned away from Sue was to help kill Romeo, who Sue had placed in the closet. Had Sue not placed Romeo in the closet, Betty and Tank may not have left her to finish Romeo off; Betty and Tank could very well have stayed focused on Sue and killed her instead. Her actions did not constitute negligence.

In *La Lone v. Smith,* 39 Wn.2d 167, 234 P.2d 893 (1951), a man assaulted a friend when the friend refused to loan him money for beer. In finding that there was no contributory negligence, the Washington Supreme Court stated:

> The findings do not afford any factual basis for this contention but, even if the findings had included in substance the statements quoted above, it does not seem to us to warrant a holding that respondent's acts amounted to contributory negligence because respondent was under no duty to placate Trask by loaning him money and thereby avoid a possible assault, regardless of previous loans to him. We cannot hold that respondent was guilty of contributory negligence in this case.

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save Romeo were just as likely to have decreased her injuries, perhaps even preserving her life.

Id. at 173. In the present case, Sue was under no duty to avoid a possible attack while she was laying asleep in her bed, regardless of Betty's prior attempts to lunge at her window and door. Sue's actions were reasonable and did not constitute negligence.

In *Reiboldt v. Bedient,* 17 Wn. App. 339, 562 P.2d 991 (1977), *rev. denied* 89 Wn.2d 1017 (1978), a tavern patron brought an action against the tavern owner for injuries the patron sustained when he was assaulted by another intoxicated patron. The Court of Appeals found that "[a] careful review of the record indicates no evidence upon which to base an instruction on contributory negligence." *Id.* at 345. Just as the tavern patron was not negligent relative to the assault on him, Sue was not negligent relative to the pit bull attack on her.

Pierce County may argue that Ms. Gorman was contributorily negligent in leaving the pet door open because Betty and Tank had come in her house through that door before. However, that incident involved very different facts than what occurred on August 21, 2007. In the middle of July 2007, Sue was playing with Misty and Romeo in her back yard. RP 1273-74. Misty and Romeo were barking and "having a lot of fun." *Id.* It was early evening and starting to get dark. RP 1274. As Sue, Misty, and Romeo came inside the house, Betty and Tank appeared and followed them in before Sue could get the sliding glass door closed. *Id.*

Sue was able to back Betty out of the sliding door, and Tank became very meek at that point. RP 1275. Tank would not go out the front door, so Sue put him out the back through the sliding glass door. *Id.*

Notably, the time period of this event, early evening, was consistent with Sue's testimony that she usually saw Betty and Tank loose in the afternoon or evenings. She had never seen Betty or Tank loose in the early morning prior to August 21, 2007. Also, Sue had been outside playing with dogs that were barking and making a commotion immediately before Betty and Tank came in, whereas on the morning of August 21, 2007, Sue was laying in her bed asleep. The fact that Betty and Tank followed her in after she played with Misty and Romeo during early evening hours would not have put Sue on notice that Betty and Tank would enter her home in the morning while she was sleeping. She was not comparatively or contributorily negligent in leaving her sliding glass door open.

D. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THERE WAS INSUFFICIENT EVIDENCE THAT ANY ALLEGED COMPARATIVE NEGLIGENCE WAS THE PROXIMATE CAUSE OF ANY INJURY.

Assuming arguendo that Ms. Gorman was somehow negligent, the Defendants still failed to present sufficient evidence that her negligence proximately caused her injuries and damages.

While Ms. Gorman stated that she did not put a nail in her door to stop it from opening wider, she explained that she did not think the presence of the nail would have mattered on August 21, 2007. Some neighborhood boys had been able to push the door open while the nail was in place, and Ms. Gorman felt that Betty and Tank could probably have done the same. The Defendants presented no evidence to contradict this.

Furthermore, Ms. Gorman testified that when the attack began, Betty and Tank were between her and her bedroom door and she could not get past them. She got weaker as the attack progressed. Her first opportunity to escape was when Betty and Tank turned to kill Romeo.

Based on this undisputed testimony, Ms. Gorman's actions could not have been the proximate cause of her injuries or damages. "But for" the Defendants' failure to follow or enforce Pierce County's animal control ordinances, the August 21, 2007 attack would not have occurred and Ms. Gorman would not have been injured. The trial court erred in failing to grant Ms. Gorman's motion for judgment notwithstanding a verdict on the issue of Ms. Gorman's comparative negligence.

VII. CONCLUSION

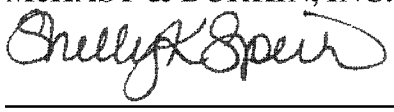
Based on the foregoing, Ms. Gorman respectfully requests that the Court affirm the jury's verdict against Pierce County. She also requests that the Court reverse the trial court's rulings on her motions for a directed

verdict and judgment notwithstanding the verdict, and strike the 1% comparative fault assessed by the jury.

In making these requests, Ms. Gorman wishes to make clear if her cross-appeal is granted, only the issue of comparative or contributory negligence will be affected; damages will not. *Heilman v. Wentworth,* 18 Wn. App. 751, 756, 571 P.2d 963 (1977), *rev. denied* 90 Wn.2d 1004 (1978). If the Court grants the relief requested, Ms. Gorman is willing to waive recovery of the 1% unallocated damages so that a retrial would not be necessary. The Defendants would be jointly and severally liable for the remaining 99% of Ms. Gorman's damages.

Respectfully submitted this 15th day of March, 2012.

TROUP, CHRISTNACHT, LADENBURG, McKASY & DURKIN, INC., P.S.



SHELLY K. SPEIR, WSBA # 27979
Of Attorneys for Respondent

CERTIFICATE OF SERVICE
Pursuant to CR 5(b), I certify that copies of this document were mailed or transmitted by messenger this date to all parties or their counsel of record.
DATED this 15th day of March, 2012.

Shelly K. Speir, WSBA # 27979

IN THE COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

SUE ANN GORMAN, Respondent/Cross-Appellant, v. PIERCE COUNTY, Appellant.	NO. 42502-5-II **CERTIFICATE OF SERVICE**

Shelly K. Speir, on oath, hereby states and declares:

On March 15, 2012, I caused copies of the Respondent/Cross-Appellant's Opening Brief and this Certificate of Service to be filed with the Court and served via legal messenger on the following:

Ronald L. Williams
Deputy Prosecuting Attorney for Pierce County
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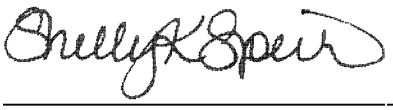
I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate to the best of my knowledge.

DATED this 15th day of March, 2012 at Tacoma, Washington.



SHELLY K. SPEIR, WSBA # 27979

RESPONDENT/
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APPENDIX 1

Chapter 6.02

ANIMAL CONTROL - GENERAL PROVISIONS

Sections: **Page #**

6.02.010 Definitions

As used in this Title, the following terms shall have the following meanings:

A. "Adult" means any animal over the age of seven months.

B. "Altered" shall mean to permanently render incapable of reproduction (spayed or neutered).

C "Animal" means any nonhuman mammal, bird, reptile or amphibian excluding livestock and poultry as defined herein.

D. "Animal Control Agency" means that animal control organization authorized by Pierce County to enforce its animal control provisions.

E. "Animal Shelter" means that animal control facility authorized by Pierce County.

F. "At large" means off the premises of the owner or keeper of the animal, and not under restraint by leash or chain or not otherwise controlled by a competent person.

G. "Auditor" means Pierce County Auditor.

H. "Cat" means and includes female, spayed female, male and neutered male cats.

I. "Competent person" means a person who is able to sufficiently care for, control, and restrain his/her animal, and who has the capacity to exercise sound judgment regarding the rights and safety of others.

J. "County" means Pierce County.

K. "Court" means District Court or the Superior Court, which courts shall have concurrent jurisdiction hereunder.

L. "Dog" means and includes female, spayed female, male and neutered male dogs.

M. "Gross Misdemeanor" means a type of crime classification, while not a felony, is ranked as a serious misdemeanor. The maximum penalty for a gross misdemeanor is 365 days in jail and/or a $5,000.00 fine.
N. "Humane trap" means a live animal box enclosure trap designed to capture and hold an animal without injury.
O. "Impound" means to receive into the custody of the Animal Control Shelter, or into the custody of the Director or his/her authorized agent or deputy.
P. "Juvenile" means any animal from weaning to seven months of age.
Q. "Livestock" means all cattle, sheep, goats, or animals of the bovidae family; all horses, mules, other hoof animals, or animals of the equidae family; all pigs, swine, or animals of the suidae family; llamas; and ostriches, rhea, and emu.
R. "Misdemeanor" means a maximum penalty of 90 days in jail and/or a $1,000.00 fine, pursuant to Section 1.12.010 of this Code.
S. "Owner" means any person, firm, or corporation owning, having an interest in, or having control or custody or possession of any animal.
T. "Potentially Dangerous Dog" means any dog that when unprovoked:

(a) Inflicts bites on a human, domestic animal, or livestock on public or private property,
(b) Chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or
(c) Any dog with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.

U. "Poultry" means domestic fowl normally raised for eggs or meat, and includes chickens, turkeys, ducks and geese.
V. "Securely enclosed and locked" means a pen or structure which has secure sides and a secure top. If the pen or structure has no bottom secured to the sides, then the sides must be embedded in the ground no less than one foot.
W. "Unconfined" means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal. (Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 92-35 § 1 (part), 1992, Ord. 89-235 § 3, 1990; Ord. 87-40S § 1 (part), 1987)

6.02.020 Authorized Agents May Perform Duties

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff. (Ord. 87-40S § 1 (part), 1987)

6.02.025 Licenses Required

Licenses required are for regulation and control. This entire Title shall be deemed an exercise of the power of the State of Washington and of the County of Pierce to license for regulation and/or control and all its provisions shall be liberally construed for the accomplishment of either or both such purposes. (Ord. 2005-108 § 1 (part), 2005)

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AA. "Severe injury" means any physical injury which results in broken bones or disfiguring lacerations.

BB. "Unconfined" means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal.

CC. "Vicious" means chasing or approaching a person or animal in a menacing or apparent attitude of attack or the known propensity to do any act which might endanger the safety of any person, animal, or property of another.

DD. "Warning Sign" means a clearly visible and conspicuously displayed sign containing words and a symbol (to inform children or others incapable of reading) warning that there is a dangerous animal on the property.

(Ord. 2011-43s § 1 (part), 2011; Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 92-35 § 1 (part), 1992, Ord. 89-235 § 3, 1990; Ord. 87-40S § 1 (part), 1987)

6.02.020 Authorized Agents May Perform Duties.

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff.

A. The animal control authority shall be a division of the Pierce County Auditor. The duly elected auditor of Pierce County shall be the director of the animal control authority.

B. The animal control authority is authorized to enforce the provisions of the Pierce County Code and the laws of the State of Washington as they pertain to animals.

C. All animal control officers must be special deputies commissioned by the Pierce County Sheriff.

(Ord. 2008-14 § 1 (part), 2008; Ord. 87-40S § 1 (part), 1987)

6.02.025 Licenses Required.

Licenses required are for regulation and control. This entire Title shall be deemed an exercise of the power of the State of Washington and of the County of Pierce to license for regulation and/or control and all its provisions shall be liberally construed for the accomplishment of either or both such purposes. (Ord. 2005-108 § 1 (part), 2005)

6.02.030 Authority to Pursue.

Those employees or agents of the County charged with the duty of seizing animals running at large may pursue such animals onto County-owned property, vacant property, and unenclosed private property, and seize, remove, and impound the same. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

6.02.040 Notice of Impounding Animal.

Upon the impoundment of any animal under the provisions of this Title, the animal control agency shall immediately notify the owner, if the owner is known, of the impounding of such animal, and of the terms upon which said animal can be redeemed. The impounding authority shall retain said animal for 48 hours following actual notice to the owner. The notifying of any person over the age of 18 who resides at the owner's domicile shall constitute actual notice to the owner. If the owner of said animal so impounded is unknown, then said animal control agency shall make a reasonable effort to locate and notify the owner of said animal. (Ord. 99-17 § 1 (part); 1999; Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

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APPENDIX 3

4. The owner purchases the license(s) voluntarily, prior to in person or field contact by animal control personnel; or
5. The owner submits other proof deemed acceptable in the animal control authority's administrative policy. (Ord. 97-111 § 4 (part), 1997; Ord. 92-35 § 3 (part), 1992; Ord. 87-40S § 3 (part), 1987)

6.04.050 License Not Transferable

Dog or cat licenses as provided for in this Chapter shall be nontransferable. A person may use a license for another dog or cat that he/she owns, if the dog or cat for which it was issued is no longer owned by such person. It is unlawful for any person to give, sell, exchange, or otherwise transfer a dog or cat license to another person, even if it is to be used for the same dog or cat for which it was originally issued. (Ord. 87-40S § 3 (part), 1987)

6.04.060 License Violation - Civil Infraction

Any violation of Sections 6.04.010, 6.04.020, or 6.04.050 of this Chapter is unlawful and shall constitute a civil infraction pursuant to Chapter 1.16 PCC. Provided, that if the person presents evidence of a valid license to the District Court, the citation shall be dismissed without cost, except that the court may assess court administration costs of $25.00 at the time of dismissal. (Ord. 99-17 § 3 (part), 1999; Ord. 97-111 § 4 (part), 1997; Ord. 87-40S § 3 (part), 1987)

Chapter 6.07

POTENTIALLY DANGEROUS DOGS

Sections:

6.07.010 Declaration of Dogs as Potentially Dangerous - Procedure

A. The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions set forth in Section 6.02.010 Q. The finding must be based upon:
1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 Q.; or
2. Dog bite reports filed with the County or the County's designee; or
3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
4. Other substantial evidence.

B. The declaration of a potentially dangerous dog shall be in writing and shall be served on the owner in one of the following methods:
1. Certified mail to the owner's last known address; or
2. Personally; or
3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation.

C. The declaration shall state at least:
1. The description of the animal.
2. The name and address of the owner of the animal, if known.
3. The whereabouts of the animal if it is not in the custody of the owner.
4. The facts upon which the declaration of potentially dangerous dog is based.
5. The availability of a hearing in case the person objects to the declaration, if a request is made within ten days.
6. The restrictions placed on the animal as a result of the declaration of a potentially dangerous dog.
7. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.

D. If the owner of the animal wishes to object to the declaration of a potentially dangerous dog:
1. The owner may request a hearing before the Director's designee County, or the County's designee, by submitting a written request and payment of a $25.00 administrative review fee to the Auditor or the Auditor's designee within ten days of receipt of the declaration, or within ten days of the publication of the declaration pursuant to Section 6.07.010 B.3.
2. If the County or the County's designee finds that there is insufficient evidence to support the declaration, it shall be rescinded, and the restrictions imposed thereby annulled.
3. If the County or the County's designee finds sufficient evidence to support declaration, the owner may appeal such decision pursuant to Pierce County Hearing Examiner Code; provided that the appeal and the payment of an appeal fee of $75.00 must be submitted to the Auditor or the Auditor's designee within ten working days after the County or the County's designee finds sufficient evidence to support the declaration.
4. An appeal of the Hearing Examiner's decision must be filed in Superior Court within 30 days of the date of the Hearing Examiner's written decision.
5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of potentially dangerous dogs to allow or permit such dog to:
a. Be unconfined on the premises of the owner; or
b. Go beyond the premises of the owner unless such dog is securely leashed and humanely muzzled or otherwise securely restrained. (Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-40S § 4 (part), 1987)

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APPENDIX 4

Chapter 6.07

DANGEROUS AND POTENTIALLY DANGEROUS ANIMALS

Sections:

6.07.010 Declaration of Animals as Potentially Dangerous – Procedure.

A. The animal control authority shall have the ability to declare an animal as potentially dangerous if the animal control officer has a reasonable belief that the animal's conduct falls within the definition of a potentially dangerous animal as set forth in Section 6.02.010 X. and that the exclusion contained in Section 6.07.010 B. does not apply. The finding must be based upon:
   1. The written or verbal complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 X.; or
   2. Animal bite reports filed with the County or the County's designee; or
   3. Actions of the animal witnessed by any animal control officer or law enforcement officer; or
   4. Other substantial evidence.

B. **Exclusions.** An animal shall not be declared potentially dangerous if the threat, injury, or bite alleged to have been committed by the animal was sustained by a person who was at the time committing a willful trespass or other tort upon the premises occupied by the owner of the animal, or who was tormenting, abusing, or assaulting the animal, or who was committing or attempting to commit a crime.

C. The declaration of a potentially dangerous animal shall be in writing and shall be served on the owner in one of the following methods:
   1. Regular and certified mail to the owner's last known address. Service shall be deemed complete upon the third day following the day upon which the notice was placed in the mail; or
   2. Personally; or
   3. If the owner cannot be located by one of the first two methods, by posting the declaration in a conspicuous location at the owner's residence.

D. The declaration shall state at least:
   1. The description of the animal.
   2. The name and address of the owner of the animal, if known.
   3. The whereabouts of the animal if it is not in the custody of the owner.
   4. A brief statement of facts upon which the declaration of potentially dangerous animal is based.

5. A reference to the Code Section that contains the definition of a potentially dangerous animal and to this Section.
6. The availability of a hearing in case the person objects to the declaration, if a request is made within ten calendar days.
7. The restrictions placed on the animal as a result of the declaration of a potentially dangerous animal.
8. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.

E. 1. The owner of the animal may appeal the declaration of potentially dangerous animal by filing an appeal of the declaration to the Pierce County Hearing Examiner.
   a. The owner must submit a written appeal and pay a $250.00 appeal fee at the Auditor's office within ten calendar days of service of the declaration.
   b. Except as provided by this Chapter, the appeal shall proceed in accordance with the Pierce County Hearing Examiner Code, Chapter 1.22 PCC.
   c. Notice of the public hearing shall be mailed to the owner at the address listed on the notice of appeal.
   d. At the public hearing, the scope of evidence and the scope of review shall be de novo.
   e. The burden shall be on the County to prove, by a preponderance of evidence, that the animal is a potentially dangerous animal as defined in PCC 6.02.010 X. and that the exclusion contained in PCC 6.07.010 B. does not apply.
   f. The Hearing Examiner shall render a decision on the appeal within 30 calendar days following the conclusion of all testimony and hearings and closing of the record unless a longer period of time is agreed to by the parties.

2. The Auditor may adopt a policy that allows a reduction of the fees listed in this Section where the owner resides in a low income household.
3. The decision of the Hearing Examiner shall be considered final and conclusive unless a writ of review is filed in Superior Court within 20 calendar days of the Examiner's decision.
4. If the owner prevails on appeal, the appeal fees listed in this Section shall be refunded to the owner.
5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of a potentially dangerous animal to allow or permit such animal to go beyond the premises of the owner unless such animal is securely leashed, under the control of a competent adult, and humanely muzzled or otherwise securely restrained. Upon noncompliance with this subsection, the animal control authority is authorized to impound the animal subject to the procedures set forth in PCC 6.02.040 through 6.02.088.

(Ord. 2011-43s § 1 (part), 2011; Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-40S § 4 (part), 1987)

6.07.015 Declaration of Animals as Dangerous – Procedure.

A. The animal control authority shall have the ability to declare an animal as dangerous if the animal control officer has a reasonable belief that the animal's conduct falls within the definition of a dangerous animal as set forth in Section 6.02.010 N. and the exclusion contained in PCC 6.07.015 B. does not apply. The finding must be based upon:

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6.07.020 Permits and Fees

Following a declaration of a potentially dangerous dog and the exhaustion of the appeal there from, the owner of a potentially dangerous dog shall obtain a permit for such dog from the animal control agency, and shall be required to pay the fee for such permit in the amount of $250.00 to the Auditor or the Auditor's designee. In addition, the owner of a potentially dangerous dog shall pay an annual renewal fee for such permit in the amount of $50.00 to the Auditor or the Auditor's designee. Should the owner of a potentially dangerous dog fail to obtain a permit for such dog or to appeal the declaration of a potentially dangerous dog, the County or the County's designee is authorized to seize and impound such dog and, after notification to the owner, hold the dog for a period of no more than five days before destruction of such dog. (Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 6

6.07.030 Confinement and Identification of Potentially Dangerous Dogs

A. Following a declaration of a potentially dangerous dog and the exhaustion of the appeal there from, it shall be unlawful for the person owning or harboring or having care of such potentially dangerous dog to allow and/or permit such dog to:
1. Be unconfined on the premises of such person; or
2. Go beyond the premises of such person unless such dog is securely leashed and humanely muzzled or otherwise securely restrained.

B. Potentially dangerous dog(s) must be tattooed or have a microchip implanted for identification. Identification information must be on record with the Pierce County Auditor. (Ord. 2005-108 § 1 (part), 2005; Ord. 97-111 § 5, 1997; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

RESPONDENT/
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APPENDIX 7

6.07.040 Penalty for Violation

Any person who violates a provision of this Chapter shall, upon conviction thereof, be found guilty of a misdemeanor. In addition, any person found guilty of violating this Chapter shall pay all expenses, including shelter, food, veterinary expenses for identification or certification of the breed of the animal or boarding and veterinary expenses necessitated by the seizure of any dog for the protection of the public, and such other expenses as may be required for the destruction of any such dog. Provided, that any potentially dangerous dog which is in violation of the restrictions contained in Section 6.07.020 of this Code or restrictions imposed as part of a declaration as a potentially dangerous dog, shall be seized and impounded. Furthermore, any potentially dangerous dog which attacks a human being, domestic animal, or livestock may be ordered destroyed when, in the court's judgment, such potentially dangerous dog represents a continuing threat of serious harm to human beings or domestic animals. (Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 8

Chapter 17.01
GENERAL PROVISIONS

Sections:

17.01.010 Title.

This title shall be known and cited as the "Zoning Ordinance of the City of Gig Harbor, Washington," as passed and adopted by Ordinance 573, approved on February 26, 1990. (Ord. 573 § 2, 1990).

17.01.020 Purpose.

A. The purpose of this title is to regulate the use of land and improvements by districts in accordance with the city comprehensive plan. These zoning regulations are designed to provide for orderly development, to lessen street congestion, to promote fire safety and public order, to protect the public health and general welfare, to prevent overcrowding, and to stimulate the systematic development of transportation, water, sewer, schools, parks, storm drainage and other public facilities.

B. It is further intended that any financial responsibility of the developer for work to be done on city streets, bounding in close proximity to and/or giving access to the development, which arises out of the provisions of this chapter, be made the subject of a contractual agreement between the developer and the city, and that such contractual agreement shall contain provisions to effectuate other sections of this chapter. (Ord. 573 § 2, 1990).

17.01.030 Conformity with regulations required.

No building or land within the city of shall hereafter be occupied or used and no building or part thereof shall be erected, moved or altered unless in conformity with applicable provisions specified in this title. (Ord. 573 § 2, 1990).

17.01.040 Public uses.

A. Approval Required to Insure Conformity. To insure that public uses and structures conform to the general community pattern and to the regulations governing private uses and development, agencies of the federal government, the state of Washington and its political subdivisions, including the city of Gig Harbor, shall submit plans and receive approvals in conformity with the regulations outlined herein when any activity covered by this title is contemplated in the city. (Ord. 605 § 2, 1991; Ord. 573 § 2, 1990).

17.01.050 Interpretation and application of provisions.
The provisions of this title shall be the minimum regulations and shall apply uniformly within each district and each class or kind of building, structure, land or water area, except as hereinafter specifically provided. (Ord. 573 § 2, 1990).

17.01.060 Conflict with other regulations.
Whenever the regulations of this title are at variance with the requirements of any other lawfully adopted rule or regulation or ordinance of the city, then the most restrictive of these provisions, or the provision imposing the highest standards as the case may be, shall apply. (Ord. 573 § 2, 1990).

17.01.070 Public notice.
Repealed by Ord. 702. (Ord. 652 § 3, 1993; Ord. 573 § 2, 1990).

17.01.080 Conformance required – Fence or shrub height.
A. In order to maintain and preserve safe vision purposes on all corner lots, there shall be no fences, shrubs or other physical obstructions within 20 feet of the apex of the property corner at the intersecting streets, higher than 36 inches above the existing grade.

B. On interior lots a fence not exceeding six feet in height above the existing grade may be located anywhere from the front yard setback line to the rear property line. Within the front yard, a fence not exceeding three feet in height may be constructed to the side yard property lines with provisions for safe vision clearance where a driveway intersects the fronting street.

C. Fences shall not be constructed of plywood or composition sheeting. (Ord. 702 § 3, 1996; Ord. 667 § 2, 1994; Ord. 652 § 2, 1993; Ord. 109A § 3, 1968. Formerly 17.08.010).

17.01.090 Temporary trailers.
A. Temporary trailers are portable trailers used for a construction office, sales office, or caretaker's quarters during the course of construction of building(s) in a plat or site plan. Temporary trailers shall be located on a lot within the site plan or plat.

B. Prior to the use of a temporary trailer on any site, a temporary use permit shall be obtained. Temporary use permits are a Type I project permit application and shall be processed as set forth in GHMC Title 19.

C. Temporary trailers must have an approved sewage disposal system, water supply, and electrical connection.

D. A temporary use permit may be issued for a period not to exceed one year; provided, the department, for good cause shown, may renew the permit for an additional six-month period, at which time the temporary trailer and all appurtenances thereto shall be removed from the property.

E. Performance Assurance. Prior to the issuance of a temporary use permit under the provisions of this section, the property owner shall submit a performance surety bond equal to not less than the 110 percent of the cost to remove the temporary trailer and all appurtenances thereto. The performance surety bond shall be executed by a surety

company authorized to transact business in the state in a form approved by the city attorney.

1. The property owner shall provide the city with a nonrevocable notarized agreement granting the city and its agents the right to enter the property and remove the temporary trailer and all appurtenances thereto.

2. If the property owner fails to remove the temporary trailer and appurtenances thereto and the city has incurred costs or expenses to remove such, the city shall call on the bond for reimbursement. If the amount of the bond is less than the cost and expense incurred by the city, the property owner shall be liable to the city for the difference. If the amount of the bond exceeds the cost and expense incurred by the city, the remainder shall be released. (Ord. 1194 § 4, 2010; Ord. 702 § 5, 1996).

17.01.100 Exceptions to minimum lot area.
Repealed by Ord. 1194. (Ord. 1106 § 2, 2007).

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 9

INSTRUCTION NO. 5

The plaintiff Sue Gorman claims that the defendant Pierce County was negligent in one or more of the following respects:

(1) failing to classify and control a potentially dangerous dog;

(2) failing to protect the public from a potentially dangerous dog;

(3) failing to confiscate and confine a potentially dangerous dog.

The plaintiff claims that defendant Pierce County's conduct was a proximate cause of injuries and damages to plaintiff. The Defendant Pierce County denies these claims.

The plaintiff claims the defendants Shellie Wilson/ Zachary Martin and Jacqueline Evans-Hubbard were both owners of dogs that attacked and bit the plaintiff Sue Gorman while she was in a private place, so they are strictly liable for any damages suffered by Sue Gorman. Defendants Wilson/Martin and Evans-Hubbard admit these claims.

All defendants further deny the nature and extent of the claimed injuries and damages.

In addition, the defendants claim as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects:

(1) leaving her door open so the dogs could enter, knowing of their potential for harm; and

(2) in attempting to rescue the Jack Russell terrier instead of fleeing for her own safety.

The defendants claim that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 10

INSTRUCTION NO. 7

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 11

INSTRUCTION NO. 8

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages if any.

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 12

INSTRUCTION NO. 11

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant Pierce County acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that defendants Wilson/Martin and Evans-Hubbard were each the owners of dogs that bit a person while in a private place and therefore are at fault and therefore strictly liable for damages suffered by the person;

Third, that the plaintiff was injured;

Fourth, that the negligence of Pierce County and/or the fault of the other defendants was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved against one or more of the defendants, your verdict should be for the plaintiff and against the defendant or those defendants. On the other hand, if any of these propositions has not been proved against one or more of the defendants, your verdict should be for that defendant or those defendants.

The defendants have the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 13

INSTRUCTION NO. 22

You do not need to decide whether the defendants Wilson/Martin and Evans-Hubbard were at fault. The defendants' fault has already been established. Accordingly, the answer to Question 1 in the special verdict form furnished to you, is "yes," and that answer has been filled in for you on the verdict form. You are to decide what damages to plaintiff were proximately caused by the defendants' fault and what amount plaintiff should recover. The plaintiff has the burden of proof on these issues.

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 14

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

SUE ANNE GORMAN, a single person, Plaintiff, v. PIERCE COUNTY, a county corporation; SHELLIE R. WILSON and "JOHN DOE" WILSON, husband and wife and the marital community composed thereof; ZACHARY MARTIN and "JANE DOE" MARTIN, husband and wife and the marital community composed thereof; and JACQUELINE EVANS-HUBBARD and "JOHN DOE" HUBBARD, husband and wife and the martial community composed thereof. Defendants.	NO. 10-2-11380-6 **SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the defendants negligent or at fault? (*Answer "yes" or "no" after the name of each defendant.*)

ANSWER:

Defendant Pierce County:	YES
Defendants Zachary Martin/Shellie Wilson:	YES
Defendant Jacqueline Evans-Hubbard:	YES

(INSTRUCTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence or fault a proximate cause of injury or damage to the plaintiff? (*Answer "yes" or "no" after the name of each defendant found negligent or at fault by you in Question 1.*)

ANSWER:

Defendant Pierce County:	YES
Defendants Zachary Martin/Shellie Wilson:	YES
Defendant Jacqueline Evans-Hubbard:	YES

(INSTRUCTION: If you answered "no" to Question 2 as to all defendants, sign this verdict form. If you answered "yes" to Question 2 as to any defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? (Do not consider the issue of contributory negligence, if any, in your answer.)

ANSWER:

For past economic damages	$ 94,605.65
For future economic damages	$ 12,300.00
For past and future noneconomic damages	$2,100,000.00

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff negligent?

ANSWER: (*Write "yes" or "no"*) YES

(INSTRUCTION: If you answered "no" to Question 4, skip Question 5, and answer Question 6. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: (*Write "yes" or "no"*) YES

(INSTRUCTION: If you answered "no" to Question 5, answer Question 6. If you answered "yes" to Question 5, skip Question 6 and answer Question7.)

QUESTION 6: Assume that 100% represents the total combined negligence and/or fault that proximately caused the plaintiff's injury or damage. What percentage of this 100% is attributable to each defendant whose negligence or fault was found by you in Question No. 2 to have been a proximate cause of the injury or damage to the plaintiff? Your total must equal 100%.

ANSWER:

Defendant Pierce County:	_____
Defendants Zachary Martin/Shellie Wilson:	_____
Defendant Jacqueline Evans-Hubbard:	_____
TOTAL:	100%

(INSTRUCTION: Sign this verdict form and notify the judicial assistant.)

QUESTION 7: Assume that 100% represents the total combined negligence and/or fault that proximately caused the plaintiff's injury and damage. What percentage of this 100% is attributable to the plaintiff's negligence and what percentage of this 100% is attributable to the negligence and/or fault of each defendant whose negligence or fault was found by you in Question 2 to have been a proximate cause of the injury and damage to the plaintiff? Your total must equal 100%.

ANSWER:

Plaintiff Sue Gorman:	1%
Defendant Pierce County:	42%
Defendants Zachary Martin/Shellie Wilson:	52%
Defendant Jacqueline Evans-Hubbard:	5%
TOTAL:	100%

(INSTRUCTION: Sign this verdict form and notify the judicial assistant.)

Date: 8-12-2011

Brandi Lawrence
Presiding Juror

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 15

464 So.2d 149
District Court of Appeal of Florida,
Fifth District.

Cora CANNON, Appellant,
v.
STATE of Florida, Appellee.

No. 83-531. | Jan. 3, 1985. | Rehearing Denied Jan. 30, 1985.

Defendant was convicted in the Circuit Court, Seminole County, Robert B. McGregor, J., of manslaughter, and she appealed. The District Court of Appeal, Sharp, J., held that evidence on issue whether defendant initiated fatal battle with her husband, whose status in the house in which defendant was staying was similar to that of an invitee or guest, and thus, whether or not defendant had duty to retreat, presents jury question.

Reversed and remanded.

West Headnotes (3)

1 **Homicide**
Confrontation on Accused's Own Premises

In the case of an attack by a houseguest or a friend, there is no duty to retreat in the home.

6 Cases that cite this headnote

2 **Homicide**
Withdrawal After Aggression

An aggressor or mutual combatant must "retreat to the wall" before using deadly force.

8 Cases that cite this headnote

3 **Homicide**
Aggression or Provocation by Accused

In manslaughter prosecution, evidence on issue whether defendant initiated fatal battle with her husband, whose status in the house in which wife was staying was similar to that of an invitee or guest, or became a mutual combatant, and thus, whether defendant had duty to retreat, presented jury question. West's F.S.A. § 782.07.

1 Cases that cite this headnote

Attorneys and Law Firms

*150 James B. Gibson, Public Defender, and Larry B. Henderson, Asst. Public Defender, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Kenneth McLaughlin, Asst. Atty. Gen., Daytona Beach, for appellee.

Opinion

SHARP, Judge.

Cora Cannon appeals from a judgment adjudicating her guilty of manslaughter[1] for the fatal stabbing of her husband, Larry. She argues the trial court erred in not giving the defense's requested jury instruction that she had no duty to retreat because her husband attacked her in her home without provocation. Instead the court instructed the jury:

The defendant cannot justify her use of force likely to cause death or great bodily harm unless she used every reasonable means within her power and consistent with her own safety to avoid the danger before resorting to that force.

The fact that the Defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if, by retreating, she could have avoided the need to use that force.

We reverse.

Back in the days of Coke, Hale and Hawk, any man who was feloniously attacked without provocation could stand his ground *anywhere,* not retreat, and use deadly force if necessary to repel the attacker.[2] However, as the centuries passed, the common law placed greater emphasis on the sanctity of life as opposed to chivalry. A duty to retreat evolved and the courts said that a person under attack had to "retreat to the wall or ditch"[3] before taking a life.
One of the exceptions to the duty to retreat was when a person was attacked in his home.[4] Mr. Justice Cardozo said "It is not now and never has been the law that a man

assailed in his own dwelling is bound to retreat." W. Burdick, *supra* note 1, at 133. The rationale was that a person in his own home had already retreated "to the wall" as there was no place to which he could further flee in safety. "Whither shall he flee, and how far and when may he be permitted to return?" *Jones v. State,* 76 Ala. 8 (1884), *quoted in* 2 C. Torcia, *Wharton's Criminal Law,* 135 (14th ed. 1979). Most jurisdictions adhere to the concept that there is no duty to retreat in one's home, even if the attacker is a spouse, invitee, or member of the family.5

***151** 1 However, Florida has adopted a variant of this rule that imposes on a person being feloniously attacked in his home a duty to retreat before the onslaught, if the attacker has a right at least equal to that of the person under attack to be on the premises. *See State v. Bobbitt,* 415 So.2d 724 (Fla.1982) (spouses both residing in their marital home); *Conner v. State,* 361 So.2d 774 (Fla. 4th DCA 1978) (mother and son who shared living quarters). In the case of an attack by a house guest or friend, however, there is no duty to retreat in the home. *Hedges v. State,* 172 So.2d 824 (Fla.1965); *Johnson v. State,* 432 So.2d 583 (Fla. 4th DCA 1983).

In this case there was substantial evidence that the decedent and Cannon were not sharing the residence on an equal basis when the attack occurred. They were separated. When she was attacked, Cannon was sharing the home with her daughter, Sherrie, who was the actual tenant on the oral lease for their house. Because Larry had no money, no job, and nowhere to sleep, they allowed him to stay at their residence for a few days-provided he "behaved himself." His clothes and belongings were in his pickup truck.

Larry apparently was a chronic alcoholic, and when drunk, would sometimes become violent. Cannon testified she had frequently been beaten and abused by him. On the night of the fatal stabbing, Larry became highly intoxicated, went into Cannon's bedroom and began beating her up. His blood alcohol level tested .277 at the time he died.

Although there were at least three versions of the ensuing events, looking at the one most favorable to support Cannon's requested instruction,6 it appears that Cannon left her bedroom in her nightgown and bare feet after suffering Larry's initial unprovoked attack. Sherrie intervened and calmed Larry down. When they told Larry to leave the house, he refused. Sherrie then persuaded Cannon that they should leave. While Sherrie was sitting in the living room watching television, Cannon made her preparations to leave. She first armed herself with a knife from the kitchen. Then she returned to her bedroom to retrieve her purse, car keys, and clothes. Without any provocation by Cannon, Larry renewed the attack. She fought back, fatally stabbing Larry by severing the illiac artery in his groin.

2 3 It appears from this record that Larry Cannon's status in the household was more similar to an invitee or guest, as in *Hedges* and *Johnson* than the persons in *Bobbitt* and *Conner.* Therefore, appellant was entitled to have the "no duty to retreat instruction" given to the jury if there was any evidence the jury could have relied upon to find that Cannon did not initiate the second fatal battle or become a mutual combatant. An aggressor or a mutual combatant must "retreat to the wall" before they can use deadly force.7 "[F]or both being in the wrong neither can right himself without retreating." *Bobbitt* at 726.

The record is in conflict on this point. Cora Cannon testified her sole purpose in returning to her bedroom was to get her clothes and car keys. She hoped she could avoid any further conflict with Larry. Sherrie's testimony supported her mother's statement. Although there were prior statements made by Cannon offered at trial which somewhat contradicted this view, Cannon attempted to explain these discrepancies. The resolution of these matters was properly for the jury. However, if they chose to believe she was not the aggressor, she was entitled to the requested instruction. *Smith v. State,* 424 So.2d 726 (Fla.1983), *cert. denied,* 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); *Mellins v. State,* 395 So.2d 1207 (Fla. 4th DCA 1981); *Williams v. State,* 356 So.2d 46 (Fla. 2nd DCA 1979). Accordingly, the judgment ***152** is reversed and this cause is remanded for a new trial.

REVERSED AND REMANDED.

DAUKSCH and ORFINGER, JJ., concur.

Parallel Citations

10 Fla. L. Weekly 115

Footnotes

1 § 782.07, Fla.Stat. (1981).

2 *See* 2 William L. Burdick, *Law of Crimes,* § 436g (1946); 4 W. Blackstone, *Commentaries* *185.

3 W. Burdick, *supra,* note 2, at § 436g.

4 *Pell v. State*, 97 Fla. 650. 122 So. 110 (1929); Annot., 26 A.L.R. 3rd 1296 (1969); W. La Fave & A. Scott, *Criminal Law*, 395-396 (1972).

5 W. La Fave & A. Scott, *supra* note 4, at 395-396; 2 C. Torcia, *Wharton's Criminal Law*, § 126 (14th ed. 1979).

6 *Smith v. State*, 424 So.2d 726 (Fla.1983); *Bolin v. State*, 297 So.2d 317 (Fla. 3rd DCA 1974).

7 W. Burdick, *supra*, note 2, at § 436g; C. Torcia, *supra*. note 5, at § 126; 4 W. Blackstone, *supra*, note 2, at *185; *Bobbitt; Pell v. State*, 97 Fla. 650, 122 So. 110 (1929); *Danford v. State*, 53 Fla. 4, 43 So. 593 (1907).

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 16

572 N.E.2d 245
Court of Appeals of Ohio, Fifth District, Morgan County.

RAYNER, Appellee,
v.
LOWE et al., Appellants.

No. CA-88-14.July 19, 1989.

Landowner sued owner of cows for damage caused when **animals** strayed onto landowner's property. The Court of Common Pleas, Morgan County, entered judgment for landowner and appeal was taken. The Court of Appeals, Smart, J., held that: (1) statute prohibiting owners and keepers of **animals** from allowing them to run at large and imposing liability for damage caused by such **animals** did not impose strict liability on owners of **animals**; (2) landowner has no **duty** to fence his land to protect it from **trespassing animals**; and (3) landowner was under no **duty** to mitigate damages except to notify owner of **animals** of their presence on his land.

Affirmed.

Milligan, J., concurred separately, with opinion.

West Headnotes (3)

1 **Animals**
Injuries by **Animals** at Large

Statutes prohibiting owner or keeper of specified **animals** from allowing them to run at large does not impose strict liability for damages caused by such **animals**; **property owner** seeking recovery must show **animal** owner or keeper failed to exercise ordinary care in restraining **animals**. R.C. §§ 951.02, 951.10.

2 Cases that cite this headnote

2 **Animals**
Fencing and Fence Laws

A **property owner** has no **duty** to fence his land to protect it from **trespassing animals**. R.C. §§ 951.02, 951.10.

3 **Damages**
Injuries to Property

Owner of property damaged by **animals** running at large has no **duty** to mitigate damages except to notify owner of their presence on his land. R.C. § 951.11.

2 Cases that cite this headnote

246 *Syllabus by the Court

*3 1. Neither R.C. 951.02 nor 951.10 imposes strict liability upon an owner of **animals** "running at large" for damages caused by such **animals**. A **property owner** seeking recovery under R.C. Chapter 951 must show that the **animal** owner failed to exercise ordinary care in restraining the **animals**.

2. A **property owner** has no **duty** to fence his land to protect it from **trespassing animals**.

3. An owner of property damaged by **animals** running at large has no **duty** to mitigate damages except to notify the owner of the **animals** of their presence on his land.

Attorneys and Law Firms

Edward S. Ormond, Zanesville, for appellee.

Michael D. Lowe, for appellants.

Opinion

SMART, Judge.

This is an appeal from a judgment of the Court of Common Pleas of Morgan County, entered upon a jury verdict in favor of the plaintiff-appellee Albert Rayner ("landowner") and against defendant-appellant Donovan Lowe.

The cause arose in July 1985, when *4 fifteen cows owned by Lowe escaped from his fenced land, and strayed into landowner's cornfield. Landowner testified that he first noticed the cows towards the end of July and

contacted neighboring farmers about them. He testified further that he could not reach Lowe, although he spoke with Lowe's associate regarding the cow problem. On August 5, landowner called the sheriff, who in turn notified Lowe. The cows were recaptured in December 1985, although landowner testified that it would have taken him two to three days to round up the cattle and get them out of the corn.

Lowe assigns three errors to the trial court:

Assignment of Error No. I

"Did the court commit error in refusing to give the jury an instruction upon minimization of the damages by the plaintiff?"

Assignment of Error No. II

"Did the court commit error in denying the defendant's motion for a directed verdict?"

Assignment of Error No. III

"Did the court commit error in refusing to instruct the jury that the owner of an **animal** is required to use ordinary care to restrain his **animal** from running at large?"

We will first address Lowe's third assignment of error.

R.C. 951.02 states:

"No person, who is the owner or keeper of horses, mules, cattle, sheep, goats, swine, or geese, shall permit them to run at large in the public road, highway, street, lane, or alley, or upon unenclosed land, or cause such **animals** to be herded, kept, or detained for the purpose of grazing on premises other than those owned or lawfully occupied by the owner or keeper of such **animals**.

"The running at large of any such **animal** in or upon any of the places mentioned in this section is prima-facie evidence that it is running at large in violation of this section."

1 At trial, Lowe requested a jury instruction that he had a **duty** to use ordinary ***247** care to restrain his **animals** from running at large. The trial court refused to give the instruction, finding that R.C. Chapter 951 governs the case at bar, and apparently concluding that the statute confers strict liability for damages upon an owner of a **trespassing animal**. This is not a correct statement of the law.

In the case of *Burnett v. Rice* (1988), 39 Ohio St.3d 44, 529 N.E.2d 203, decided only a week prior to the trial court's decision in this case, our Supreme Court explained that R.C. 951.02 does not make **animal** owners strictly liable when their **animals** run at large on a public highway. The statute rather creates a rebuttable presumption of negligence when the **animal** is found running at large. The owner may rebut this presumption with evidence that he did not know the **animal** had escaped, and that he had exercised ordinary care in restraining it. The jury then decides the reasonableness of the owner's conduct.

2 R.C. 951.10 states:

"The owner or keeper of an **animal** described in section 951.01 to 951.02 of the Revised Code, who permits it to run at large in violation of either of such sections, is liable for all damages caused by such **animal** upon the premises of another without reference to the fence which may enclose such premises."

This statute has been construed to mean that a person has no **duty** to fence his land in order to protect it from a **trespassing animal**, and is not contributorily negligent if he fails to protect his property. *5 *Eichel v. Dudley* Cty.Ct.1962), 18 O.O.2d 158, 179 N.E.2d 812.

We acknowledge that *dicta* in *Burnett v. Rice* suggests that the damages statute *could* be read to confer strict liability for **animals** that run at large on private property. In our view, the statutes should be read in conjunction to require a sequential analysis. R.C. 951.02 is the starting point. If the trier of fact concludes the owner of an **animal** has failed to use ordinary care in restraining it, then the owner is in violation of R.C. 951.02, and the **animal** is "running at large." The owner is *then* liable for damages under R.C. 951.10, and the defense of contributory negligence, because the other did not erect fencing, is unavailable to him.

We think our reading of R.C. 951.10 is more logical. If strict liability were intended, then no defense of contributory negligence is available to the tortfeasor. We find significant the fact that the legislature chose not to use the phrase "strict liability" but rather chose to adopt a rule regarding fences in particular.

In sum, we hesitate to impose strict liability upon a farmer whose **animal** escapes through no fault of his own, in the absence of clear legislative intent or mandate from our Supreme Court.

We conclude that in appropriate cases, the jury must decide whether the defendant has breached a **duty** of

ordinary care. The trial court did not err in refusing the requested instruction on the particular facts of this case, however, because it was not warranted by the evidence. A judge must tailor his charge to those disputed facts which the evidence presented at trial tends to prove or disprove. *Sherer v. Smith* (1951), 155 Ohio St. 567, 44 O.O. 506, 99 N.E.2d 763.

The third assignment of error is overruled.

We now turn to Lowe's second assignment of error.

Following *Burnett v. Rice, supra,* we find that landowner set forth his prima facie case against Lowe and that the case presented questions of fact for the jury. It was not error for the trial court to overrule Lowe's motion for directed verdict.

The second assignment of error is overruled.

3 Landowner testified that two or three days was a reasonable length of time to remove the cows from the cornfield. Lowe argues that landowner had a **duty** to mitigate his damages, and if he could have removed the cows quickly then he had a **duty** to do so. Lowe cites general authority on mitigation of damages but does not direct us to any cases on point.

***248* R.C. 951.11 makes it permissible, but not mandatory, for a private person who finds a stray **animal** to take it and confine it.

We find that landowner had no **duty** to minimize his damages beyond giving notice to the owner of the **animals** that they were on his property, as the record reflects he did.

The first assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Morgan County is affirmed.

Judgment affirmed.

PUTMAN, P.J., concurs.

MILLIGAN, J., concurs separately.

MILLIGAN, Judge, concurring.

The trial court did not err in submitting this case to the jury as a case of strict liability. R.C. 951.02 defines the prohibited conduct and, as to the cows being on "the premises of another," R.C. 951.10 fixes the consequences.

**6* The Supreme Court recognized the distinction:
" * * * R.C. 951.10 addresses 'damages caused by such **animal** *upon the premises of another.*' (Emphasis added.) Assuming *arguendo* that such section provides for a strict liability standard, its application would be limited to damages occurring upon the premises of another. It has no application to damages caused by the presence of the **animal** upon a public highway. Finally, the imposition of strict liability in the case *sub judice* would conflict directly with the plain language of R.C. 951.02 that '[t]he running at large of any such **animal** in or upon any of the places mentioned in this section is prima-facie evidence that it is running at large in violation of this section.' The 'places mentioned' in R.C. 951.02 include 'the public road, highway, street, lane, or alley * * *.' Thus, in contrast to the language of R.C. 951.10 pertaining to **animals** which **trespass** upon the premises of another, R.C. 951.02 creates a rebuttable presumption of negligence when an **animal** is at large and upon a public thoroughfare." *Burnett v. Rice* (1988), 39 Ohio St.3d 44, 46, 529 N.E.2d 203, 205-206.

I would conclude that the legislature has created the kind of specific requirement or **duty** contemplated in *Reed v. Molnar* (1981), 67 Ohio St.2d 76, 21 O.O.3d 48, 423 N.E.2d 140, and *Burnett, supra,* as to **animals** running at large *upon the premises of another.*

R.C. 951.10 provides:

"The owner or keeper of an **animal** described in section 951.01 to 951.02 of the Revised Code, who permits it to run at large in violation of either of such sections, *is liable for all damages caused by such animal upon the premises of another* without reference to the fence which may enclose such premises." (Emphasis added.)

Parallel Citations

572 N.E.2d 245

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RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 17

473 P.2d 812
Court of Appeals of Arizona, Division 1, Department B.

George C. RICCA, Robert L. Peart, Robert W. Gilpin and Lee Stephens, Board of Supervisors of Mohave County, Arizona, now composed of George C. Ricca, Robert W. Gilpin and F. L. Caughlin, Appellants,
v.
Albert BOJORQUEZ, Appellee.

No. 1 CA-CIV 1004.Aug. 25, 1970.Rehearing Denied Sept. 25, 1970.Review Denied Nov. 4, 1970.

Action by holder of Taylor Grazing Act permit for declaration that statute providing for establishment of no-fence districts on filing of petition signed by majority of taxpayers in a given area was unconstitutional and that no-fence district purportedly formed thereunder was void. The Superior Court of Mohave County, Cause No. 6503, D. L. Greer, J., granted summary judgment for plaintiff, and defendant appealed. The Court of Appeals, Haire, J., held that legislature was not without authority to delegate legislative power to county board of supervisors to form no-fence districts, in which owners of livestock are liable for damage caused by **trespassing** livestock, with owners of land not required to fence out **trespassing** livestock to recover for damage they cause, that statute did not violate due process for failure to provide plaintiff and others similarly situated notice and opportunity to appear and be heard by board before entry of order and that order did not illegally interfere with rights under Taylor Grazing Act permit.

Reversed and remanded for further proceedings.

West Headnotes (7)

1 **Animals**
Liabilities for **Trespasses** in General
Animals
Effect of Defects in Fences

At common law, an owner of livestock was liable for damage caused when those **animals trespassed** onto the land of another; the landowner had no **duty** to fence his lands to keep **trespassing** livestock out.

2 **Declaratory Judgment**
Interest in Subject Matter

Holder of Taylor Grazing Act permit, whose grazing lands were in area included in no-fence district, had standing to bring action seeking declaration that statute providing for establishment of no-fence districts was unconstitutional and that no-fence district purportedly formed thereunder was void. A.R.S. § 24-341 et seq.; Taylor Grazing Act, § 1, 43 U.S.C.A. § 315.

1 Cases that cite this headnote

3 **Animals**
Stock Laws
Constitutional Law
Counties and County Employees and Officials

Legislature was not without authority to delegate legislative power to county board of supervisors to form no-fence districts, in which owner of land is not required to fence out **trespassing** livestock in order to recover for damage they may cause. A.R.S. § 24-341 et seq.

1 Cases that cite this headnote

4 **Counties**
Powers and Functions in General

A county board of supervisors possesses only such powers as are expressly conferred by statute, or are necessarily implied therefrom.

3 Cases that cite this headnote

5 **Animals**
Fencing and Fence Laws
Constitutional Law
To Non-Governmental Entities

Requirement that before ordering formation of no-fence district county board of supervisors be satisfied that petition complies with statutory requirements, including requirement that petition

be by majority of taxpayers in described area, was implied in provision of no-fence statute that on filing petition board order that district be formed; thus, statute was not unconstitutional as unlawful delegation of legislative power to circulator of petition. A.R.S. § 24-341 et seq.

6 **Animals**
⚖Fencing and Fence Laws
Constitutional Law
⚖Fence and Stock Laws

Statute providing for creation of no-fence district on petition of majority of taxpayers in described area did not violate due process as failing to provide that livestock owners resident in district be afforded opportunity, as matter of right, to appear and be heard by county board of supervisors prior to entry of order establishing district. A.R.S. § 24-341 et seq.

7 **States**
⚖Particular Cases, Preemption or Supersession

Order establishing no-fence district, in which owners of livestock are liable for damage caused by **trespassing** livestock, with owners of land not required to fence out **trespassing** livestock to recover for damage they might cause, did not illegally interfere with rights under Taylor Grazing Act permit to graze cattle on federal lands within area circumscribed by district. Taylor Grazing Act, § 1, 43 U.S.C.A. § 315; A.R.S. § 24-341 et seq.

2 Cases that cite this headnote

Attorneys and Law Firms

**11* ***813* William Clark Kennedy, Kingman, for appellants.
Favour & Quail, by John B. Schuyler, Jr., Prescott, for appellee.

Opinion

HAIRE, Judge.

This appeal involves the constitutionality of A.R.S. s 24-341, a statute providing for the establishment of so-called 'no-fence districts' upon the filing of petitions signed by a majority of taxpayers in a given area. The trial court, in granting the plaintiff's motion for summary judgment, held the statute to be unconstitutional. This appeal followed.

1 Before discussing the facts of this particular case, a few remarks about the background and purpose of no-fence districts will be made. At common law, an owner of livestock was liable for the damage caused when those **animals** **trespassed** onto the land of another; the landowner had no **duty** to fence his land to keep **trespassing** livestock out. Restatement of Torts s 504(1) (1938); 22 Am.Jur. Fences s 4 (1939); W. Prosser, Handbook of the Law of Torts s 75 (3d ed. 1964). In many states-especially western states -such a rule was incompatible with the best interests of the community and the common law rule was held inapplicable or was abrogated by statute. Restatement of Torts s 504(2), comment H (1938); See, e.g., A.R.S. s 24-501 Et seq. The effect of such judicial or legislative alterations was to require a landowner to construct a fence to keep **animals** out. Absent such a fence, a landowner could not recover for damage to his lands caused by **trespassing** livestock. Restatement of Torts s 504(2) (1938); 22 Am.Jur. Fences s 5 (1939).

The Arizona legislature, however, realizing that in various parts of the state the original common law rule might be more suitable to community needs, made statutory provision whereby the common law rule could be restored through local creation of so-called 'no-fence districts'. See A.R.S. s 24-341 Et seq. In a no-fence district an owner of land is not required to fence out **trespassing** livestock in order to recover for the damage they cause; rather, as at common law, the owner of the livestock has a **duty** to prevent their **trespass**; he has to respond in damages when he 'knowingly, wilfully, carelessly or negligently allows or permits' his livestock to run at large. A.R.S. s 24-344. With the foregoing in mind we turn to the facts of the case before us.

Plaintiff is the holder of a permit from the federal government which allows him to graze his cattle on certain federal lands in Mohave County, Arizona. The authority for the granting of such permits is 43 U.S.C. s 315, known as the Taylor Grazing Act. The defendants, the Board of Supervisors of Mohave County, were petitioned to form a no-fence district by property taxpayers of the Mohave Valley Irrigation and Drainage District pursuant to the terms of A.R.S. s 24-341. That statute reads as follows:

'A. A majority of all taxpayers, according to the last preceding assessment roll for county and state taxes, residing on land in an irrigation district containing not less than thirty-five thousand acres of irrigable land for which water is available, or a majority of all taxpayers residing upon any portion of a compact body of land containing not less than twenty thousand acres and where at least seventy-five per cent of the area of such body of land is being successfully irrigated, or a majority of all taxpayers *12 **814 residing upon a body of land containing not less than one thousand acres when the land is contiguous to the limits of an incorporated city or town which had a population of not less than thirty thousand people as shown by the last preceding United States census, and such body of land extending not more than twelve miles in one direction beyond the limits of such incorporated town or city, may petition the board of supervisors of the county in which such district or land is situated that a no-fence district be formed and that no fence be required around the land in the no-fence district designated in the petition.

'B. Upon filing the petition, the board shall immediately enter the contents upon its records and order that the no-fence district be formed.'

The petition was filed with the Board of Supervisors (hereinafter defendants or board) on January 5, 1965, and the board entered its order establishing the district approximately two weeks later, after the board had examined and considered the petition's contents. After approving the petition the board caused its order to be published for four successive weeks as required by A.R.S. s 24-342.

Subsequently plaintiff, whose grazing lands were in the area included in the no-fence district, commenced this action for a judgment declaring that A.R.S. s 24-341 was unconstitutional and that the no-fence district purportedly formed thereunder was void. The trial court held the statute to be unconstitutional because it violated

'* * * the due process clauses of the Constitution of the State of Arizona, Article II, Section 4, and the 14th Amendment to the United States Constitution in that the said statute does not provide the Plaintiff and other persons in the same class with notice and an opportunity as a matter of right to appear and be heard before the County Board of Supervisors prior to the entry of orders establishing no-fence districts under the said statute, and because the said statute also constitutes an unlawful delegation by the legislature of its powers * * *.'

The defendants have appealed from the foregoing judgment.

2 In our opinion, under the provisions of the Uniform Declaratory Judgment Act and the principles enumerated in Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939), and Planned Parenthood Committee v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962), plaintiff had standing to bring this action. The order establishing the no-fence district with the concomitant statutory sanctions applicable to plaintiff's admitted activities brought into direct play the statutory language making this remedy available when a person's rights, status or other legal relations are affected by a statute or municipal ordinance. See A.R.S. s 12-1832. As stated in A.R.S. s 12-1842, the statutorily provided declaratory relief remedy has for its purpose '* * * to settle and to afford relief from uncertainty and insecurity * * *; and is to be liberally construed and administered.'

As indicated earlier herein, plaintiff holds a substantial acreage of grazing lands within the area circumscribed by the purported no-fence district.1 If the 'no-fence' district is valid, he is subject to both civil and criminal liability for 'knowingly, wilfully, carelessly or negligently' allowing his livestock to run at large within the district. A.R.S. s 24-344. He has thus had to curtail the grazing activity of his cattle in and near the no-fence district in order to avoid any such possible liability. Plaintiff should not be required to violate the terms of the statute in order to obtain an adjudication of its constitutionality and the validity of the no-fence district created pursuant thereto, *13 **815 Monk v. City of Birmingham, 87 F.Supp. 538 (D.C.Ala.1949), aff'd, 185 F.2d 859 (5 Cir., 1950), cert. denied, 341 U.S. 940, 71 S.Ct. 1001, 95 L.Ed. 1367 (1951); 2 W. Anderson, Actions for Declaratory Judgments s 623 at 1435 (2d ed. 1951).

3 4 We now proceed to the first constitutional issue. Plaintiff asserted at trial and the trial court held that A.R.S. s 24-341 constituted an unlawful delegation of legislative power. We note that this argument is not that the state legislature delegated legislative power to the County board of supervisors in this matter, for this they clearly may do;2 rather, plaintiff asserts in his brief that in enacting A.R.S. s 24-341 the legislature '* * * delegated to the Circulator of the petition the raw power to require the Board of Supervisors to create the no-fence district.' (Emphasis in original). This argument is based on plaintiff's interpretation of the language of A.R.S. s 24-341 to mean that upon the filing of the petition, the board of supervisors is required to enter its order creating the no-fence district without checking or verifying the sufficiency of the petition and its compliance with the statutory requirements. We disagree with such an interpretation of A.R.S. s 24-341. Admittedly there is no express language in the statute requiring that the board be 'satisfied' that the provisions of subsection A of s 24-341 have been complied with. However, in our opinion such a requirement is clearly implied. A board of supervisors possesses only such powers as are expressly conferred by

statute, or necessarily implied therefrom. Board of Supervisors of Apache County v. Udall, 38 Ariz. 497, 1 P.2d 343 (1931). Here, the sole source of any power in the board of supervisors to create no-fence districts is found in A.R.S. s 24-341. The exercise of that power is made dependent upon the existence of the jurisdictional prerequisites set forth in subsection A of that statute. When subsection B states that 'Upon filing the petition, the board shall * * * order that the no-fence district be formed', the words 'the petition' must be understood as referring to a petition which in the opinion of the board complies with all of the requirements set forth in subsection A. We do not believe that anyone would argue that under this statute mandamus would lie to compel the board to enter an order establishing a 'no-fence' district upon the filing of a petition which does not meet the statutory requirements. The board is not required to form the district merely because a piece of paper denominated 'petition' has been filed. It is clearly implied that the board will examine the petition and satisfy itself of the existence of the facts made necessary by the statute as a pre-condition to the exercise of the board's authority to create the district, and in our opinion it is immaterial that this statute does not expressly condition the entry of the order creating the no-fence district upon the board's being 'satisfied' that the petition complies with the statutory requirements. Cf. State ex rel. Pickrell v. Downey, 102 Ariz. 360, 430 P.2d 122 (1967).

5 For these reasons, we hold that A.R.S. s 24-341 does not unconstitutionally delegate legislative power to the circulator of a petition, but rather is a permissible delegation of legislative power to a political subdivision-the county-for the purpose of local self-government. Maricopa County Municipal Water Conservation District Number One v. LA Prade, 45 Ariz. 61, 73, 40 P.2d 94, 99 (1935); Hernandez v. Frohmiller, 68 Ariz. 242, 254, 204 P.2d 854, 862 (1949); 16 Am.Jur.2d Constitutional Law s 250 (1964); 16 C.J.S. Constitutional Law s 140 c (1956).

6 The other basis upon which the trial court found the statute to be unconstitutional *14 **816 was that it violated the due process clauses of both the state and federal constitutions '* * * in that the said statute does not provide the plaintiff and other persons in the same class with notice and an opportunity as a matter of right to appear and be heard before the county board of supervisors prior to the entry * * *' of the order establishing the no-fence district.

We know of no constitutional due process requirement that legislative bodies afford to each individual citizen who might be interested notice and an opportunity to appear and be heard concerning the enactment of legislative acts which might directly affect that citizen's interest or activity. The Arizona Supreme Court has often held that the legislature is not required to give notice of hearing to so-called 'interested' persons before enacting legislation, and that this also applies to county boards of supervisors or other governmental units when acting in a legislative capacity pursuant to validly delegated legislative authority. Territory v. Town of Jerome, 7 Ariz. 320, 64 P. 417 (1901); Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 P. 382 (1915); Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939). We note that there is no contention or suggestion that the order entered by the board was not duly enacted at a lawfully scheduled meeting, nor is there any contention that the order was not duly published for four successive weeks as required by A.R.S. s 24-342 before it became effective.

Plaintiff points to certain decisions which have found a denial of due process in the enactment of zoning ordinances where prior to the adoption thereof no notice was given to interested **property owners**. A review of these decisions reveals that in all cases except one,3 the denial of due process which was found by the court had its actual basis in the failure of the governmental subdivision to comply with the provisions of a statutory enabling act which expressly required that such notice be given as a part of the enactment of the zoning ordinance. See, e.g., Wood v. Town of Avondale, 72 Ariz. 217, 232 P.2d 963 (1951). Whether or not, in the absence of statutory requirements, constitutional due process would require special notice to **property owners** before the passage of a zoning ordinance is an interesting question, but one which we do not need to determine here, because in our opinion an order establishing a no-fence district is in no way analogous to the passage of a zoning ordinance in its effect upon plaintiff's use of his property.

The effect of the sanctions imposed by A.R.S. s 24-3444 is not to Directly interfere with plaintiff's use of his property. He may still use it for cattle grazing purposes or otherwise to the full extent that he was previously able to do so. However, his right to use, or perhaps better stated, his freedom from liability for the use of the property of others is severely curtailed-he will be liable both civilly and criminally for damages caused by his **trespassing** livestock under the circumstances set forth in the statute.

The statute authorizing no-fence districts is in our opinion more analogous to the provisions of A.R.S. s 9-240, subsec. B 16 which authorizes cities and towns to enact ordinances prohibiting '* * * the roaming at large of **animals** within the town.' We do not believe that anyone would seriously contend that constitutional due process would require that notice and an opportunity to appear and be heard be given to all city property holders before *15 **817 passage of such an ordinance. The reasoning and holding of the Alabama court in Street v. Hooten, 131 Ala. 492, 32 So. 580 (1901) is directly in point and particularly pertinent to the due process question here urged. Quoting from the opinion in that case:

'This act of 1899 is not void for its failure to provide for any notice of the application to the commissioners' court for the incorporation of adjacent territory into an existing stock-law district. No man has such estate or interest in the lands of another as entitles him to turn his live stock at large upon it, and a requirement that he keep his stock on his own premises deprives him of no property right or other right assertable in any court. The legislature might, in the exercise of its police power, have forbidden the running at large of all stock in Clay county, or in any part thereof, absolutely, without notice to owners of stock there; and it was clearly competent for that body to confer upon the commissioners' court the power to designate the districts in which the stock law enacted by the legislature should operate and be effective, without any notice to persons living and owning stock within any such district.' (131 Ala. at 503, 32 So. at 583).

We find no due process infirmity in the statute and order here involved.

7 Plaintiff's additional contention that the order establishing the no-fence district illegally interfered with his federally granted rights under his Taylor Grazing Act permit is likewise invalid. That act specifically subjects plaintiff's grazing rights to state exercise of the police power. See 43 U.S.C. s 315 n. Noh v. Babcock, 21 F.Supp. 519 (D.C., 1937), Reversed on other grounds, 99 F.2d 738 (9 Cir., 1938), relied upon by plaintiff, is not persuasive. In that case, the state attempted to completely prohibit the very use authorized by the federal lease. No such prohibition is here involved.

The judgment of the trial court is reversed and the matter remanded for further proceedings.

EUBANK, P.J., and J. THOMAS BROOKS, Superior Court Judge, concur.

Note: Judge EINO M. JACOBSON having requested that he be relieved from consideration in this matter, Judge J. THOMAS BROOKS was called to sit in his stead and participate in the determination of this decision.

Parallel Citations

473 P.2d 812

Footnotes

1 Pursuant to a provision in the Taylor Grazing Act, 43 U.S.C. s 315n, plaintiff, as a permittee of the federal government, takes his federal rights subject to the state's exercise of its police powers.

2 Maricopa County Mun. Water Cons. Dist. No. 1 v. LA Prade, 45 Ariz. 61, 73, 40 P.2d 94, 99 (1935); Hernandez v. Frohmiller, 68 Ariz. 242, 254, 204 P.2d 854, 862 (1949); 16 Am.Jur.2d Constitutional Law s 250 (1964); 16 C.J.S. Constitutional Law s 140 c (1956).

3 Georgia decisions appear to be based strictly on constitutional due process requirements. See Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956).

4 'The owner or person in charge of livestock, who knowingly, wilfully, carelessly or negligently allows or permits livestock to run at large within a no-fence district is guilty of a misdemeanor, and in addition is liable for damages for any trespass as provided for the collection of damages by owners of land enclosed within lawful fences.'

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RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 18

59 U.S. 396
Supreme Court of the United States

DANIEL SOUTH, JOHN W. STOUFFER, JACOB FIERY, DANIEL MIDDLEKAUFF, SENIOR, AND JOHN A. K. BREWER, PLAINTIFFS IN ERROR,
v.
THE STATE OF MARYLAND, USE OF JONATHAN W. POTTLE.

December Term, 1855

Opinion

THIS case came up by writ of error from the circuit court of the United States for the District of Maryland, having been tried in that court by the late Judge Glenn, district judge.

It was an action brought in the name of the State of Maryland by Pottle upon a sheriffs' bond given by South with the other plaintiffs in error as sureties. Under the instructions of the court below, the verdict and judgment were for the plaintiff. Being brought to this court, by writ of error, it was argued at a former term, and was ordered to be reargued and the following questions suggested for discussion:--

1. Whether or not, the declaration contains a cause of action entitling the plaintiff (Pottle) to recover against the sheriff and his sureties within the condition of the official bond, according to the laws of the State of Maryland?

2. Whether or not, the sheriff, as conservator of the public peace, is liable to a civil action for an injury to the person or property of an individual, from a riotous assembly or mob, according to any law of the State of Maryland, if it should appear said sheriff unreasonably omitted or neglected to exert his authority to suppress it?

3. Whether or not the sheriff, as conservator of the public peace, is liable to the plaintiff in an execution, attending personally upon the levy or sale under it, for an injury to his person or property from a riotous assembly or mob, according to any law of the State of Maryland, if it should appear that said sheriff unreasonably omitted or neglected to exert his authority to suppress it?

4. Whether or not, on the case last stated, the sheriff would be liable to the plaintiff in the execution, if he desisted in good faith from the exertion of his authority at the instance and request of said plaintiff, while in the hands of the mob, from an *397 apprehension of greater bodily injury if an effort should be made to suppress it?

West Headnotes (4)

1 **Officers and Public Employees**
-Liabilities for Negligence or Misconduct

Where an officer acts ministerially and is bound to render certain services to individuals for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party injured by them.

37 Cases that cite this headnote

2 **Officers and Public Employees**
-Offenses

An officer is punishable by indictment for breach of a public duty.

17 Cases that cite this headnote

3 **Sheriffs and Constables**
-Right of Action

An action will not lie on the official bond of a sheriff for his neglect or refusal to preserve the public peace in consequence of which plaintiff claims to have been injured, since such neglect is a neglect of a public duty, punishable by indictment only.

51 Cases that cite this headnote

4 **Sheriffs and Constables**
-Declaration, Complaint, or Petition

In a suit against a sheriff on his bond by an individual, the declaration must allege some right in the plaintiff from the exercise of which he has been restrained by the malicious act of the defendant, or charge the defendant with malfeasance or neglect in the execution of some process in which the plaintiff was concerned, or it will be bad on motion in arrest of judgment.

26 Cases that cite this headnote

Attorneys and Law Firms

It was again argued at this term by *Mr. Nelson*, for the plaintiffs in error, and by *Mr. Dobbin* and *Mr. Johnson*, for the defendant.

As the case turned upon the sufficiency of the declaration, which sets out the case, it is thought propoer to insert it, viz:--

Where, in an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested; but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob; the declaration did not set forth a sufficient cause of action against the sheriff and his sureties.

The powers and duties of a sheriff explained; and the difference pointed out between his ministerial and judicial functions.

It is only for a breach of his duty in the execution of the former, that the sheriff and his sureties are liable upon his bond, and the declaration in this case does not set out such a breach.

Narr.

UNITED STATES OF AMERICA,

District of Maryland, sct.

Daniel South, John W. Stouffer, Jacob Fierey, Daniel Middlekauff, senior, and John A. K. Brewer, late of said district, citizens of the State of Maryland, were summoned to answer unto the State of Maryland, of a plea that they render unto the said State the sum of twenty-six thousand six hundred and sixty-six dollars and sixty-six and two third cents, which to the said State they owe, and from the said State unjustly detain: And whereupon the said State, by Dobbin and Talbott, its attorneys, complains that whereas the said defendants, on the seventeenth day of December, in the year eighteen hundred and forty-nine, at the district aforesaid, by their certain writing obligatory, sealed with their seals, and to the court now here shown, whose date is the day and year aforesaid, acknowledged themselves to be held and firmly bound to the said plaintiff in the just and full sum of twenty-six thousand six hundred and sixty-six dollars and sixty-six and two third cents, to be paid to the said plaintiff whenever afterwards they, the said defendants, should be thereto required, which said writing was and is subject to a certain condition thereunder written, to wit: That if the said Daniel South, as sheriff of Washington county, did and should well and faithfully execute that same office in all things appertaining thereto, and should also render to the several officers within the said State a just and true account of all fees placed in his hands for collection within the times limited by law, and should also well and truly pay all sums of money received by him, and also collect and pay all public dues, fines, and forfeitures, which are due or belonging to the State, and should also well and faithfully execute and return all writs, process, and warrants, to him directed and delivered, and should also pay and deliver to the person or persons entitled to receive the same all sum or sums of money, tobacco, goods, chattels, or property by him levied, seized, or taken, agreeably to the directions of the writ, process, or warrant under which the same should be levied and seized; and should ***398** also detain and keep in his custody all and every person and persons committed to his custody, or by him taken in execution, or who should be committed for the want of bail, without suffering them or any of them to escape or depart from his custody; and should also pay and satisfy all judgments which should or might be rendered against him as sheriff, and should also well and truly execute and perform the several duties required of and imposed upon him by the laws of said State, then the said obligation was to be void and of none effect, otherwise to remain in full force and virtue in law.

And the said plaintiff further saith, that the said Daniel South, at the time of making the writing obligatory aforesaid mentioned, and long before and thereafter, and at the time of, and after the committing the wrongs hereinafter complained of, was sheriff of Washington county, in the State aforesaid, duly elected, commissioned, and qualified, and by the duty of his office of sheriff aforesaid, and according to the tenor and effect of the condition of the writing obligatory aforesaid, ought to have preserved and maintained the peace of the State of Maryland, in the county of Washington aforesaid.

And the said plaintiff further saith, that a certain Jonathan W. Pottle, a citizen of the State of Massachusetts, in the indorsement of the writ original in this cause mentioned, at whose instance and for whose use the same is instituted, was, after the making of said writing obligatory, and during the time within which said Daniel was sheriff as aforesaid, to wit, on the within day of June, in the year eighteen hundred and fifty, lawfully present in Washington county aforesaid, and engaged in and about

his lawful business; and the said Daniel South, sheriff as aforesaid, was then and there also present with the said Jonathan W. Pottle, when certain evil-disposed persons came about the said Jonathan W. Pottle, and by force and arms hindered and prevented him in the execution of his lawful business, and threatened the life and personal safety of the said Jonathan W. Pottle, and with force and arms demanded of said Jonathan W. Pottle a large sum of money, the property of the said Jonathan W. Pottle, to wit, the sum of twenty-five hundred dollars, and then and there unlawfully and injuriously, and against the will of the said Jonathan W. Pottle, and also against the laws of the said State, and without any legal warrant, authority, or legal or justifiable cause whatsoever, did imprison, and detain so imprisoned there the said Jonathan W. Pottle for a long space of time, to wit, for the space of four days then next ensuing, and until he, the said Jonathan W. Pottle, had paid to the said evildisposed persons the sum of two thousand five hundred dollars for his enlargement, and other wrongs to the said Jonathan W. ***399** Pottle then and there did, to the great damage of the said Jonathan W. Pottle, and against the peace of the State of Maryland.

And the said Jonathan W. Pottle then and there applied to the said Daniel South, sheriff as aforesaid, then and there present, to protect and defend him, the said Jonathan, from the said unlawful conduct and threatened violence of the said evil-disposed persons, and to preserve and keep the peace of the State of Maryland, in Washington county aforesaid, the said Daniel South, sheriff as aforesaid, then and there having the power and authority so to do. But the said Daniel South, sheriff as aforesaid, did then and there neglect and refuse to protect and defend the said Jonathan from the said unlawful conduct and threatened violence of the said evil-disposed persons, and to preserve and keep the peace of the State of Maryland, in Washington county aforesaid; and so the said plaintiff saith that the said Daniel South did not well and faithfully execute the office of sheriff of Washington county, in all things appertaining thereto according to the form and effect of the condition aforesaid, to wit, at the district aforesaid, whereby the said writing obligatory became forfeited, by reason whereof an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of twenty-six thousand six hundred and sixty-six dollars and sixty-six and two third cents.

Nevertheless, the said defendants, although often requested, have not, nor hath either of them paid the said sum of money above demanded of them, or any part thereof, but so to do have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff twenty thousand dollars; and thereupon it brings suit, &c.

DOBBIN AND TALBOTT, *For plaintiff.*

Mr. Nelson, for the plaintiffs in error, made the following points, viz:–

1. That the declaration contains no cause of action entitling the plaintiff to recover against the sheriff and his sureties within the condition of the official bond, according to the laws of the State of Maryland.

2. That the sheriff, as conservator of the public peace, is not liable to a civil action for an injury to the person or property of an individual from a riotous assembly, or mob, according to any law of the State of Maryland, even if it should appear that said sheriff unreasonably omitted or neglected to exert his authority to suppress it. 1 Thomas's Coke, 81, 82; Comyn's Dig. tit. Viscount-authority of a sheriff (c. 1.); Watson's Sheriff, 2, 3; 1 Perry & Davidson, 297; Pitcher *v.* King, 2 Barnewall & Ald. 473; Hilary *v.* Breare and Holmes, 1 Moody & Malkin, 52; Tensley *v.* ***400** Nassau, 7 State Trials, 442; 6 Howell, 1094; Soames *v.* Barrardister; 12 Coke, 24.

3. That the sheriff, as conservator of the public peace is not liable to the plaintiff in an execution attending personally upon the levy or sale under it for an injury to his person or property from a riotous assembly or mob, according to any law of the State of Maryland, even if it should appear that said sheriff unreasonably omitted or neglected to exert his authority to suppress it.

4. That in the case last stated the sheriff would not be liable to the plaintiff in the execution, if he desisted in good faith from the exertion of his authority at the instance and request of said plaintiff, while in the hands of the mob from an apprehension of greater bodily injury if an effort should be made to suppress it. 6 Barn. & Cress. 739, Cook and others *v.* Palmer; 8 Barn. & Cress. 598; 7 Missouri, 536; 13 Ibid. 437.

5. That however true it may be as a general proposition, that the sheriff is responsible for the acts and omissions of his deputy, yet that in this case no such responsibility exists, because, by his declaration, the plaintiff charged no such acts or omissions.

6. That there was error in the instruction give by the court below; because it took from the jury the inquiry whether the omission of the sheriff to exert his authority to suppress the riot, was unreasonable or otherwise.

Mr. Dobbin and *Mr. Johnson*, for the defendant in error, made the following points, viz:–

1. That the sheriff, South, was *virtute officii*, the conservator of the peace of the State. Dalton on Sheriff, 26; Com. Dig. Sheriff, C. a, C. 1, C. 2; 2 Hawk, P. C. c. 8, § 4; Cro. Car. 27; 8 Bac. Abr. 689, tit. Sheriff, L.

2. That, as sheriff, he was responsible for the acts and omissions of his deputies; and that, whether so or not,

South, the high sheriff, having been present during two days of the riot, became responsible for all omissions of his official duty after such presence. Dalton, 176; 8 Bac. Abr. 675; 2 McLean, 193; 6 Shep. 277; 2 App. 93.

3. That the sheriff's official bond, which is here the subject of suit, is liable for every failure on his part to faithfully execute his office of sheriff in any thing appertaining thereto, and that his failure to protect and relieve Pottle was a breach of the condition of the bond, upon which a right of action accrued to Pottle against the sheriff and his sureties. 1 Pet. 46; 12 Pick, 303; 6 Wend. 454.

4. That the sheriff, having permitted the said unlawful duress of imprisonment to be made and continued, is not discharged from ***401** liability therefor by any declaration made by Pottle during such duress.

Mr. Justice GRIER delivered the opinion of the court.

In this case a verdict was rendered for the plaintiff in the court below, and the defendant moved, in arrest of judgment, 'that the matters set out in the declaration of the plaintiff are not sufficient, in law, to support the action.' If it be found that the court erred in overruling this motion and in entering judgment on the verdict, a consideration of the other points raised on the trial will be unnecessary.

The action is brought on the official bond of South, as sheriff of Washington county. The declaration sets forth the condition of the bond at length. The breach alleged is, in substance, 'that while Pottle was engaged about his lawful business, certain evildisposed persons came about him, hindered and prevented him, threatened his life, with force of arms demanded of him a large sum of money, and imprisoned and detained him for the space of four days, and until he paid them the sum of $2,500 for his enlargement.'

That South, the sheriff, being present, the plaintiff, Pottle, applied to him for protection, and requested him to keep the peace of the State of Maryland, he, the said sheriff, having power and authority so to do. That the sheriff neglected and refused to protect and defend the plaintiff, and to keep the peace, wherefore, it is charged, 'the sheriff did not well and truly execute and perform the duties required of him by the laws of said State;' and thereby the said writing obligatory became forfeited, and action accrued to the plaintiff.

This declaration does not charge the sheriff with a breach of his duty in the execution of any writ or process in which Pottle, the real plaintiff in this case, was personally interested, but a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob. It assumes as a postulate, that every breach or neglect of a public duty subjects the officer to a civil suit by any individual who, in consequence thereof, has suffered loss or injury; and consequently, that the sheriff and his sureties are liable to this suit on his bond, because he has not 'executed and performed all the duties required of and imposed on him by the laws of the State.'

The powers and duties of the sheriff are usually arranged under four distinct classes:--

1. In his judicial capacity, he formerly held the sheriff's tourn, or county courts, and performed other functions which need not be enumerated.

***402** 2. As king's bailiff, he seized to the king's use all escheats, forfeitures, waifs, wrecks, estrays, &c.

3. As conservator of the peace in his county or bailiwick, he is the representative of the king, or sovereign power of the State for that purpose. He has the care of the county, and, though forbidden by *magna charta* to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace, and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For these purposes he may command the *posse comitatus* or power of the country; and this summons, every one over the age of fifteen years is bound to obey, under pain of fine and imprisonment.

4. In his ministerial capacity he is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe-keeping of prisoners. He summons and returns juries, arrests, imprisons, and executes the sentence of the court, &c. &c. 1 Black. Com. 343; 2 Hawk, P. C. C. 8, § 4, &c. &c.

Originally, the office of sheriff could be held by none but men of large estate, who were able to support the retinue of followers which the dignity of his office required, and to answer in damages to those who were injured by his neglect of duty in the performance of his ministerial functions. In more modern times, a bond with sureties supplies the place of personal wealth. The object of these bonds is security, not the imposition of liabilities upon the sheriff, to which he was not subject at common law. The specific enumeration of duties in the bond in this case includes none but those that are classed as ministerial. The general expression, in conclusion, should be construed to include only such other duties of the same

kind as were not specially enumerated. To entitle a citizen to sue on this bond to his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case. When the sheriff is punishable by indictment as for a misdemeanor, in cases of a breach of some public duty, his sureties are not bound to suffer in his place, or to indemnify individuals for the consequences of such a criminal neglect.

It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he ***403** is liable for acts of misfeasance or non-feasance to the party who is injured by them.

The powers and duties of conservator of the peace exercised by the sheriff are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace. It is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only.

The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

In the case of Entick *v.* Carrington, State Trials, vol. 19, page 1062, Lord Camden remarks: 'No man ever heard of an action against a conservator of the peace, as such.'

The case of Ashby *v.* White, 2 Lord Raym. 938, has been often quoted to show that a sheriff may be liable to a civil action where he has acted in a judicial, rather than a ministerial capacity. This was an action brought by a citizen entitled to vote for member of parliament, against the sheriff for refusing his vote at an election. Gould, justice, thought the action would not lie, because the sheriff acted as a judge. Powis, because, though not strictly a judge, he acted *quasi* judicially. But Holt, C. J., decided that the action would lie: 1. 'Because the plaintiff had a right or privilege. 2. That, by the act of the officer, he was hindered from the enjoyment of it.' 3. By the finding of the jury the act was done maliciously. The later cases all concur in the doctrine, that where the officer is held liable to a civil action for acts not simply ministerial, the plaintiff must allege and prove each of these propositions. See Cullen *v.* Morris, 2 Starkie, N. P. C.; Harman *v.* Tappenden, 1 East, 555, &c. &c.

The declaration in the case before us is clearly not within the principles of these decisions. It alleges no special individual right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been restrained or hindered by the malicious act of the sheriff; nor does it charge him with any misfeasance or non-feasance in his ministerial capacity, in the execution of any process in which the plaintiff was concerned. Consequently, we are of opinion that the declaration sets forth no sufficient cause of action.

The judgment of the circuit court is therefore reversed.

Parallel Citations

18 How. 396, 1855 WL 8263 (U.S.Md.), 15 L.Ed. 433

End of Document

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 19

195 S.E. 496
Supreme Court of Appeals of Virginia

PENDLETON W. TATE
v.
LUCY OGG.

March 10, 1938.

*95 Present, Campbell, C.J., and Holt, Hudgins, Gregory, Eggleston and Spratley, JJ.

Appeal from Circuit Court, Louisa County; Alexander T. Browning, Judge.

Suit by Pendleton W. Tate against Lucy Ogg to enjoin defendant from permitting horses, cattle, pigs, and turkeys to **trespass** upon the lands of plaintiff. From a decree denying relief prayed for, plaintiff appeals.

Affirmed.

West Headnotes (17)

1 **Trespass**
⚖ **Trespass** to Real Property

Every person is entitled to redress if exclusive and peaceful enjoyment of his own land is wrongfully interrupted by another.

3 Cases that cite this headnote

2 **Animals**
⚖ Liabilities for **Trespasses** in General

The rule allowing person redress if exclusive and peaceful enjoyment of his own land shall be wrongfully interrupted applies to acts of **trespass** by domestic **animals**, unless some provision of law requires landowner to actually fence out such **animals**.

3 Cases that cite this headnote

3 **Animals**
⚖ Fencing and Fence Laws

When a boundary line has been made by statute a lawful fence as to certain **animals**, the owner of such **animals** is liable for damage committed by their acts of **trespass**.

4 **Animals**
⚖ **Duties** of Owners

The common-law rule requiring owner of domestic "**animals**" at his own peril to keep them on his own land or within inclosures includes domestic turkeys and poultry, since word "**animals**" viewed in broad sense is used in contradistinction to a human being, and signifies an inferior living creature generally having the power of self-motion.

4 Cases that cite this headnote

5 **Animals**
⚖ Statutory Regulations in General
Animals
⚖ Fencing and Fence Laws

Under statute allowing recovery for **trespass** of any horse, mule, cattle, hog, sheep, or goat upon land of another inclosed by lawful fence, Legislature has not attempted to prevent domestic fowls from running at large, nor to require landowner to fence against fowls of another. Code 1936, §§ 3538-3562.

1 Cases that cite this headnote

6 **Animals**
⚖ Statutory Regulations in General

The statute allowing recovery for **trespass** of specified **animals** is limited to quadrupeds and **animals** of self-motion and confined to the ground; the word "cattle" in common acceptation being a collective name for domestic quadrupeds such as horses, mules, and those which serve as food for man. Code 1936, §§ 3541, 3548.

7 **Animals**
⚖Fencing and Fence Laws

The common-law rule which requires the owner of turkeys and domestic fowls to keep them inclosed has not been altered by the statute. Code 1936, § 2; §§ 3538-3562.

8 **Animals**
⚖Statutory Regulations in General

The statute allowing recovery for **trespasses** of any horse, mule, cattle, hogs, sheep, or goats does not apply to fowls or dogs, since Legislature changed the common-law rule of **trespass** with reference to named **animals**, and had the power also to change as to poultry and fowl, and, in absence of any such change, court could not infer that it was so intended. Code 1936, § 2; §§ 3538-3562.

9 **Statutes**
⚖Express Mention and Implied Exclusion

The maxim "Expressio unius est exclusio alterius" is especially applicable in the construction and interpretation of statutes.

9 Cases that cite this headnote

10 **Animals**
⚖**Duties** of Owners

The common-law rule requiring owner of domestic **animals** to keep them on his own land with respect to fowl is in force in Virginia. Code 1936, § 2.

3 Cases that cite this headnote

11 **Injunction**
⚖Repeated or Continuing **Trespasses**

When acts of **trespass** by **animals** are being continually repeated in a jurisdiction where owner is required to keep **animals** on his own premises, and remedy at law is insufficient, court of equity will grant relief by injunction.

12 **Animals**
⚖**Duties** of Owners

A person may not raise a flock of turkeys for his own use or for commercial purposes and either willfully drive them or carelessly permit them to go upon the lands of another and destroy the property of the other.

13 **Injunction**
⚖Actual or Anticipated Violation of Right

Where fowls on adjacent farms take infrequent visits to property of adjoining landowner, causing inconsequential damage, and circumstances indicate that fowls have escaped for only a few minutes from their pens or from vigilance of their owner, and there is no reason to believe that **trespasses** will continue in future, relief by injunction will be denied.

14 **Injunction**
⚖Trial or Hearing

Whether circumstances are such as to justify granting of an injunction to compel the owner of domestic fowl to keep them on his own land and not permit them to **trespass** on adjoining lands is a question of fact.

15 **Injunction**
⚖Substantial Character of Right or of Injury

Where **trespasses** of turkeys upon adjoining landowner's premises were infrequent and not willful, and damages were trivial and

inconsequential, together with fact that there was bitter feeling between landowner and owner of turkeys, court properly denied injunctive relief against **trespass** of turkeys to adjoining landowner.

16 Evidence

⁂Phenomena of **Animal** and Vegetable Life

The Supreme Court of Appeals will take judicial cognizance of the fact that it is the nature of a turkey to chase a grasshopper or other bugs or insects without paying much attention to fences or boundary lines.

17 Injunction

⁂Substantial Character of Right or of Injury

A court of equity will not dignify occasional chase of turkeys after grasshopper or other bugs or insects upon lands other than of owner with a restraining order.

VIRGINIA REPORTS SYNOPSIS

Appeal from a decree of the Circuit Court of Louisa county. Hon. Alexander T. Browning, judge presiding. Decree for defendant. Complaint appeals.

Affirmed.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

1. **TRESPASS** - *Right to Redress for Interruption of Peaceful Enjoyment of Land.* - Every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another.

2. **ANIMALS** - *Trespassing Animals - Landowner's Right to Redress.* - The rule that every person is entitled to the exclusive and peaceful enjoyment of his land and to redress if such enjoyment be interrupted, applies to acts of **trespass** by domestic **animals**, unless some provision of law requires the landowner to actually fence out such **animals**.

3. **ANIMALS** - *Trespassing Animals - Liability Where Broundary Line Has Been Made Lawful Fence.* - When a boundary line has been made by statute a lawful fence as to certain **animals**, the owner of such **animals** is liable for damage committed by their acts of **trespass**.

4. **ANIMALS** - *Trespassing Animals - Change in Common-Law Rule.* - While at common law the owner of domestic **animals** was required, at his own peril, to keep them on his own land, or within enclosures, the rule has been changed in Virginia as to certain **animals**, including horses and cattle, by legislative action, except in those counties where a 'no fence' law has been adopted under the provisions of the Code.

5. **ANIMALS** - *Trespassing Animals - Common-Law Rule Not Changed as to Wilful Trespass.* - The common-law rule that the owner of domestic **animals** is required at his own peril to keep them on his own land or keep them in an enclosure is not changed as to a wilful **trespass** by domestic **animals**, and the owner of cattle and horses, who drives them upon the lands of another, is answerable for whatever damage they do while there.

6. **ANIMALS** - *Trespassing Animals - 'Animal' Defined.* - The common-law rule which requires the owner of **animals** to keep them on his own land, or within enclosures, is applicable to domestic **animals**. Viewed in its broad sense, the word '**animal**,' in the language of the law, is used in contradistinction to a human being, and signifies an inferior living creature, generally having the power of self-motion. It may, therefore, be said to include domestic turkeys and poultry.

7. **ANIMALS** - *Trespassing Animals - No Statute Regulating Fowl.* - The legislature has not attempted to make a general provision to prevent or regulate domestic fowls from running at large, nor is there any general statute requiring a landowner to fence his land for protection against the fowl of another.

8. **ANIMALS** - *Trespassing Animals - Section 3548 of the Code of 1936 - To What Livestock Applicable.* - The livestock named in section 3548 of the Code of 1936, making it unlawful to permit any horse, mule, cattle, hog, sheep or goat to run at large upon lots or lands enclosed by a lawful fence, are quadrupeds and **animals** whose self-motion is confined to the ground.

9. **ANIMALS** - *Words and Phrases - 'Cattle.'* - The word 'cattle' in common acceptation is a collective name for domestic quadrupeds, such as horses, mules and those which serve as food for man.

10. **ANIMALS** - *Trespassing Animals - Section 3538 of the Code of 1936 - Not Applicable to Poultry or Fowl.* - Section 3538 of the Code of 1936 in defining a fence in relation to section 3548, making it unlawful to permit any horse, mule, cattle, hog, sheep, or goat to run at large on

lots or lands enclosed by a lawful fence, provides that such a fence may be built only forty-two inches high with intervals between the boards or the strands of wire, running to eight inches. This language indicates that the legislature gave no thought to the building of a fence designed to keep out chickens, turkeys or other poultry or fowl.

11. **ANIMALS** - *Trespassing Animals - Sections 3538, 3541 and 3548 of the Code of 1936 - Inapplicable to Fowl or Dogs.* - The language of sections 3538, 3541, and 3548 of the Code of 1936, relating to enclosures and **trespasses** and specifically naming 'any horse, mule, cattle, hog, sheep, or goat,' *ex vi termini* **excludes** the applicability of these statutes to fowls or dogs.

12. **ANIMALS** - *Trespassing Animals - No Inference of Legislative Intent to Change Common-Law Rule as to Poultry or Fowl.* - The legislature changed the common-law rule of **trespass** with reference to horses, mules, cattle, hogs, sheep, or goats, and it also had the power the change it as to poultry or fowl. In the absence of any such change it cannot be inferred that a change was intended.

13. STATUTES - *Construction - 'Expressio Unius Est Exclusio Alterius.'* - The maxim *'expressio unius est exclusio alterius,'* is especially applicable in the construction and interpretation of statutes.

14. **ANIMALS** - *Trespassing Animals - Common-Law Rule in Force as to Fowl.* - The common-law rule requiring the owner of domestic **animals** to keep them on his own land is in force in Virginia with respect to fowl.

15. **ANIMALS** - *Trespassing Animals - Injunctive Relief.* - When acts of **trespass** by **animals** are being continually repeated and threatened, in a jurisdiction where the owner is required to keep his **animals** on his own premises, and the remedy at law is insufficient, a court of equity will grant relief by injunction.

16. **ANIMALS** - *Trespassing Animals - Injunctive Relief.* - Where the damages occasioned by **trespassing animals** are more than merely trivial, and it would be impossible accurately to measure them at law, or where a multiplicity of suits would be required to recover a small amount of damages for each of several separate acts of **trespass**, or where the owner of the **animals** may be insolvent, injunctive relief may be granted.

17. **ANIMALS** - *Trespassing Animals - Fowl - Injunctive Relief.* - One may not in Virginia raise a flock of turkeys for his own use, or for commercial purposes, and either wilfully drive them, or carelessly permit them to go upon the lands of another, and there destroy the property of the other. But where the fowls on adjacent farms merely make infrequent visits to the property of the adjoining landowner, and the damages occasioned thereby are inconsequential, and the circumstances indicate that the fowls have escaped for only a few minutes from their pens or from the vigilance of their landowner, and there is no good reason to believe that the **trespass** will continue in the future, relief by injunction will be denied.

18. JUDICIAL NOTICE - *Animals - Propensity of Turkeys to Trespass.* - The Supreme Court of Appeals will take judicial cognizance of the fact that it is the nature of a turkey to chase grasshoppers, or other bugs, or insects, without paying much attention to fences or boundary lines.

19. **ANIMALS** - *Trespassing Animals - Fowl - Occasional Trespass Not to Be Enjoined.* - Where a turkey chases grasshoppers or other bugs across a boundary line a court of equity will not dignify such occasional chase with a restraining order.

20. **ANIMALS** - *Trespassing Animals - Fowl - Denial of Injunctive Relief from Occasional Trespasses Causing Trivial Damage - Case at Bar.* - In the instant case, a suit between adjoining landowners, plaintiff sought an injunction restraining defendant from maintaining and permitting **trespasses** by defendant's turkeys upon plaintiff's land. The evidence showed that during a period of six years there were only a few instances in which the turkeys strayed on plaintiff's land, and on those occasions the vigilance of the parties was such that any damage caused by the turkeys was restricted to a small amount and a small area. The evidence also showed that there was more or less bitter feeling between the parties.

Held: That the relief prayed for should not be granted, as the acts of **trespass** were only occasional and not wilful, and the damages at most were of a trivial and inconsequential nature.

END OF VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

Attorneys and Law Firms

***497 *98 L. Cutler May,* for the appellant.

W. Earle Crank, for the appellee.

Opinion

JUDGE: SPRATLEY

SPRATLEY, J., delivered the opinion of the court.

The plaintiff, Pendleton W. Tate, on November 19, 1936, filed a suit in equity alleging that the horses, cattle and pigs, and more especially the turkeys of the defendant, Lucy Ogg, for many years and with great frequency, had been **trespassing** upon his lands and destroying his crops; that there was such a threat of continued and future injury therefrom as would cause the plaintiff great and irreparable damage; and that he had no adequate remedy at law. He prayed that an injunction issue restraining the defendant, her agents and employees, from maintaining and permitting the alleged **trespasses** to continue.

The defendant demurred, and for grounds of her demurrer stated that the plaintiff had an adequate remedy at law for

the alleged **trespasses** of the horses, cattle and pigs, and as to the alleged **trespasses** of the turkeys, the complainant had failed to fence his land against domestic fowls as required in Virginia. She also filed her answer, in which she denied the material allegations of the plaintiff's bill, and relied upon the second ground of demurrer.

The trial court heard the evidence *ore tenus,* and a summary of the evidence is certified in the record.

The trial court, by decree of December, 3, 1936, being of the opinion that the alleged **trespasses** were only of a minor and inconsequential nature, and the damages only trivial, denied the relief prayed for.

**99* The plaintiff, while admitting that the trial court had the right to accept the evidence of the defendant, and to reject that of the plaintiff, contends that the evidence of the defendant alone justified the granting of the injunction.

A large proportion of the briefs of each counsel is taken up with a discussion of the rule of the common law, which requires the owner of **animals** to keep them on his own land, or within enclosures. Since it was apparent from the evidence that the alleged **trespasses** by the livestock of the defendant, such as horses, cattle and pigs, were in reality of such seldom occurrence and trivial nature, the plaintiff in his brief and in his argument, practically abandoned any claim to relief from that source. He insists, however, that the evidence does establish such repeated, continuous and threatened **trespasses** by the ***498* turkeys as to warrant relief therefrom in equity.

The plaintiff contends that turkeys are domestic **animals**, and that the common law rule, which requires the owner to keep such **animals** enclosed, is in force in Louisa county. The defendant argues that the rule is not in force in Louisa county, nor in Virginia, having been changed by statute, and even if it be in force, that the **trespasses** complained of were infrequent, trivial and inconsequential.

1 2 3 As a general principle of law, every person is entitled tothe exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another. This rule applies to acts of **trespass** by domestic **animals**, unless some provision of law requires the landowner to actually fence out such **animals**. When a boundary line has been made by statute a lawful fence as to certain **animals**, the owner of such **animals** is liable for damage committed by their acts of **trespass**.

The books abound with many cases relative to acts of **trespass** committed by such domestic **animals** and livestock as cattle, horses, pigs, sheep, etc., but few relate to domestic poultry.

This is the first time that this court has been called on to pass upon the question of liability for a **trespass** by **100* chickens, turkeys, or domestic fowls. So far as a diligent search discloses, only three of such cases have reached courts of final resort in the United States. Two of these cases are from Iowa and one from Missouri. Each specifically involves chickens. *Keil v. Wright* (1907), 135 Iowa 383, 112 N.W. 633, 13 L.R.A.(N.S.) 184, 124 Am.St.Rep. 282, 14 Ann.Cas. 549; *Kimple v. Schafer* (1913), 161 Iowa 659, 143 N.W. 505, 48 L.R.A.(N.S.) 179, Ann. Cas. 1916A, 244; *Evans v. McLalin, et al.,* 189 Mo.App. 310, 175 S.W. 294.

In the case of *Keil v. Wright, supra,* the court held that since under general principles a landowner should not be disturbed in the exclusive and peaceful enjoyment of his premises, an injunction would lie to restrain domestic fowls from **trespassing** upon his property. It was specifically stated in the opinion that the question as to whether or not the common law rule as to **trespass** by domestic fowls was in force in Iowa had not been raised at the proper time in the pleadings and had not, therefore, been considered.

In the second Iowa case of *Kimple v. Schafer, supra,* the holding in the above case as applicable in Iowa was expressly overruled. The subsequent opinion held that the common law rule, with reference to **trespass** of domestic **animals**, was not, and never had been, in force in Iowa; and that in the great western States where there are vast regions of land, where chickens, turkeys and poultry are raised on a large scale in the rural communities, an injunction against **trespass** by them will not be held applicable in the absence of a statute, requiring a contrary conclusion. It appears from the opinion that the legislature of that State had enacted regulations as to the running at large of many kinds of domestic **animals**, but none restricting and regulating poultry and fowls, except in cities and towns.

The case of *Evans v. McLalin, et al., supra,* is in agreement with the holding in the second Iowa case. The Missouri court seemed to take considerable pride in the fact that Missouri was the greatest poultry State in the Union. It **101* describes poultry as being 'privileged characters,' and as in the Iowa case, treats them as 'free rangers.'

We find the case of *Poindexter v. May,* 98 Va. 143, 34 S.E. 971, 47 L.R.A. 588, most illuminative in setting out an historical review of the common law rule as to **trespass** by domestic **animals**, and the effect of certain changes therein by statute in Virginia. In that case, an injunction was sought to prevent the owner of cattle and horses from turning them out upon the unenclosed land of

his adjacent neighbor. The defendant contended that, in the absence of a lawful fence on the said lands, as defined in the Code of Virginia, his horses and cattle had a right to run thereon, and there was no remedy therefor. At the time of that decision in 1900, neither had the landowner erected a lawful fence under the statute, nor had the boundary line of his property been declared a lawful fence under statutory proceedings. The opinion held that while at common law the owner of domestic **animals** was required, at his own peril, to keep them on his own land, or within enclosures, the rule had been changed in Virginia, as to certain **animals**, including horses and cattle, by legislative action, except in those counties where a 'no fence' law had been adopted under the provisions of the Code. The court said, in granting the relief asked for, that the change in the common ***499** law rule did not apply to a wilful **trespass** by domestic **animals**, and that the owner of cattle and horses, who drives them upon the lands of another, is answerable for whatever damage they do while there. This case is of no value as an authority here except in setting out a review of the common law rule and the history and effect of the changes made by statute.

4 The common law rule was, in general terms, applicable to domestic **animals**. Viewed in its broad sense, the word '**animal**,' in the language of the law, is used in contra-distinction to a human being, and signifies an inferior living creature, generally having the power of self-motion. 2 Am.Jur. 689. It may, therefore, be said to include domestic turkeys and poultry.

***102** In Virginia, by Code 1936, section 2, the common law of England is continued in force and effect, except insofar as it may be in conflict with the Bill of Rights and the Constitution, or has been changed by legislation.

A change in the common law rule in Virginia as to certain **animals**, is now evidenced by the present chapter on 'Enclosures and **Trespasses**,' Virginia Code 1936, sections 3538-3562, inclusive.

Code, section 3541, provides for the recovery of damages for **trespass** by the **animals** mentioned in section 3548.

Section 3548 makes it unlawful to permit 'any horse, mule, cattle, hog, sheep, or goat' to run at large upon lots or lands enclosed by a lawful fence.

Section 3538 provides the definition as to what shall constitute a lawful fence.

Section 3547 provides how the boards of supervisors of counties may adopt the boundary lines of lots or lands as lawful fences.

The plaintiff alleges in his brief that the boundaries of his land in Louisa county had been made a lawful fence in accordance with Code, section 3547. The record, however, is silent on that subject; but in the view that we take of this case, we do not consider that point material here.

5 None of the above Code sections make any reference to chickens, turkeys, poultry or domestic fowl. We do not find any attempt by the legislature to make a general provision of prevent or regulate such domestic fowls from running at large, nor any general statute requiring a landowner to fence his land for protection against the fowl of another.

6 The livestock named in the above Code sections are quadrupeds and **animals**, whose self-motion is confined to the ground. The word 'cattle' in common acceptation is a collective name for domestic quadrupeds, such as horses, mules and those which serve as food for man. 2 Am.Jur. 690.

Section 3538 refers to an actual fence and its constituent materials and its measurements. It further specifically ***103** refers by mention and name to the stock described in sections 3541 and 3548, 'which could not creep through the same.' That it may be built only forty-two inches high, with intervals between the boards or the strands of wire, running to eight inches, indicates that the legislature gave no thought to the building of a fence designed to keep out chickens, turkeys, or other poultry or fowl. To require the erection of a fence around a large farm sufficiently tight and high to keep out fowls, such as turkeys, might well be prohibitive because of the cost.

The very nature of poultry, - the fact that they can fly as well as walk and that they roost on fences and in trees, - places them in a different classification from other domestic **animals**, both with regard to the manner of travel and to the nature of confinement required to prevent travel. All of this, perhaps, accounts for the omission of turkeys and fowls from the list of **animals** named in sections 3541 and 3548.

Likewise, dogs are, by reason of their nature, habits, disposition and usefulness, treated as belonging to a separate classification as **animals**. In Virginia they are made the subject of special and peculiar regulations. Code 1936, section 3305(62) *et seq.*

7 8 9 If chickens, turkeys or fowls were included among the domestic **animals** covered in the rule of the common law, we can find no removal from such inclusion by statute in Virginia. The language of Code, sections, 3538, 3541 and 3548, specifically naming 'any horse, mule, cattle, hog, sheep, or goat,' *ex vi termini* **excludes** the applicability of these statutes to fowls or dogs. The legislature changed the common law rule of **trespass** with reference to the named **animals**, and it had the power also

to change it as to poultry and fowl. In the absence of any such change, we cannot infer that it was so intended. The maxim '*Expressio unius est exclusio alterius,*' is especially applicable in the construction and interpretation of statutes. ***500** *Whitehead v. Cape Henry Syndicate,* 105 Va. 463, 54 S.E. 306.

***104** **10** We conclude that the common law rule requiring the owner of domestic **animals** to keep them on his own land, with respect to fowl, is in force in Virginia, and is applicable in this case.

11 We are in accord with the general principle that when acts of **trespass** by **animals** are being continually repeated and threatened, in a jurisdiction where the owner is required to keep his **animals** on his own premises, and the remedy at law is insufficient, a court of equity will grant relief by injunction. Where the damages are more than merely trivial, and it would be impossible to accurately measure them at law, or where a multiplicity of suits would be required to recover a small amount of damages for each of several separate acts of **trespass**, or where the owner of the **animals** may be insolvent, injunctive relief may be granted. High on Injunctions, section 702-a; 32 A.L.R. 540; 14 R.C.L. 154.

12 **13** One may not in Virginia raise a flock of turkeys for his own use, or for commercial purposes, and either wilfully drive them, or carelessly permit them to go upon the lands of another, and there destroy the property of the other. But where the fowls on adjacent farms merely make infrequent visits to the property of the adjoining landowner, and the damages thereby are inconsequential, and the circumstances indicate that the fowls have escaped for only a few minutes from their pens or from the vigilance of their landowner, and there is no good reason to believe that the **trespasses** will continue in the future, relief by injunction will be denied.

14 The remaining question resolves itself into one of fact. Does the evidence justify granting the relief prayed for? If it makes out a case against the defendant, the judgment of the trial court was erroneous.

In the great rural, agricultural community of Louisa county, the parties hereto own adjoining farms. Mr. Tate's lands comprise eighty-one acres, upon which he raises mostly corn and wheat, and some peas and other crops. He owned a limited number of cattle, two mules, one horse ***105** and two cows, one hundred and fifteen to one hundred and twenty chickens, and three dogs. Mrs. Ogg owns 141 acres, upon which she does some farming, and raises some turkeys. She also owned four horses, twelve cattle and some pigs.

The evidence with reference to **trespass** by Mrs. Ogg's horses, cattle and pigs shows, perhaps, in seven years, three such isolated acts; one where her colt got hung up in the fence and remained on Tate's land for five minutes; another where the pigs wandered across the boundary line for a few minutes; and one instance where her bull ate some grass for fifteen minutes. This we regard as almost inevitable in farm and country life.

While the lands of the parties adjoin, their respective dwelling houses are about one-half a mile apart. A division fence half a mile long runs on a line about midway between the houses, with a four-strand wire.

While Mrs. Ogg has owned turkeys since 1921, in varying numbers, the record is so shadowy as to alleged depredations by them for the years prior to 1930, we will not go back prior to that year.

In 1930, she raised eight turkeys. In 1931 and 1932, she raised turkeys in pens, the pens occupying about two and one-half acres, and being enclosed by a five and one-half foot fence. In 1933, she kept them in these pens until they were grown, and although they were then turned out, they did not go on Tate's place. In 1934, she had one hundred and ten turkeys, which were kept in coops until they were six weeks old, during which year she admits they got on Tate's land a few times by flying out of the pens. In 1935, she raised thirty-nine turkeys in a pen on another place, and they did not get out at any time during that year. In 1936, she had between one hundred and fourteen and one hundred and seventeen turkeys, and during that year some of them strayed on Tate's place for five or six times; but they got only on the edge of his land and never more than forty feet thereon. She has had her two single girls and a son at her home since 1934, and they kept a close and constant watch on the turkeys. The vigilance of Mr. ***106** Tate, and more frequently the vigilance of Mrs. Ogg, caused the wandering turkeys to make such a hurried return home that any damage caused was restricted to a small area and a small amount.

The record does not show how many turkeys ever got on Tate's place, nor does it give any estimate of damages, except the suggestion of Tate that, maybe, several ***501** visits alleged to have been made by the turkeys on his land in the fall of 1936 caused a loss of ten dollars.

We are not advised whether the course of travel by the turkeys was by air-flight, by foot, over the fence, around the fence, under the fence, or between the strands.

Mrs. Ogg also relates that the visits of her **animals** were, on several occasions, returned by visits of the cattle and livestock of Mr. Tate to her lands.

It seems that Tate's dogs killed some of Mrs. Ogg's turkeys three times during the year 1936, when the turkeys were not on his place. The game warden of Louisa county, after making an investigation of the

killing, for the purpose of reimbursing the owner of the turkeys, secured, on his own initiative and in pursuance of his **duties**, an order from the trial justice of his county directing him to kill Tate's dogs, because of the above mentioned attacks. The three dogs of Tate were accordingly killed.

There is some evidence for the plaintiff in conflict with the number and frequency of the **trespasses** of the turkeys upon his land. The testimony of the plaintiff himself, however, in this regard is in conflict and confusing.

It is necessary, in order to get a complete picture of the situation, to add that there was a more or less bitter feeling between the parties. Mrs. Ogg had refused to testify for Tate in some litigation over a will, and her son had testified against him, for which he had cursed and abused her. He blamed Mrs. Ogg for instigating the killing of his dogs, although the game warden assumed the responsibility, and contradicted Tate in this respect.

15 16 17 This court will take judicial cognizance of the fact that it is the nature of a turkey to chase a grasshopper, **107* or other bugs, or insects, without paying much attention to fences or boundary lines. A court of equity will not dignify such occasional chase with a restraining order. Under such circumstances, it seems improper to grant an injunction restraining the owner of fowls from permitting them to escape from his own enclosure under penalty of contempt for a violation thereof.

We are unable to say that the learned, able and experienced trial judge, who had the benefit and advantage of seeing and hearing all of the witnesses testify in this case, came to an erroneous conclusion as to the value of the facts. The evidence favorable to the defendant shows that the **trespasses** were only occasional and not wilful, and that the damages at most were of a trivial and inconsequential nature.

The decree of the trial court is affirmed.

Affirmed.

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Article

CITIZEN NO-DUTY RULES: RAPE VICTIMS AND COMPARATIVE FAULT

Ellen M. Bublick[a1]

In this Article, Professor Bublick examines the generally accepted practice of allowing third parties like hotels and landlords, and occasionally rapists themselves, to take advantage of broad defenses of rape victim fault in civil law rape cases. As the law currently stands, whatever limits courts have placed on rape victim comparative fault defenses arise solely from the moral culpability of the defendants. Bublick argues that courts' exclusive focus on defendant culpability overlooks a second, equally compelling factor for determining whether courts should allow defenses of rape victim fault---citizen entitlements. She argues that regardless of defendants' culpability, citizens have independent interests in not being legally required to shape their conduct around the reality of pervasive rape and fear of rape in our society. Those interests stem from concerns for citizen freedom and equality, and are not outweighed by deterrence considerations. She then outlines three ways in which the law could be changed to incorporate both plaintiff-entitlement and defendant-culpability considerations. Specifically, the Article advocates judicial creation of citizen "no-duty rules" in the context of civil rape cases. The concept of no-duty rules was recently endorsed by the newly-enacted Restatement (Third) of Torts: Comparative Apportionment.

Introduction

Much has been written about the criminal law's inadequate response to rape.[1] In light of this literature, and the law's failure to combat sexual violence more generally, scholars eager to find avenues of redress for rape victims have begun to focus increased attention on the civil courts.[2] *1414 These scholars surmise that because tort cases require a lower burden of proof than do criminal cases, rape victims will fare better in civil fora.[3]

While there is no doubt that civil actions are an important remedial device for rape victims,[4] and may become more so,[5] neither scholars nor victims' advocates should assume that biases against rape victims will fall away in the civil courts. Nor should civil remedies be seen as a replacement for an inadequate criminal process. Tort law is not simply a diluted version of the criminal law, nor is it inherently less problematic for rape victims than the criminal law. The hundreds of published opinions in civil rape cases[6] reveal that many of the prejudices that obstruct criminal convictions--such as the requirement that rape victims physically resist their assailants--may also hinder civil recovery.[7] In addition, tort actions present anti-victim biases unique to the civil context in matters not directly involved in criminal proceedings, such as comparative fault and damages assessment.[8]

*1415 This Article confronts one tort doctrine that blames rape victims for rape--rape victims' "comparative fault."[9] Under existing law, defendants may successfully argue that a rape victim's conduct is a legal cause of her rape.[10] While most jurisdictions do not allow rapists themselves to raise rape victim comparative fault defenses[11] (though a very small and possibly growing minority of jurisdictions may[12]), these same jurisdictions allow negligent third parties like hotels and landlords to raise virtually unlimited defenses of rape victim "fault."[13] Thus, while a court would ordinarily bar a rapist from asserting that the rape victim was at fault for her own rape because she agreed to drink alcohol with him, a hotel could nevertheless raise that identical defense.[14]

*1416 I contend that the current law is flawed. The predominant rule assumes that defenses of rape victim fault are problematic only if they are invoked by rapists (and under the minority, perhaps not even then). Accordingly, whatever limits courts have placed on rape victim comparative fault defenses arise solely from the moral culpability of the rapist defendant. This exclusive focus on defendant culpability fails to recognize that defenses of rape victim fault are problematic regardless of the identity of the defendants who invoke them. I argue that courts have overlooked a second, and equally compelling, basis for denying rape victim comparative fault defenses: citizen entitlements.[15] Even in cases involving negligent

tortfeasors, a citizen should be entitled to shape her life around the assumption that others will not intentionally rape her.

The desire to recognize citizen entitlements stems in part from concerns for individual freedom. The law should not translate the social reality of rape into requirements (especially broad requirements) that female citizens trade their liberties for tort law protection. Instead, citizens' liberties should be recognized as an integral part of the freedoms that third-party liability seeks to protect.

The need for citizen entitlements in the context of rape also stems from the gendered nature of rape, fear of rape, and the social meaning of that fear. Courts should be particularly reluctant to condition any part of a rape victim's recovery on her failure to take liberty restrictions that are based on gender. In addition, courts should be concerned not only about shifting the costs of rape back to individual rape victims, but also about doing so through doctrines that blame women individually and collectively for rape.

As a result of citizens' freedom and equality interests, I argue that courts should prevent all defendants--whether rapists or third parties--from raising defenses of rape victim comparative fault. A rape victim's conduct should not be considered a legal cause of her own rape. To reframe the point in terms of duty rather than legal cause, I argue for judicial recognition of citizen no-duty rules in the context of rape cases--rules acknowledging citizens' legal entitlement not to adapt to the social reality of pervasive rape and fear of rape in our society.[16] Through such *1417 no-duty rules, courts could refuse to reinforce and legitimate the distressing reality of female fear and restriction.

Recognition of citizen entitlements and corresponding no-duty rules is important not only for the development of civil rape law, but also for the development of tort law as a whole. The concept of citizen no-duty rules--also termed "plaintiff no-duty rules"--has been a central aspect of the debate surrounding the proposed Restatement of the Law (Third) Torts: Apportionment of Responsibility.[17] The Restatement proposes no-duty rules to restrict claims of plaintiffs' comparative fault.[18] Because this Article supports the concept of plaintiff no-duty rules, it is germane to issues surrounding the Restatement. However, this Article's support for citizen no-duty rules in civil rape cases does not require, nor even suggest, that other Restatement proposals such as a comparative apportionment approach be adopted.[19]

*1418 The development of plaintiff no-duty rules is not dependent on acceptance or rejection of comparative apportionment, though the need for no-duty rules may be particularly acute in comparative apportionment jurisdictions.[20] Instead, a citizen no-duty concept recognizes that within either a traditional comparative negligence paradigm or a more recently developed comparative apportionment framework, citizens have certain interests in acting without fear of rape regardless of the culpability of the defendants they sue. These citizen interests should be protected in cases involving third-party defendants as well as in cases involving rapists themselves.

Before explaining the need for a no-duty approach, I first discuss existing case law. Part I briefly outlines the existing state of rapist and third-party civil liability and the relationship between the two. Part II addresses judicial attempts to apply comparative fault defenses in civil rape cases. Part III shows how courts have abandoned citizen entitlements, and discusses the troubling consequences of that abandonment. Part IV sets forth an alternative framework for evaluating comparative fault defenses, and discusses rationales supporting citizen no-duty rules within the parameters of existing third-party duties. Finally, Part V outlines more minimal reforms that might be adopted by courts reluctant to embrace a fuller conception of citizen entitlements.

This Article proposes citizen no-duty rules in the context of civil rape cases, a particularly troubling area given concerns for equality as well as citizen freedoms. But many of the concerns raised in this Article are not exclusive to rape cases. Courts have applied the flawed analysis this Article seeks to correct in other contexts, such as robbery and murder.[21] As such, courts can, and I think should, craft no-duty rules in contexts involving other intentional torts, particularly those torts involving acts or threats of physical violence which are malum in se.[22]

*1419 I. Existing Rapist and Third-Party Liability in Civil Rape Cases

Before turning to issues of rape victim comparative fault, it is necessary to understand the background against which defendants' fault is assessed. Under existing law, rapists as well as a wide range of third parties may be liable to victims of rape.[23] Rapists may be sued for the intentional tort of rape, primarily through doctrines proscribing battery. Third parties may be liable for their negligence in failing to take reasonable care for the safety of others in the face of foreseeable criminal conduct.[24]

A. Rapists' Civil Liability

Rapists may be civilly liable for rape under general tort law proscriptions against battery,[25] as well as assault, false

imprisonment, and intentional infliction of emotional distress.[26] Rapists' civil liability is consistent with the many contexts in which wrongful conduct may constitute both an intentional tort and a crime.[27] That liability also comports with tort law goals of accountability,[28] compensation,[29] and deterrence.[30]

Despite the recent attention given to civil actions, rapists' civil liability for rape is not new. It has been recognized in some jurisdictions since ***1420** at least the early 1900s[31] and has continued to be accepted throughout the century.[32] Moreover, the creation of new victim-protective civil rights measures such as the Violence Against Women Act[33] may expand rapists' liabilities under federal law.[34]

B. Third Parties' Civil Liability

Third-party defendants, such as hotels, landlords, and employers, also may be civilly liable to rape victims. Third-party liability is generally grounded on theories of negligence, rather than intentional tort theories.[35] Under negligence rules, individuals ordinarily do not have a duty to take reasonable care to protect others from crime.[36] However, courts have created exceptions to this rule, primarily in cases involving special relationships.[37] When a defendant 1) has a special relationship with the ***1421** plaintiff,[38] 2) has a special relationship with the rapist,[39] 3) has contributed to the dangerous situation in which the plaintiff is found,[40] or 4) has volunteered to render assistance,[41] the defendant's general duty of reasonable care may include the duty to take reasonable care to protect others from foreseeable criminal victimization. For example, many courts have held that a business owner's duty to "exercise due care and prudence for the safety of business invitees" extends to protection against "criminal acts by third parties."[42]

In some courts, the question of third-party duty rests not only on the existence of a special relationship, endangerment of plaintiff, or volunteer of assistance, but also on the foreseeability of crime[43]--an issue that in other contexts is more frequently left to the jury as a question of breach.[44] Courts employ a number of different tests to evaluate foreseeability.[45] Those tests often look at the existence of prior similar incidents either on the premises or within the general vicinity.[46] Some courts also ***1422** limit third-party duties through categories related to the status of the plaintiff[47] and through other policy-based restrictions.[48]

As a practical matter, liability for third parties with special relationships generally arises in one of two contexts: when the third party controls factors that determine whether or to what extent others will be exposed to danger; or when the third party, by virtue of position, has superior information regarding a danger.

In the first context, because the third party's conduct affects others' exposure to potential danger, the third party has a duty to take reasonable care. For example, a landlord may have a duty to fix a broken entrance lock, lest a rape occur on the premises.[49] Similarly, when a property management company refuses to permit a tenant to install a deadbolt lock on her door and retains a copy of the tenant's apartment key for its own use, it is liable when it mishandles the key in a way that allows a rapist to get the key and use it to gain entry into the tenant's apartment.[50]

In the second context of liability, because of its position of superior information, a third party may have a legal duty to provide accurate safety information, either by warning of latent dangers on the premises or by providing truthful safety information when such information is requested. A classic example of the duty to warn in cases of superior information arises in the context of innkeepers. Because a hotel conducts business on a daily basis in a particular location, and hotel guests may be unfamiliar with that location, the hotel is often in a better position than guests to know the danger of violent crime in the surrounding area. A hotel may therefore have a legal duty to warn its guests of recent criminal attacks.[51] Likewise, misrepresentation of safety-related information may lead to liability. Accordingly, a landlord may not tell prospective tenants that sheriffs' deputies live on and protect the premises, nor may he deny ***1423** knowledge of prior crimes on the premises, if that information is plainly false.[52]

In either of these two contexts, third parties with special information or control are held accountable for exposing others to foreseeable and unreasonable risks. Where third parties make safety-related decisions like whether to install locks or hire personnel, their decisions must be reasonable. Where third parties have superior safety information, they must not mislead others and must at times reveal that information to certain unsuspecting persons.[53]

Third-party liability is designed to deter entities from creating, ignoring, or disguising safety hazards. As the Tennessee Supreme Court recently noted, imposing a duty on third parties will encourage businesses "to take reasonable security precautions."[54] Courts want to encourage these precautions because "[t]he merchant is in the best position to know the extent of crime on the premises and is better equipped than customers to take measures to thwart it,"[55] thereby potentially reducing crime.[56] In many cases, third-party liability is tied to control over property.[57] Often the third party is the only party entitled by property laws to take the omitted safety-related precautions.[58]

Courts also impose third-party liability to serve victim compensation objectives. Third parties are in a better position to "distribute the costs" of crime[59] and, in light of the profits that they make from their enterprise, they "must justifiably expect to share in the cost of crime attracted ***1424** to the business."[60] For these reasons among others, third-party liability is currently recognized in most jurisdictions[61] and has become more prevalent in recent times.[62]

Because third-party actions often proceed in negligence, the plaintiff must prove the ordinary elements of negligence. As with other duties in negligence, the defendant's duty is one of reasonable care under the circumstances. A third-party defendant will avoid liability if it can show one of the following: 1) that it had no duty to take reasonable precautionary measures to protect the victim--i.e., because of the lack of a special relationship or other affirmative obligation; 2) that it breached no duty--i.e., by taking reasonable care under the circumstances; 3) that the plaintiff suffered no harm; 4) that its breach was not the actual cause of the plaintiff's harm--for example, that the rape would have occurred even if the defendant had taken reasonable care; or 5) that its breach was not a legal cause of the plaintiff's harm--for example, that its breach risked some other type of harm to some other class of persons.63

Although courts sometimes state that a third-party defendant's duty is to "protect the victim" from rape, that statement is inaccurate to the extent that it implies that the third party has a legal obligation to ensure a particular outcome (strict liability) rather than to take reasonable precautionary measures (to behave non-negligently).64

*1425 C. Relationship Between Rapist and Third-Party Liability

Although courts broadly agree that both rapists and third parties may be liable to rape victims, the contours of that liability and their interaction vary greatly among jurisdictions. Traditionally, tortfeasors were jointly and severally liable for a single indivisible injury.65 In addition, most jurisdictions refused to compare intentional and negligent fault, and therefore did not compare rapist and third-party responsibility.66 As a result, both intentional and negligent tortfeasor defendants were liable to the plaintiff for her full injuries, with the caveat that the plaintiff could receive only one satisfaction.67

However, in some states, the recent advent of comparative apportionment rules, which compare intentional and negligent fault, coupled with the elimination of joint and several liability, may virtually eliminate third party obligations.68 Juries required to compare rapist and third-party liability will often find the rapist largely, if not entirely, responsible.69 And when juries do not reach such conclusions, some appellate courts have sent cases back for redetermination.70 Thus, the primary issue of the existence of third-party liability is intimately intertwined with the secondary issue of apportionment of fault.71

The move to compare negligent and intentional fault in several-liability jurisdictions not only raises many issues regarding the purpose and ***1426** scope of third-party liability,72 but also vividly illustrates the pressure on courts to minimize or eliminate that liability through other doctrines. At the same time, the numerous doctrines courts have crafted to avoid this diminution also illustrate courts' desire to preserve third-party liability. Some states that have comparative apportionment systems avoid the substantial dilution of third-party negligence rules by refusing to include intentional torts in their apportionment schemes.73 In jurisdictions that do compare defendants' intentional and negligent fault, some courts have avoided diminution of third-party liability by holding negligent tortfeasors jointly and severally liable for the conduct of intentional tortfeasors when the very purpose of the negligent tortfeasors' duty was to prevent the intentional tort.74 Another approach is to refuse to compare intentional and negligent torts in particular circumstances in which such comparisons would violate public policy.75 Finally, at times diminution of ***1427** negligent tortfeasor responsibility can be avoided by concluding that fault need not be allocated to intentional tortfeasors not named as defendants in the action.76

Consequently, while the contours of third-party liability may be contested, such liability is still the norm even in comparative apportionment jurisdictions. Against that backdrop, this Article examines how the many courts that do recognize third-party liability should apply defenses of comparative fault arising within those contexts.77

II. Current Approaches to Rape Victim Comparative Fault Defenses

Most appellate courts, when confronted with rape victim comparative fault defenses, accept or reject those defenses based entirely on a single factor-- the defendant's status as an intentional or negligent tortfeasor. Within this majority paradigm, courts prohibit rapists from raising all defenses of rape victim comparative fault, but permit negligent third parties to raise any such comparative fault defenses. More recently, a few jurisdictions have adopted comparative apportionment schemes which would appear to permit all defendants-- rapists and third parties alike--to take advantage of assessments of rape victim fault. Cutting across both of these paradigms, a few courts have suggested some limits on rape victim comparative fault defenses. In this Part, I describe the ways in which courts routinely analyze rape victim comparative fault defenses under minority and majority paradigms.

A. Comparative Apportionment: The Minority Paradigm

Although traditional tort law rules do not allow rapists to assert rape victim comparative negligence defenses,78 a recent trend has persuaded a minority of jurisdictions to abandon traditional principles and compare intentional and negligent fault.79 Under this approach, courts apportion ***1428** "responsibility" for an injury among intentional tortfeasors, third parties, and victims, into separate categories that always total 100%.80 Within such a framework, a rapist's moral and financial responsibility for rape may be diminished by the rape victim's "fault." For example, if the rape victim is adjudged five

percent responsible for her own rape--a very real possibility under the prevailing law in comparative apportionment states--that determination would diminish the damages the rapist would pay by five percent.[81]

Before a 1996 statutory change, Louisiana was the main producer of cases reducing intentional tortfeasor fault by victim negligence.[82] One such case, Morris v. Yogi Bear's Jellystone Park Camp Resort,[83] involved the gang rape of thirteen-year-old Sherry Morris by three seventeen-year-old boys in Jellystone Park. As the facts are set forth in the Louisiana appellate court opinion, Morris went with a friend and her family on a camping trip to Jellystone Park. At Jellystone, Morris and her friend went to a playground, where the three older boys approached them. The boys offered the girls illegally-purchased alcoholic beverages and the entire group drank. Morris then left with one of the boys to go to an enclosed area of the playground.[84] Another boy also went to that area of the playground. Morris's friend approached Morris and saw a boy unzipping his pants. Morris's friend, confused about what action to take, went to the bathhouse to think, went back to the enclosed playground to try to get Morris out, and then ran and yelled for help. By the time help arrived, Morris "was moaning and groaning and would not answer questions. When asked if they raped her, she shook her head 'yes' and held up three fingers."[85] An examining physician found evidence of seminal fluid and severe physical trauma. Three to four hours after the rape, Morris's ***1429** blood alcohol level was 0.11%, above Louisiana's limit for intoxication while operating a motorized vehicle.[86]

Morris's mother filed suit on her daughter's behalf against the three rapists, their custodial parents, Yogi Bear's Jellystone Park Camp Resort, and other third parties including Jellystone's insurer.[87] Morris reached a settlement agreement with the third parties before trial. At trial the jury apportioned fault as follows: 10% Yogi Bear's Jellystone Park, 38% rapist Darren Bouzigard, 22% rapist Wade Galjour, 18% rapist Randy Cheramie, and 12% rape victim Sherry Morris.[88] Ms. Morris moved for partial judgment notwithstanding the verdict with regard to the twelve percent fault attributed to her daughter. The trial court denied the motion, and Morris appealed.[89]

In a unanimous opinion, a Louisiana appellate court affirmed the jury's finding that Sherry Morris was twelve percent at fault for her own gang rape. "There is no doubt," the court wrote, "that each of the parties were [sic] at fault to some degree."[90] The court defined Morris's fault as "willingly participat[ing] in the original beer drinking, and apparently willingly and voluntarily le[aving] her friend to go to a secluded place with a strange boy."[91] According to the appellate court, the victim's actions "undoubtedly set the stage for the terrible events which followed."[92] While the court considered Morris's age and lack of maturity to be "mitigating factors," and suggested that the appellate court de novo "might have come to different conclusions," the court refused to assign error on the ground that "we are not so clairvoyant that we can say that the percentages of blame assigned by the jury are clearly wrong," and that those percentages "seem to be reasonable considering all the circumstances of the case."[93] Accordingly, the Morris court allowed rapists themselves to mitigate their responsibility for their own intentional gang rape of a young unconsenting girl by focusing on the "faulty" conduct of their victim.

It is tempting to sweep aside the results of the Morris case as anomalous. The Louisiana Supreme Court distanced itself from the opinion,[94] no appellate courts outside Louisiana appear to have permitted rapists themselves to take advantage of rape victim comparative fault doctrines, ***1430** and even Louisiana--the leading source of comparative apportionment cases reducing intentional tortfeasor fault--has since passed a statute refusing to let intentional tortfeasors reduce their liability for damages based on victim comparative negligence.[95]

However, given the present state of the law, courts in other jurisdictions could easily replicate the result reached by Morris when they are first asked to permit comparative fault defenses in rape cases. First, a plain reading of the statutes and case law in many comparative apportionment jurisdictions would allow rapists, like other intentional tortfeasors, to diminish their responsibility based on rape victims' alleged negligence.[96] Second, other state courts with comparative apportionment schemes have compared the conduct of other types of intentional tortfeasors, even murderers, to the victim's alleged fault.[97] And third, even the Restatement of Torts: Apportionment of Liability originally endorsed an approach that would seem to have permitted at least some comparisons of rapist and rape victim fault.[98] In fact, the draft not only endorsed comparison of defendants' intentional fault and victims' negligent fault,[99] but actually ***1431** listed the need for "adopt[ing] plaintiff negligence as a defense to intentional torts and strict product liability" as one of only two rationales for including disparate bases of liability in a single apportionment system.[100] The Restatement now takes "no position" on whether courts should compare plaintiffs' negligence with defendants' intentional torts.[101] Thus, other jurisdictions could easily replicate Morris when called upon to compare rapist and rape victim fault under their new comparative apportionment schemes.

B. Defendant Culpability: The Majority Paradigm

Within the more traditional and more broadly accepted paradigm, the availability of rape victim comparative fault defenses rests entirely on the status of the defendant being sued--rapists cannot avail themselves of any rape victim comparative fault defenses, while negligent third parties can take advantage of any such defenses.[102] Consequently, if the Morris case had been brought in a jurisdiction employing a defendant-culpability paradigm, the rapists would have been barred from asserting that

Morris was twelve percent at fault for her own gang rape because she went off with them to drink beer, but third party Jellystone Park could have raised that exact same defense. The paradigm assumes that the rapist's culpability and resulting lack of moral standing are the sole problems in permitting rape victim comparative fault defenses.

Courts applying this defendant-culpability paradigm routinely permit third-party defendants to assert broad rape victim comparative fault defenses. Consequently, in the cases decided under this paradigm, it is not the rapist asserting that the victim said "no" but really meant "yes," or that she "asked for it" by her conduct--it is bus companies, hotels, landlords, and other third-party defendants who advance these arguments. That these victim-blaming defenses are being raised by third parties rather than rapists is significant. Indeed, courts use these defendants' lesser culpability as a reason for permitting even broader constructions of rape victim fault.

Civil courts' frequent conclusions that women are at fault for rape stem from a combination of doctrinal factors. First and foremost, courts do not examine the allegedly negligent plaintiff's duty, creating a tacit assumption that citizens must ordinarily take reasonable care to protect themselves against rape. Second, with respect to the issue of breach, courts give juries free rein to determine what precautions reasonable persons--primarily women--should take against rape. And third, courts and juries are at times very willing to believe that different individual rape ***1432** victim conduct would prevent rape. Each of these issues will be addressed in turn.

1. Duty.--Consistent with the principle that comparative fault defenses involve no issue of duty,[103] courts examining rape victim comparative fault defenses routinely ignore questions of victim duty.[104] Even when courts have held that rape victims were not at fault, they have reached those decisions as a matter of deference to the jury, not as a matter of law. For example, in Murrow v. Daniels, the defendant motel argued that the rape victim "voluntarily exposed herself to danger by opening her room door, knowing there were questionable characters outside making noise and demanding entrance."[105] The jury concluded that the rape victim was not at fault, and the North Carolina Supreme Court affirmed the jury's verdict. The court based its ruling on the ground that the lower court had given sufficient comparative negligence instructions, which asked the jury to evaluate the reasonableness of the plaintiff's conduct.[106] The court did not suggest that the plaintiff could open the door assuming that the people on the other side, however loud, would not rape her.

Courts' failure to consider citizen no-duty arguments is not a result of litigants' failure to raise the issue. Even when plaintiffs explicitly argue that rape victim fault should not be at issue because "the conduct which injured [the victim] was intentional," courts often fail to consider those arguments beyond their standard defendant-culpability view.[107] Instead of addressing whether and to what extent a citizen has a duty to shape her conduct around the fear of rape, courts simply focus only on the status of the third-party defendant as a negligent tortfeasor.[108]

In the absence of any legal limitation on what might constitute citizens' fault for purposes of contributory negligence, courts leave juries unbounded discretion to determine what precautions a reasonable plaintiff must take.

2. Breach.--Comparative fault defenses frequently call upon juries to determine when a rape victim's conduct has subjected her to an unreasonable risk of rape. The answer, from a broad swath of case law, seems to be that almost any conduct by a woman (and the case law makes it clear that it's a woman) may subject her to an unreasonable risk of rape. According to the cases, a reasonable woman does not go outside alone at night to hail a cab[109] or walk to her car in a hotel parking lot, especially if ***1433** a man is outside.[110] She does not take four or five steps inside the door before closing it.[111] She double checks her door locks[112] and is certain that every window is closed.[113] She does not open the door when someone knocks[114] or invite a salesman into her home[115] or a man into her hotel room.[116] She never drinks alcohol with a man, particularly if he is older[117] or streetwise[118] or someone she has recently met.[119]

One thing we know quite clearly about the reasonable woman from the case law: she is afraid--of going out, of letting someone in, of rape. She is always on guard, and her fear of rape shapes every aspect of her life and conduct.

The other thing we know about the reasonable woman is that, according to the defendants, she is forever doing the wrong thing when a man is trying to rape her. She cries when she should scream.[120] She does not run soon enough,[121] or far enough or fast enough.[122] She fights when she should not,[123] and does not fight when she should.[124] As in the ***1434** criminal law, the focus of civil comparative negligence defenses "is on women generally, and on the victim as she compares (poorly) to the [jury's] assessment of the reasonable woman."[125]

That judges and juries have found such a broad range of conduct unreasonable stems from several factors: ambivalence about third-party liability, lack of judicial mechanisms to review jury determinations of comparative fault, and a tendency to blame rape victims for rape. In part, the result also emanates from traditional tort law tests of reasonableness. In tort law, reasonableness is often judged by community custom or risk-utility analysis. Custom is shaped by what other members of the community actually do. Surely women do take extensive precautions to avoid rape.[126] As such, using custom as a standard of

reasonableness could easily lead to gender-biased and extensive rape victim comparative fault rulings.

Another tort law guide to reasonableness, the risk-utility test, is less bound to existing community practices. However, application of this test may be equally likely to lead to gendered and expansive findings of rape victim fault. This occurs because of the test's failure to deal with entitlements, the impracticability of valuing non-monetary costs, and the lack of meaningful appellate review.

A case authored by Judge Richard Posner of the Seventh Circuit, Wassell v. Adams,[127] provides a useful illustration of a risk-utility approach in civil rape cases. In Wassell, plaintiff Susan Marisconish (later Wassell) stayed at a motel outside the Great Lakes Naval Training Station to attend her fiancé's graduation from basic training. The motel, located four blocks west of a high crime area, had been the site of several incidents of violent crime in the past, including a rape and a robbery. The motel owners occasionally warned "women guests" about the neighborhood at night, but did not warn Wassell.[128] On the evening of the attack, Wassell locked her door and went to sleep. She awakened to a knock at the door. When she looked out the peephole she did not see anyone. She did not look out a pane glass window that was next to the door.[129] Wassell opened the door, thinking it was her fiancé. It was not. Instead, a man she had never seen before asked for a glass of water. She got the water. The man then went into the bathroom. Wassell hid her purse. There was no telephone in the room. Wassell had not been told that there was an alarm that would have activated in case someone tried to steal the television set. When the man came out of the bathroom naked from the waist down, Wassell fled and pounded on the door of an adjacent room. No ***1435** one answered. The man ran after her and grabbed her. She screamed. No one heard. The motel did not have a security guard and the owners lived on the other end of the motel. The man raped her at least twice before she was able to escape.[130]

Wassell brought suit against the motel owners for negligence based on two separate theories of liability--failure to warn about the dangerous neighborhood and failure to take adequate precautionary measures, such as installing phones or alarms in the rooms or hiring a security guard. The motel owners' counsel "argued to the jury (perhaps with the wisdom of hindsight) that [Wassell's] 'tragic mistake' was failing to flee when the man entered the bathroom."[131]

A jury found the motel owners negligent, but also found that Wassell was negligent and that her negligence "had been 97% to blame for the attack."[132] On the basis of this allocation of fault, the jury awarded Wassell $25,000 in damages. Wassell asked for judgment notwithstanding the verdict, based in part on her argument that she could not be held negligent as a matter of law.[133]

Judge Posner, writing for the Seventh Circuit, affirmed the jury's verdict. Applying a risk-utility standard, the court compared the "respective costs to the plaintiff and to the defendant of avoiding the injury."[134] Under this standard, the court disregarded negligence claims for which there were no monetary costs in the record (like the claim for phones in the room), and compared the $20,000-per-year cost of hiring a security guard with "the monetary equivalent of greater vigilance on the part of [Wassell] that would have averted the attack."[135] The court suggested that the jury verdict seemed to fail this risk-utility standard.[136] But as jury determinations of breach are reviewed only for abuse of discretion, the court chose not to reverse or modify the jury's apportionment.

The court's risk-utility calculus highlights three factors that are common to such analyses. First, risk-utility calculations do not account for citizen entitlements.[137] In Wassell, for example, women's obligation to take precautions against rape is bounded only by considerations of efficiency. If it is less costly for women to stay inside at night than for hotels, ***1436** employers, and stores to take precautions for women's safety, the risk-utility test requires women to stay indoors, not for third parties to take precautions.

Second, a risk-utility standard poses difficult valuation questions--what is the cost of citizen precautions? The Wassell analysis appears to have mistakenly evaluated the cost of victim precautions rather than citizen precautions. The court seems to have compared the hotel's aggregate costs of hiring a night security guard ($20,000 per year), with the disaggregated cost of greater vigilance by Wassell, an individual rape victim.[138] However, Wassell did not know in advance that she would be victimized while staying at the motel, nor did other guests know in advance that they would not be. As such, the appropriate cost of increased vigilance would be not only a cost of increased vigilance by Wassell, but by all potential victims at the motel over the course of the year. This problem is significant because examining costs to only the parties in the case greatly undervalues citizen costs from the outset. Had the court compared the $20,000-per-year cost of a guard with this aggregate cost of citizen care, the price of the motel guard would have been more in the neighborhood of $5 per room, per night--a significant cost, but still a seemingly different comparison.

Even when the problem is understood as a valuation of citizen precautions rather than victim precautions, the task of valuing those costs is just as difficult. Judge Posner aptly notes that "it cannot be assumed that the cost . . . was zero, or even that it was slight."[139] And yet, despite his vigilance in declaring that a cost exists, he suggests no method for valuing those costs.[140] Although there are costs in expecting women to assume that every knock on the door is a rapist lurking, these burdens are

unvalued by the court, or at least not valued enough to upset a jury determination. Without an explicit price tag, non-monetary costs get lost in the shuffle.

Finally, as with other comparative fault questions, in the civil rape context courts lack any meaningful capacity for reviewing jury determinations.[141] Courts have few standards for evaluating whether a jury's assessment *1437 of fault should be overturned, and are reluctant to overturn a jury verdict even when the available standards seem to be violated.

As a result of the risk-utility test's limited capacity for meaningful judicial review, its inability to value nonmonetary costs, and its failure to account for entitlements, courts applying a risk-utility test also have not set boundaries on the scope of appropriate citizen precautions.

3. Actual Cause.--Actual cause determinations are often difficult because they are counter-factual, requiring courts and juries to imagine what would have happened had different actions been taken. But within this collective imagination of alternative scenarios, judges and juries are at times very willing to believe that systemic precautions would be ineffective in rape prevention and that individual action would achieve better results. In Wassell, for example, Judge Posner rejects the plaintiff's failure to warn argument based on his conclusion that "[i]t is unlikely that a warning would have averted the attack."[142] But while he dismisses the idea that defendant's warning would have been effective, he is nevertheless willing to assume that the victim could have avoided the rape by "schooling herself to greater vigilance."[143] If the victim's decision to keep the door closed would have prevented the rape (an uncertain proposition given that a prior rape at the motel occurred after a hotel guest failed to answer the door and the rapist simply kicked the door open), a meaningful warning about specific dangers in the neighborhood could have provided the best influence over the plaintiff's level of care--action based on specific information rather than generalized fear. Even if the warning would not have changed plaintiff's decision to open the door, a meaningful warning could have averted the attack in another way: It could have encouraged Wassell to find a safer place to stay--a very real fear of the motel's.[144]

The Cook case also illustrates the potential for juries to overestimate the usefulness of individual victim actions. In Cook, a Minnesota court stated that a rape victim might be contributorily negligent for drinking *1438 alcohol with a passenger who raped her on a crowded bus.[145] The evidence in Cook indicated that a bus driver stopped to let a boisterous and visibly intoxicated passenger get more alcohol, which in turn created a loud environment of general drinking and intimidation. In that context, the victim's willingness to drink alcohol is of questionable import.[146] At times, courts and juries may overestimate the usefulness of individual rape victim precautions and underestimate other factors, including shared vigilance and structural crime-prevention measures.[147]

C. Roots of Rape Victim No-Duty Rules

Within both comparative apportionment and defendant-culpability paradigms, a few courts, judges, and commentators have opposed rape victim comparative fault defenses. Although the cases rarely articulate why rape victim comparative fault defenses are problematic, they nevertheless seem to be rooted in a no-duty concept.

Perhaps the broadest articulation of a no-duty concept is found in Utah Supreme Court Justice Stewart's powerful dissent in the recent case Field v. Boyer Co.[148] In Field, a store employee was sexually assaulted on her way to the shopping mall's employee parking lot. The store owner and the mall moved to include the fault of the attacker in the jury's apportionment of fault. Although the court did not permit comparison in this case because the unknown attacker was not a party to the case, it did hold that the state's comparative fault statute permitted comparisons of intentional and negligent fault, leaving open the possibility that a rapist's intentional fault and a rape victim's negligent fault could be compared in other cases where the attacker was a known party. In his objection to this troubling possibility, Justice Stewart boldly stated that "[t]he law does not impose on a victim a duty to avoid a criminal act by another."[149] The principle behind this strong language suggests that Justice Stewart might preclude all rape victim comparative fault defenses--with respect to both *1439 rapists and third parties.[150] However, since his opinion was primarily concerned with comparisons of rapist and rape victim fault, the applicable scope of Justice Stewart's proposition to the third-party context is unclear.

Still other cases support at least a limited rape victim no-duty rule in the context of third-party liability. In Metropolitan Atlanta Rapid Transit Authority v. Allen (MARTA), for example, a woman was raped while retrieving her automobile from a transit authority parking lot in a dark area where a burned-out floodlight had not been replaced.[151] In its defense, the defendant transit authority argued that plaintiff "was well aware of the danger in being out alone in the City of Atlanta at night and yet voluntarily chose to undertake those risks."[152] Based on this defense, the defendant disputed the adequacy of the lower court's instructions on issues of comparative negligence and assumption of risk. Although the appellate court noted that comparative negligence instructions had been provided to the jury, it then used strong language suggesting that submission of the third-party defendant's comparative fault defense was not required.[153] "[W]e presume," the court wrote, "that MARTA does not take the position that anyone who uses its rail system at night is presumptively lacking in care for his

or her safety."[154] Although the court's presumption recognized that such a defense would be problematic, it failed to articulate why the rape victim's decision to take public transportation alone at night (a possibly risky activity) could not constitute fault, or to clarify whether that was its holding as a matter of law.[155] Other courts have evinced similar ***1440** unease with plaintiff fault defenses in third-party cases, but have not identified a way for judges to address them.[156]

The most thoughtful work on no-duty rules to date comes not from courts and case law, but instead from the new Restatement of Apportionment. The Restatement explicitly recognizes courts' power to develop no-duty rules for "plaintiffs injured by intentional tortfeasors."[157] Those rules would apply in third-party actions as well as actions against intentional tortfeasors. Moreover, the rules would allow courts to define entitlements more broadly in the case of an intentional tortfeasor defendant.[158] The rationale for these rules is explicitly based on giving an entitlement to individuals facing the risk of intentional torts.[159]

Yet while the Restatement establishes the no-duty concept, and articulates some of the principles that warrant such entitlements, it does not attempt to delineate the appropriate scope of no-duty rules, declaring those questions "beyond the scope" of the Restatement.[160]

D. A Summary

As an overview of the current case law reveals, courts examining rape victim comparative fault defenses have reached a wide range of outcomes based on different approaches. Although most of the published cases conclude that intentional tortfeasors are barred from claiming comparative fault, Morris allowed even the intentional tortfeasors to claim comparison of fault. Furthermore, while most courts allow third-party defendants to raise comparative fault defenses, a few courts have suggested that such defenses would be inappropriate. Finally, in the many cases in which comparative fault defenses were permitted, juries and judges evaluated those defenses by different standards and with few, if any, principled limits.

Despite the disparities, however, much of the existing case law shares important structures and a unifying theme--that victims can be considered at fault for rape. Stated differently, many courts and juries have concluded that women citizens, as potential rape victims, have a general duty to act reasonably at all times to prevent rape--not to drink alcoholic ***1441** beverages underage, not to associate with older boys, not to open the door at night, especially if a man is present. Not only is it wise for women to take these precautions in an attempt to avoid being raped: If they don't want to diminish their right to others' care, the law requires it of them.

III. Inadequacy of Courts' Current Approaches

Courts and commentators have long recognized that it is "contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm."[161] However, the policy rationales for this intentional-tort exception have been multiple and loosely defined.[162] Because third parties originally had little or no obligation to take reasonable care to protect against rape or other intentional torts, the intentional tort exception was consistent with both rapists' moral culpability and plaintiffs' entitlement to proceed on the assumption that others would not intentionally harm them.[163]

However, with the increased number of suits against third parties, differentiation between defendant-culpability and victim-entitlement rationales for the intentional-tort exception becomes important. Either rationale could bar rapists from ever raising comparative fault defenses. However, if courts exclusively apply a defendant-culpability rationale, negligent tortfeasors may raise unlimited rape victim fault defenses. And if courts exclusively apply only a partial citizen-entitlement approach, rapists themselves may raise some defenses of rape victim fault.

Without considering, or perhaps even noticing, the divergent result of these rationales, courts have generally relied on an exclusive defendant-culpability approach. Little thought appears to have been given to the citizen entitlements left behind.[164] However, recognizing both defendant-culpability and citizen-entitlement rationales is crucial to defining the scope of rape victim comparative fault defenses.

Although defendant-culpability and plaintiff-entitlement approaches can be employed as mutually exclusive alternatives, as they were originally in the Restatement draft,[165] the two concepts are not necessarily in opposition. It is possible to acknowledge both that a victim has a legal interest ***1442** in not shaping her conduct around the risk of violent crime (through citizen no-duty rules), and that rapist and other intentional tortfeasor misconduct is more culpable than third parties' negligent misconduct (a defendant-culpability-based conception). Before outlining a few approaches that recognize both of these interests, this Part explores some of the problems inherent in the current paradigms.

The central problem with current comparative fault defenses is the baseline that those defenses accept. The baseline ignores

any notion of citizen entitlement and assumes that pervasive rape and fear of rape in our society provide an appropriate foundation on which to construct citizens' duties of care. Under the current rule, since rape is common, reasonable women not only take many precautions to protect themselves, but must do so if they want to fully invoke their right to obtain third-party care. Thus the law not only reflects the reality of female fear and restriction--it reinforces and legitimates that reality.

The problems with such a baseline are multidimensional--inherent in the rule and exacerbated by the rule as applied, reflective of wider problems with using intentional torts as a baseline, and unique to the context of rape. I explore a number of these difficulties both to show the range of problems that cause the current results in rape cases and to further an understanding of related contexts that involve only some of these problems. As a whole, the current baseline is problematic because it transforms the social reality of rape and fear of rape into an obligation that diminishes individual freedoms, harms equality, and is not likely to enhance deterrence.

First, a citizens' duty to take precautions to avoid rape harms individual freedom because of its excessive scope, its requirement that citizens abandon liberties in exchange for tort law protection, and its license to institutions to fashion their level of care on the assumption of citizen-restriction. Second, the obligation diminishes equality because the liberty restrictions necessary to obtain tort law protection are based on gender, blame women individually and collectively for rape, and shift the costs of preventing and dealing with rape to women, who already bear the overwhelming majority of losses caused by this crime. And third, these harms to women's freedom and equality are not likely to be justified by deterrence goals. Women are already likely to take substantial precautions to avoid the risk of rape, and any increase in victim precautions would probably be offset by a diminution in third-party structural precautions that may more effectively decrease real risk and reduce citizen fear.

A. Victim Freedom

"[I]n civilized society men must be able to assume that others will do them no intended injury--that others will commit no intentioned aggressions *1443 upon them."166 What is at stake in rape victim comparative negligence doctrines is precisely this assumption--that women citizens have a legal entitlement to act on a day-to-day basis on the premise that others will not intentionally rape them.167 Under the current baseline, the law denies women this entitlement. This denial is particularly troubling to victim freedom because of its excessive scope, its potential to erode norms of individual liberty, and its impact on the design of broader institutional protections.

1. Scope of Citizens' Obligations.--Courts often justify a baseline that requires precautions against rape on a notion of perceived symmetry. That is, if third parties have a duty to take reasonable precautions to prevent rape, citizens should too. But the perceived symmetry under the current law is illusory. Third-party duties are limited in ways that citizen obligations are not. In addition, the notion that third-party and citizen obligations should be the same ignores critical differences between citizens and third parties and the risks posed by their behavior.

In terms of scope, third-party duties are circumscribed with respect to who owes a duty and when a duty is owed. Courts restrict third-party duties through no-duty rules, narrow conceptions of foreseeability, and additional limits based on public policy.168 Courts that adopt these restrictions often emphasize that such limits are necessary to prevent the creation of a general duty requiring third parties to take reasonable care to protect others from crime.169

However, by refusing even to recognize that a duty question exists with respect to rape victim comparative fault, courts provide no similar boundaries on citizens' obligations. Citizens generally must take reasonable care to prevent their own victimization if they wish to sue third parties; this "duty" is universal and not limited ex ante to certain circumstances or individuals.

For example, a third party is on notice, through the doctrine of "special relationships," that it has a duty of care with respect to a certain limited number of individuals. However, even where a woman may benefit from a special relationship with a third party, she would have no reason to know of her own obligation without knowing when a third party has breached its obligation of reasonable care to her--for example, when a *1444 door labeled self-locking isn't,170 or a chain lock is installed backwards.171 Therefore, a woman who wants to meet legal expectations of reasonable care must always take precautions against rape, depriving her of the ability to assume that others are taking reasonable care.172

Similarly, judicial unwillingness to recognize citizen no-duty issues means that rape is always considered foreseeable to women, even though courts restrict foreseeability to third parties more narrowly. In third-party actions, some courts have disavowed broad analyses of the forseeability of crime, finding foreseeability only where the third party has concrete knowledge of specific prior crimes or unsafe conditions. In premises-liability cases, for example, it has been said that "'[c]rime may be visited upon virtually anyone at any time or place,' but criminal conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost

anywhere, especially in a large city."[173] Instead, "[m]ost courts have looked to narrow geographic areas in analyzing the foreseeability of criminal conduct."[174] Even then, some courts have held that prior crimes in the area must have been directly reported to the landowner or widely publicized.[175] A few courts have taken even narrower views.[176]

To say that some courts still take narrow views of foreseeability is not to suggest that they should do so. A narrow view of third-party foreseeability ***1445** has been soundly criticized as overly restrictive.[177] Still, to the extent that courts do elect this type of narrow foreseeability standard in the third-party liability context, one might expect courts to pay equal attention to the victim's right not to have to protect herself constantly from criminal acts. Yet courts expect women to foresee the possibility of rape regardless of whether they are in unfamiliar areas, are unaware of prior crimes in the vicinity, or could not have obtained actual data about the relative safety of various areas or locations. Courts expect women to act on the assumption that rape is foreseeable at any time and in any place, and give juries complete latitude to entertain that expectation. And because courts don't recognize the duty question in the context of citizens' obligations, those obligations are not limited by the kinds of explicit public policy factors that courts use to constrain third-party liability. Since courts do not currently recognize that citizens may at times have no duty, a citizen's obligation to take reasonable care to protect herself from being raped is generally in force. The reasonable woman must take constant precautions or risk being found to have failed to protect herself adequately.

In so broadly defining women's obligations to protect themselves against rape, courts overlook women's strong interest in not taking constant precautions against rape. Conditioning women's recoveries, or part of those recoveries, on their willingness to live in a world of fear and precaution creates real harms because the precautions required are themselves costly, all-encompassing, or based on misguided assumptions about risks. Persistent thoughts about protection itself imposes a toll on women, hindering their ability to experience the world and to participate in society.[178] Requiring constant vigilance and precaution as a precondition to recovery is particularly ironic, because the very thing required ex ante by the current legal rule--'lack of trust'--is often described as one of the main harms of rape.[179] The precautions themselves can chill individual liberties that are important facets of citizenship and autonomy. A citizen's interest in not having to take constant precautions against crime is not so weak that it is easily trumped by risk of conduct that may never happen, or may happen despite restriction.[180] For example, even with ***1446** the extensive precautions that women already take against rape, "[t]hree out of four American women will be victims of violent crimes sometime during their life."[181]

The liberty interest in not being required to take precautions against crime is particularly strong in the context of rape, where citizen restrictions are either theoretically limitless or unrealistic. For example, if women are required to take precautions against acquaintance rape, not just stranger rape, every aspect of a woman's life could be constrained.[182] According to U.S. Department of Justice statistics, the largest percentage of rapes--thirty-five percent--occur at or in the victim's own home.[183] If a reasonable woman knows that she is more likely to be raped in her home than anywhere else, what is her legal obligation? If a reasonable woman knows that she is more likely to be raped by a male friend or acquaintance than by a stranger, then what? Does the victim's duty require her to look at every man as a potential rapist? To avoid all unsupervised contact with men? To avoid all men?[184]

The more one considers how, when, and where rape tends to occur, the more problematic comparative fault defenses become. If the law took a realistic view of rape without recognizing a no-duty rule, women might be expected to forgo any number of activities.[185] Alternatively, if the law does not take acquaintance rape into account, and views rapists only as strangers hiding in bushes and sneaking in back windows, the law instead requires citizens to shape their conduct around overestimated risks rather than accurate ones.

A broad duty is problematic not only because of women's strong interest in not taking precautions, but also because the duty would often require reasonable care in times of duress, when rational action is least ***1447** likely. And what would constitute rational action is subject to dispute.[186] In addition, many rape victims are children.[187] Requiring these victims to take reasonable care for their own safety--even the limited care expected from a child of the same age and abilities--may be not only unrealistic, but ultimately contrary to individuals' long-term safety interests.[188]

The broad scope of citizens' obligations under the current law is also worrisome in light of considerations that make the risks taken by citizens less objectionable than the risks taken by third parties. One difference is that third-party actions threaten physical harm to others, while citizens' actions pose risks of physical harm to self. That risks are to self rather than others makes those risks less culpable.[189] Thus while it is possible to say that citizens' exercise of liberties without regard to the possibility that they may be raped is "wrong" or "irresponsible" because it subjects them to risks of harm from others, it is wrong in a rather limited sense. Even when accountability is recognized as the explicit goal of tort law, it is possible to make a convincing case that some plaintiff negligence should not diminish the defendant's duty under a comparative fault system.[190]

Another reason to expect citizen obligations to be narrower than third-party duties is that third-party duties are often placed on enterprises rather than on individuals. Indeed, even in the third-party context, some courts have been reluctant to impose liability when the defendants are not enterprises.[191] That the obligation is imposed on an enterprise is ***1448** relevant for

several reasons. First, enterprise practices that create unreasonable risks often expose many people to those risks over substantial time periods, making harm to someone more foreseeable.192 Second, enterprises do not have citizenship rights to lose. This is not to say that at times third-party precautions may not adversely impact nonparties' liberties.193 Still, requiring due care when due care means an enterprise must install safe lighting or emergency telephones is less problematic than requiring due care when due care means that an individual cannot ride the subway at night, or open the door when someone knocks, or go for a drink with an acquaintance--activities that have a stronger association with citizenship. Finally, enterprises often receive monetary profits for their services. At times, courts have been more willing to impose obligations on for-profit enterprises,194 whether because of earlier ideas about consideration,195 or because of more recent concepts of loss spreading.196

As the above analysis demonstrates, the current baseline of expansive obligations of citizen self-care is overly broad, despite substantial citizen interests in not taking precautions against intentional torts and fewer reasons to sanction citizens' risks. Thus, despite the rhetorical power of arguments that symmetry requires unlimited rape victim fault defenses in cases involving third-party defenses, real asymmetries underlie the existing baseline.

2. Trading Liberties for Security.--Under the current baseline, if citizens do not want to diminish others' duty of care, they must curtail their own liberties, potentially in myriad ways. The availability of broad victim comparative fault defenses gives citizens a choice--'voluntarily' surrender liberties or reduce third parties' legal responsibility to provide reasonable care.197 Either way citizens lose--liberty or security. Even in *1449 cases that do not pose the choice between liberty and security in such stark, all-or-nothing terms, the same issues are present in questions of degree.

In other contexts, courts have refused to condition plaintiffs' tort law recovery on their willingness to sacrifice otherwise applicable entitlements. For example, in LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway, the Supreme Court refused to condition the plaintiff's recovery on his willingness to take reasonable care to protect his property against negligent harm.198 Similarly, in Marshall v. Ranne, a plaintiff was permitted to recover for injuries inflicted by his neighbor's vicious hog even though he could have taken steps to minimize the risk of injury to himself.199 The rationale underlying these cases is that plaintiffs are not legally required to trade entitlements for tort law protection.200

Even when self-harm is nearly certain to follow from plaintiffs' conduct--not merely a slight risk as in the rape cases--a few courts have still taken the view that citizens should not be forced to trade entitlements in order to obtain tort law protection. For example, in some jurisdictions persons who refuse blood transfusions for religious reasons may be able to recover from private parties the full costs of harm suffered although that harm resulted in part from their own refusal to seek treatment.201 And even when the entitlements are small or nonexistent, and the gravity of the risk significant, some courts refuse to reduce citizens' tort law recoveries based on their failure to take precautions. For example, many states still do not allow failure to wear a seatbelt to be considered comparative fault even though persons injured in accidents without seatbelts suffer more damage than accident victims who were wearing seatbelts.202 As such, drivers are neither required to take reasonable precautions for their own safety nor required to sacrifice compensation if they do not.

*1450 Courts' refusal to condition citizens' tort recoveries on their abandonment of certain freedoms rests on a concept of entitlement. "Victim freedom is predicated on the belief that, within certain domains, persons may do what they wish with their persons and their property. That freedom includes the freedom not to take precautions for the protection of themselves and their property, even when doing so will prevent an accident at the lowest possible cost."203 One commentator has effectively argued that victim freedom better affords both protection and freedom.204 "[I]f we conceive of our claims to freedom and security as dependent upon the balance of costs and benefits, we may erode our liberties in a thousand small steps."205

It may seem rather perverse to argue that victims should have the freedom to put themselves into situations in which they face an unreasonable risk of rape. Who wants that right? Certainly women are likely to be more interested than any other group in preventing themselves from being raped and in restricting their own liberties if and when such an approach seems effective. However, abandonment of citizens' duty would allow women to balance for themselves the advantages and disadvantages of liberty restrictions--whether, for example, the benefits of working at night, or any other potentially risky activity, outweigh the risks of that activity.206 Preserving women's right to make those decisions would promote women's interest in autonomy.

There is no reason to think women will give too little weight to the risk of being raped or that juries are better able to make decisions about the costs and benefits of activities forgone as a result of fear. A review of the case law shows that the reverse is true. Even courts that recognize the theoretical costs of citizen precautions are unable to estimate and factor these costs into their decisions in any concrete way.207 An actual accounting is difficult, in part because of the intangible nature of citizens' interest, and in part because of tort law's focus on the cost of precautions to an individual victim rather than the aggregate

cost to citizens.

In addition, the ad hoc nature of the jury process makes consistent valuation of women's liberties even less likely. Although some juries may value women's liberties and the costs to women of restricting those liberties, many will not.[208] With the current baseline, whether citizens' freedoms ***1451** are valued is subject to the ad hoc whims of a jury. It is this type of concern for the difficulty of valuing important but intangible freedoms that has persuaded courts in other contexts to value freedoms as a matter of law-- for example, by limiting civil liability where that liability might chill First Amendment rights.[209] As in the First Amendment context, allowing juries in civil rape cases to decide questions of intangible value is particularly problematic because it can chill individual liberties that are important facets of citizenship, moral autonomy, and equality. Even worse, in the context of comparative fault, unlike in the First Amendment context, courts have no systematic means to review jury determinations.[210]

A person's right to proceed in the world without fear of violence is as important as her right to proceed over her specific property. The surrender of that intangible yet valuable right should not be required as a condition of full recovery.[211]

3. Institutional Design.--If citizens are required to restrict their liberties in order to obtain full tort law protection, the loss is not only a direct loss to citizens' liberties (real or symbolic), but also a diminution of the defendant's duty of protection. This wide-ranging view of comparative fault in rape cases raises the problems associated with a broad view of plaintiff fault more generally. An expansive conception of rape victim fault tends to minimize or eliminate the defendant's duty. In addition, it accomplishes that end by undermining the moral foundation of judgments about fault.

The precautions required of a potential rape victim are extensive. As the law stands, a third party's duty of care fully extends only to a reasonable woman inside her house alone; in any other circumstances, a citizen's right to full care from others is unclear. Perhaps the clearest example of this phenomenon arises within the context of homosexual rape in prison, a context deeply connected with subordination by gender.[212]

***1452** In one such case, McGill v. Duckworth,[213] the Seventh Circuit determined that, as a matter of law, a prisoner in protective custody had assumed the risk of rape when he chose to leave his prison cell during the one hour of the day that he was entitled to do so in order to take a shower. The prisoner, McGill, had been placed in protective custody in part because of his slight build and rumors of homosexual overtones to his crime. After another prisoner made sexually suggestive comments to McGill, McGill nevertheless left his cell to take a shower. While in the shower, he was raped by three prisoners brandishing crudely fashioned knives. The officer who was in charge of "monitoring the shower area to protect the inmates from each other" had "left his post without authorization."[214]

Despite a jury verdict for the prisoner for $10,000 on the basis of the prison administrators' negligence,[215] Judge Easterbrook, writing for a divided panel of the Seventh Circuit, reversed the judgment. Although Indiana law requires prison officials and guards to take "reasonable precautions to preserve an inmate's health and safety,"[216] Easterbrook held that McGill was not entitled to those precautions because he had not taken reasonable care for his own safety. This conclusion was based on the defendants' argument that "McGill assumed the risk [of being raped] by leaving his cell and proceeding into the showers when he knew that [the other prisoner] and pals were on his heels."[217] Judge Easterbrook explained his conclusion in typical defendant-culpability-based terms. According to Easterbrook,

[i]f this were a suit against [the rapists], McGill's failure to return to his cell or alert the guards would be no defense. No one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood. Rape is an intentional tort, and defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts. So, too, these defenses often fall away when the defendant acts recklessly or wantonly. But McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety.[218]

***1453** Under the majority's reasoning, had McGill exercised such care, he "could have stayed in his cell or arranged for individual shower and recreation periods--and as we have emphasized, he could have alerted the guards he passed on the way [that another prisoner had made a sexually suggestive comment]."[219] Thus under the majority approach, the third parties had a duty to take reasonable care for McGill's safety only so long as McGill stayed inside his locked private cell twenty-four hours a day or acted on the assumption that the guard assigned to the showers had abandoned his post. Once the plaintiff exercised the limited freedom he was permitted, or assumed that the prison was taking reasonable care for his safety, his right to defendants' care was lost as a matter of law.

The expansive conception of victim fault in McGill and other comparative fault cases is used to achieve an effect similar to recent comparisons of fault between rapists and third parties--to diminish if not eliminate third-party liability.[220] As Judge Cudahy aptly noted in his vigorous dissent in McGill, to conclude that prisoners voluntarily assume the risk of rape by venturing out into a dangerous prison environment "is virtually to exculpate prison authorities in advance for any responsibility to provide protection against homosexual rape."[221] Noting the potential breadth of this defense, Judge Cudahy cautioned, "I don't know what this approach to risk assumption in rape cases holds in store for multitudes of females

innocently walking the streets or taking the sun on the beach."[222]

Comparative fault defenses force courts to consider whether the defendant's duty is designed to protect the plaintiff's freedoms.[223] One might say that the purpose of imposing a duty on third parties is to protect women against rape, not to protect women's freedoms. But protection of women without protection of entitlements will provide little if any protection. In many cases, the plaintiff's allegedly negligent conduct gives rise to the very reason for the third party's duty. For example, in the MARTA case,[224] the rationale for imposing the legal duty to maintain adequate lighting is the use of public transportation at night. To allow MARTA to assert that the plaintiff was contributorily negligent for using public transportation at night would negate the very purpose of its duty. Similarly, in Wassell, the very reason that a duty to warn would be imposed (if the jury felt that such a duty should be imposed in the first place) is to ***1454** help the plaintiff make informed decisions about matters such as the propriety of opening her motel room door at night. To allow the defendant to reduce its obligation to give accurate safety information by pointing to a decision the plaintiff made in the absence of such information defeats the purpose of imposing the duty. Even where the plaintiff's supposed negligence is not the reason for the defendant's duty, it may be desirable to have institutions provide protection even to negligent plaintiffs. So, for example, a hotel's front desk should respond to emergency calls, regardless of whether the woman being raped had previously exercised a great amount of care for her safety or not.[225]

The reasons for not reducing third-party liability through expansive notions of victim fault include many of the reasons for imposing liability on third parties in the first place. In terms of deterrence, a growing body of criminological research suggests that institutional design can actually deter crime. Situational crime prevention literature indicates that security precautions may be effective in deterring particular acts of crime, as well as in reducing the general level of crime. Even "[w]ith respect to crimes thought to be the province of 'hardened' offenders, evidence is now accumulating of successes achieved by situational prevention, including the virtual elimination of aircraft highjackings by baggage screening and substantial reductions in robbery achieved by target hardening measures in post offices, convenience stores, and banks."[226] For example, studies have found that the presence of two cashiers greatly reduced the incidence of convenience store robberies. In some cases, even simple measures such as increased exterior lighting have been effective in reducing crime and the fear of crime in particular areas.[227]

A myriad of anecdotal evidence also suggests that third-party tort liability encourages enterprises to think more carefully about their security practices.[228] For example, a door-to-door vacuum cleaner sales company that insisted it could not institute background checks of its employees did so after it lost a case in which an employee with prior convictions raped customers.[229] Extra care appears to have positive results. An article written ***1455** for a trade publication reported that Wal-Mart's implementation of inexpensive parking lot security measures, ranging from patrols to surveillance cameras, produced "outstanding" results in reducing the 80% of the crime that occurred in the parking lots or outside perimeters of its stores.[230]

Holding third parties accountable for precautions is not only beneficial to victims; third-party choices affect many of the costs to others associated with crime. A shift to a twenty-four-hour-a-day workplace, for example, may benefit individual store owners. Yet for employees and customers, this change may generate increased costs in terms of crime--to employees who are forced to work and travel to jobs at night, and to customers who may be unaware of prior incidents of crime.[231] If companies benefit from nighttime business, it is reasonable that they bear some of the costs associated with those benefits. For example, if Exxon has a policy requiring its contractors to stay open twenty-four hours a day,[232] it should expect to provide reasonable security measures for the employees that work these round-the-clock hours.

In terms of compensation, there are real differences in parties' abilities to bear the costs of security. The people working in late-night, unsafe jobs are disproportionately likely to be young or poor.[233] As one court noted in response to a third party's claim that its employee had been contributorily negligent in his robbery because he worked at the store late at night, it is a reasonable inference that persons who work in unsafe, low-paying jobs at night are unlikely to have many other employment opportunities.[234] Thus, the reasons for creating third-party duties also provide an argument against not diluting them.

An expansive conception of victim fault not only diminishes plaintiff's right to third-party care, it accomplishes that diminution by imposing an extra harm--blaming the victim for the injury suffered. Judge Easterbrook's assertion in McGill, that "[n]o one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood," is only half true under his own analysis.[235] Under the present baseline, as against a rapist, a citizen does not surrender ***1456** her entitlement to bodily security by leaving home at night, but as against a third party, she most assuredly may do so.

Diminishing the defendant's duty through an over-broad conception of rape victim negligence is troubling because it erodes the moral foundation of judgments about fault. If most conduct can be "fault," then fault loses its authority to delineate socially undesirable conduct and its capacity to assist courts. An expansive view of assumption of risk has been criticized on the basis that it is not really about consent.[236] When an over-broad assumption of risk defense becomes an over-broad contribution fault defense, it may not be about fault either.[237]

That third-party liability has been limited through victim blame is not a surprising result of allowing comparative fault doctrines in civil rape cases. Instead, it is a foreseeable outgrowth of judicial ambivalence toward third-party liability, the lack of legal limits on the concept of fault in comparative fault defenses, and tendencies to blame rape victims for their own victimization.

B. Equality

In the context of rape, the current baseline of citizens' duty also harms equality.[238] Rape is a gendered crime.[239] Fear of rape is a distinctly female fear.[240] And the fact of rape is perceived in this culture as justifying special restrictions on women's conduct.[241] In light of these factors, a baseline that requires citizen conduct to be fashioned around risk of rape and fear of rape poses specific threats to equality. First, a duty of care based on rape harms equality because that duty requires women to cede a greater portion of their liberties than do men in order to ***1457** obtain third-party protection. Second, the focus on rape victim fault undermines equality norms and contributes to the revictimization of rape victims in the legal process. And third, a citizens' duty shifts to individual women the financial costs of rape.

1. Precautions Based on Gender.--A duty of care based on rape has a disparate impact on women. The duty requires women to take liberty-restricting precautions because of gender. The differential impact of rape on women is similar to the differential impact of other hate crimes and harassment.[242] A hate crime not only creates the ordinary harms to the community that result from crime, but also harms to equality.[243] The harm to equality stems from the fact that members of different groups face different threats of harm, and varying fear of harm.[244] With rape, the persons threatened and not threatened are divided into categories along gender lines.[245] As such, a duty to take precautions against rape harms equality by creating two communities--one that must restrict liberties by taking precautions (women), and one that need not restrict liberties by taking precautions (men).[246] Thus, using rape as a baseline for citizen's legal duties translates the social harm of rape against women, which itself harms equality, into legal rules that further disadvantage women because of those harms.[247] The baseline harms equality by diminishing ***1458** the legal capacity of women to participate in society as autonomous equals.[248]

Gender-based violence already impairs women's ability to participate in the economy.[249] A baseline fashioned around gendered violence may further harm women's ability to participate in the economy as full and equal citizens--not simply because working alone at night may be considered an unreasonable risk for a woman (which it might), but because the availability of such defenses could reduce employers' need to provide safe work environments for women. Rape victim comparative fault doctrines create the possibility that third parties could keep an environment safe enough for men but not for women (or at least safe enough that men perceive it as safe even if women do not).[250] If third parties are not required to provide a work environment safe enough for all workers, women will be foreclosed from a large number of jobs in the economy.

It is easy to imagine that gender equity concerns might fall away given a broader focus on duties to take precautions against all crime. While women are more likely than men to be victimized by rape, to experience fear of rape, and to restrict their liberties because of rape, one might imagine that men, who are the predominant victims of other types of crime such as murder, would be more likely to experience fear from the risk of those crimes and to restrict their liberties based on them. Whatever the rational basis for this argument, it is simply not borne out in contemporary understanding. Extensive violence against men is not socially understood to require greater restrictions on men's conduct than women's when the risks of these crimes, such as murder, are at issue. Despite the greater overall incidence of violent crime to males than to females,[251] women consistently restrict their behavior in more dramatic ways than do men, and are expected to do so--refusing to work at night, ***1459** or to leave their homes to go out alone.[252] In an attempt to avoid victimization, 41.5% of women in one study often "stayed inside," "avoided being on the streets," or "avoided going to certain parts of town."[253] "Those women with fewer financial, educational, and personal resources--the poor, the elderly, blacks and Hispanics, and the less educated--relied even more than the average woman on these especially restrictive tactics."[254] Although women are only two-thirds as likely as men to experience victimization,[255] only 10.5% of men in this study often employed similar isolationist strategies.[256] In terms of other precautionary tactics, over 70% of women often employed "street smarts" strategies, which include avoiding eye contact and certain forms of dress and watching people nearby, while only 29.4% of men often employed these sorts of tactics.[257] Thus, regardless of whether men's overall risk of victimization in a given situation is actually lower than women's (and statistics don't reflect that fact due to women's greater precautions), or whether men's risks of victimization are in fact higher (but are nevertheless regarded as normal, perhaps because male risks are often regarded as the norm), risks of harm to men concerning murder and robbery are not socially understood as a justification for increased restriction on males as opposed to females.

The perceived need for women to take increased precautions because of rape may therefore reflect not only the gendered nature of the crime of rape, but also the social construction of the meaning of violence against women-- female fear and

female restriction. Indeed, a paternalistic notion that women should be "protected" from rape by restrictions placed on women's own liberties has significant historical antecedents.258 Nineteenth-century legislation "protecting" women workers "prohibited the employment of women in certain industries and occupations or limited women to daytime work."259 In the Victorian era, "representations of women as sexual victims" were used to justify "limits on women's independence and repression of their sexuality."260 And in more recent times, ***1460** colleges imposed female-only curfews, supposedly to protect women students, under the doctrine of in loco parentis.261

Men's vulnerability to other types of victimization has not carried the same historical or cultural meaning. Until juries believe that men should not be working at convenience stores late at night because men's particular vulnerability to murder makes the job suited only for women, men's increased vulnerability to other sorts of crimes, even if true, will not diminish the equality concerns raised by a citizens' duty.262

Consistent with the historical and social belief that vulnerability to rape requires restrictions on women and not men, both judicial opinions and jury verdicts suggest that women must take greater precautions than do men. The case law takes a gendered view of what reasonable women should do (or, as is more typically the case, not do) out of concern for their own protection.263 For example, although Morris "set the stage" for rape by drinking with older boys,264 under the same state's law, a fifteen-year-old boy who drank eight beers with an older man was not contributorily negligent for his subsequent rape.265 And while there was no suggestion that a straight white man was negligent for his rape because he was out alone in a nightclub parking lot,266 a female rape victim's negligence was set at thirty percent of the total, and her damages reduced accordingly, since certain streets "were dangerous places for a young lady to be at 3:00 o'clock in the morning."267 The gender-specific language in courts' own analyses leaves little doubt that the gendered nature of juries' conclusions is not only sanctioned, but shared by judges.

One of the problems with the current system in which juries evaluate the reasonableness of rape victims' conduct is that it invites the jury to violate principles of formal equality.268 By evaluating the precautionary measures that a potential rape victim is legally required to take against what is, in practice if not in theory, a reasonable woman standard, and ***1461** relying on sexist notions that reasonable women restrict their conduct in ways that men do not, women are penalized for conduct for which men would not be.269 Thus, while a court or legislature could not directly enact a law saying that men but not women may go outside at night, and an employer could not directly restrict women's but not men's night work opportunities, juries may impose with impunity differential restrictions on men's and women's night activities in the tort context on the basis of gender.

As in the context of criminal rape cases, victim comparative fault arguments also perpetuate traditional rape myths--for example, that a girl who drinks beer with a group of boys is "asking for it."270 Juries may be similarly biased against women's sexual agency and display particularly punitive attitudes toward women who violate sex role norms.271 Required citizen precautions are not only based on gender in the sense that women must take greater precautions than men, but they are also based on gender in the sense that estimates of victim fault are particularly great against those women who violate sex role norms. For example, a woman who was raped by a vacuum cleaner salesman in her home--a more traditionally feminine setting-- was considered only ten percent at fault for her rape, while a woman raped by a man that she had recently met and gone to bars with was considered fifty-one percent at fault--a determination that ultimately barred her recovery altogether.272 When helping victims, ***1462** courts discuss the need to protect vulnerable women with children or older women at home alone.273 However, the idea that a grandmother needs third-party protection from rape when in a hotel on business274 gets less serious consideration. And the idea that the young woman at home alone with kids may also need protection when staying in a hotel with a friend for the weekend never gains serious currency.275 Third-party duties are seen as protecting vulnerable, frightened, passive women, not women who are agents as well as victims.

The current case law also expects women to rely on sexist and racist stereotypes about danger, including stereotypes that all unknown males are aggressive--or, at least, that all men of color are.276 Civil rape cases are replete with racial coding concerning perpetrators.277 They are also replete with other kinds of coding about the men who women should expect not to be rapists.278 These assumptions about rape are not only unsupported, but also impose harms of their own.279

The concern that juries violate principles of formal equality and decide cases based on rape myths and racial sex-role stereotypes is particularly salient in this context, where appellate courts often exercise little if any oversight of comparative fault determinations. Indeed, appellate review is nearly impossible given the lack of standards for deciding comparative fault questions and the fact that juries need not give reasons for their verdicts.280

***1463** 2. Equality Norms Inside and Outside the Courtroom.--A citizens' duty in the context of rape also creates significant process-related harms. Rape victim comparative negligence defenses tell women, both collectively and individually, that they are at fault for rape.

Law has an expressive function.281 It not only reflects, but also shapes social norms.282 Current rape victim fault defenses tell women, individually and as a group, that they are at fault for rape when they choose to enter situations in which they risk being victimized by rape. According to the current law, women should restrict their liberties as a result of crime against them --after all, reasonable women do.

The message undermines norms of equality and women's entitlement not to be raped. When laws directly require women to restrict their conduct in ways that men do not, or to conform to traditional sex-role stereotypes, courts frequently conclude that such restrictions constitute gender discrimination.283 Legal rules that require women to accept these same gendered restrictions in order to obtain full tort law protection undermine antidiscrimination norms.

Moreover, the tort law notion of rape victim fault undermines efforts to disband the popular belief that women are at fault for violent crimes committed against them such as rape. As one witness testified before Congress prior to enactment of the Violence Against Women Act, there persists "'the widespread belief that people who are raped precipitate [it] in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date." '284 And yet the doctrine of rape victim comparative fault allows courts to reinforce this notion of victim precipitation on a regular basis.
To say that rape victim comparative fault defenses undermine equality is not necessarily to say that the Constitution or Title VII forbids this application of the tort law, though such an argument is possible.285 ***1464** Rather, it is to say that tort law operates in the shadow of constitutional principles of equality,286 and as such, violations of principles of formal equality are troubling in this context as well as others.287

Ultimately, the message courts express about women and rape depends on the norms that we want as a society. Whether society considers rape victims' conduct faulty, or, conversely, whether we give victims an entitlement not to shape their conduct around rape, depends on whether "we want to get accustomed, whether we wish to become callous, or whether, instead, we think that as a society we would be better off if we continued to view some things as shocking, offensive, and even abominable."288 The current rights norms in rape victim comparative fault doctrines suggest that we want a woman to expect that every time she hears a knock on her door at night, it is a rapist, and we want a thirteen-year-old girl to expect to be gang raped if she drinks with older boys. But while rape is prevalent, there is a harm in requiring women to view rape as a normal part of their environment.289 To encourage women's full participation in society, the law should instead allow women to "take back the night"--by commending their exercise of freedoms, even when they are exercised in the face of constant risks of rape.
Not only do rape victim fault defenses cause collective harms to women, they also contribute to process-related harms. Holding that a victim has contributed to the causation of her own rape is necessarily victim-blaming. In the context of comparative fault, the duty of reasonable care ***1465** is breached by "conduct of the plaintiff which is improper because of its tendency to subject [her] to a risk of harm."290 Comparative negligence doctrines evaluate whether the plaintiff's conduct "falls below the standard to which [she] is required to conform for [her] own protection" such that it contributes "as a legal cause to the harm [she] has suffered."291 The contributorily negligent plaintiff is denied all or part of her recovery because her conduct has been adjudged to be a legal cause of her harm.292 A jury determination that a plaintiff has been contributorily negligent declares the victim's conduct blameworthy. As in criminal rape cases, civil contributory fault defenses place "the victim as much on trial as the defendant."293

This victim-blaming imposes harm on individual plaintiffs.294 Comparative fault defenses focus attention on a rape victim's conduct in a way that is likely to revictimize her in the courtroom. Rape victims already experience significant shame and stigma.295 Many victims pursue tort claims in order to obtain a sense of vindication.296 Defenses that blame the victim diminish opportunities for vindication.297 Among other things, victim-blaming defenses reinforce the use of "language as a form of domination in rape trials."298 Such domination is often accomplished by defense attorneys' "reproduc[tion of] rape by assembling the facts to construct the victim's moral character in a way that holds her responsible for the incident."299 Contribution to the rape defenses legally sanction such domination in the courtroom by providing a "legitimate" defense to which such victim-blaming arguments are relevant. In fact, the potential for damage reduction through contribution to the rape defenses is likely to encourage defendants to raise victim-blaming legal arguments,300 and ***1466** may make victims less likely to pursue civil remedies.301 Moreover, victim-blaming defenses are likely to expand the scope of invasive victim questioning considered "relevant" to the proceedings at other stages of litigation.302 Although it may be therapeutic for rape victims to see ways to avoid situations in which victimization is more likely,303 it is improbable that ex post fault attribution in an adversarial courtroom process would have a therapeutic effect.

It has been argued that allocating a duty to potential victims to take reasonable measures to avoid rape can be "empowering" to women. Instead of treating women as victims, the argument goes, this allocation of rights treats women as powerful actors who control their own decisions. According to such logic, the potential rape victim who knew or should have known that she

could be raped--if she went outside at night, if she had a drink with a stranger, if she opened her hotel room door, etc.--must accept the consequences of her own actions.

The key problem with this argument is its concession to the overall conditions of violence and victimization within which women are denied power.[304] Under this theory, potential victims are legally responsible for their actions, but third parties are not responsible, or are less responsible, for making the broader world into which women venture safe for them.[305] Under such an "empowerment" theory, many oppressive circumstances for women could be justified. For example, sexual harassment defendants could argue that female employees assume the risk of ***1467** hostility by choosing to work in male-dominated environments, or simply by choosing to work.[306]

Establishing that women do not have to take reasonable precautions to protect themselves from rape does not deny women's agency. Rather, it recognizes the broader social constraints within which that agency is exercised.[307] A woman may have a choice between opening a door at night when someone knocks and being raped, or keeping the door closed. But without the choice of opening the door at night and not being raped, her consent is limited.[308]

3. Shifting Costs to Individual Women.--A victim-based duty not only blames women, but does so in order to shift the costs of rape, in whole or in part, to individual women. Although courts are often reluctant to require third parties to absorb the costs of rape, they have not addressed why it is more fair for women in general, and individual rape victims in particular, who already bear the primary physical and emotional costs of rape, to bear these costs.

The United States Department of Justice estimates that the "aggregate out-of-pocket costs of rape are about $7.5 billion"--primarily for medical and mental health care costs.[309] "When pain, suffering, and lost quality of life are quantified, the cost of rape" reaches $127 billion.[310]

Despite the magnitude of these losses, rape victims--like victims of many, but not all intentional torts--are largely excluded from traditional compensation systems such as insurance.[311] Insurance policies covering perpetrators often have provisions excluding coverage for intentional torts.[312] In some cases, the intentional tort exclusions are getting ***1468** broader.[313] And while many states mandate insurance coverage in some negligence contexts, like auto insurance, in the context of intentional torts, states may prohibit insurance coverage.[314] Even rape victims who have medical insurance may find that basic services such as mental health care are excluded or limited. Although there are some compensation programs specifically tailored to victims of violence,[315] these compensation systems are extremely modest.

The massive individualized losses suffered by rape victims raise broad questions about the need for adequate compensation systems for victims of intentional torts.[316] Although a full discussion of that important and underdeveloped topic is beyond the scope of this Article, the third-party liability system is one of the few existing mechanisms for spreading rape-related losses. A third-party liability system allows the costs of rape to be borne by a larger group of men and women--for example, a business's customers-- through self-insurance or commercial insurance.[317]

Requiring individuals to bear the full harms of injury can be disabling.[318] The harms attendant to uncompensated injuries from violence are particularly acute because they often fall on individuals with the least ability to cope with those losses. "Low-income women are more likely to experience violent victimizations"[319] and are the most susceptible to repeat victimization.[320] Rape victims' ability to cope with losses may be particularly strained in light of estimates that many rape victims lose their jobs after being raped.[321]

***1469** Allowing negligent third parties to reduce their liability because of women's conduct shifts more costs of rape back to women--the group disproportionately harmed by rape. Refusing to allow third parties to shift losses to rape victims is not simply a question of requiring enterprises to spread consumer losses (although a compelling case for enterprise liability could be made in this context). Third parties would only be prevented from shifting back losses associated with their own negligence.

C. Deterrence

Reduction of women's freedom and equality are in themselves harms sufficient to disavow a victim-based duty. However, deterrence is also a consideration, not only because it promotes efficiency, but also because it is "a generous, warm-hearted, compassionate, and humane goal."[322] But even within a discourse that accepts some "tradeoff between justice and efficiency,"[323] recognition of a victim-based duty is still unwarranted.

It can be argued that elimination of comparative fault defenses in civil rape cases could lead to suboptimal safety precautions by women and thereby increase the overall number of rapes. At times, including groups of people in activities which are central to citizenship may well have "a price in lives and accidents."[324] According women equal freedoms could come at the cost of increased numbers of rapes. However, there are several reasons to doubt that eliminating comparative fault defenses in civil rape cases will increase that number to any substantial degree.

In theory, rape victim comparative fault defenses could induce optimal safety precautions in the same way other comparative fault rules are thought to induce optimal bilateral incentives. Certainly, in some circumstances women have superior safety information or control over safety precautions and consequently might be in the best position to reduce the risk of rape. The possibility of liability for both defendants and plaintiffs may induce "rational parties to take all cost-justified care--i.e., to purchase precaution up to the point at which the marginal benefit of that precaution (in terms of the reduced probability and severity of an accident) equals the marginal cost."325 Absent a comparative negligence rule, women might be expected to take suboptimal safety precautions with respect to third parties, while third parties may end up taking excessive safety precautions.326 A suboptimal level of citizen precautions ***1470** could, in an imperfect market, yield an increase in the number of rapes and result in overinsurance.327

There is no way to determine the actual optimal level of citizen care, or to determine whether a comparative fault rule creates optimal citizen precautions. Still, there are reasons to suspect that imposing legal incentives on potential victims to protect themselves from rape, as the current baseline does, is unlikely to reduce the number of rapes to any substantial degree.

To reduce the number of rapes, a comparative fault rule would need to have three effects. First, the rule must increase women's level of care. Second, the increase in women's level of care must reduce the overall number of rapes. And third, the decrease in rapes resulting from women's increased care must not be offset by an increased number of rapes resulting from a decrease in third parties' level of care. At each of these three junctures, particularly the last, there are reasons to doubt that comparative fault defenses in civil law rape cases will reduce the aggregate number of rapes. In particular, victims have significant nonlegal incentives to take reasonable precautions to avoid rape, women's increased restrictions may increase rather than decrease the incidence of rape, and any marginal deterrence gained through victim fault defenses may be more than offset by the deterrence lost from third-party enterprises. In addition, any potential inefficiency from excessive third-party precautions is likely to be offset by other social gains.

1. Effect on Citizen Care.--Women take a wide variety of precautions in an attempt to avoid victimization. Fear of rape "is central to the day-to-day concerns of about a third of women" and alters women's conduct in myriad ways.328 Almost fifty percent of women do not use public transportation alone at night because of their fear of rape.329 Fifty-two percent never walk by parks or empty lots alone after dark.330 But while women take abundant precautions, it is unclear what portion of that care, if any, is due to a civil comparative fault rule.

Comparative fault rules are unlikely to have a direct effect on citizens' level of care. The actors to be influenced--citizens--are generally unsophisticated parties who are not repeat players in the tort law system. ***1471** 331 Moreover, those actors have substantial nonlegal incentives to avoid the risks of rape where feasible.332 Aversion to the devastating harms of rape, which include pain, physical and emotional suffering, and the risk of death, changes women's behavior.333 If ever nonlegal incentives could provide adequate plaintiff caution, it is difficult to imagine why this would not be that context.334 As such, persistent doubts about whether comparative fault rules deter plaintiff negligence in any context335 are likely to be particularly acute in civil rape cases.

However, comparative fault rules may indirectly affect women's conduct. Such rules may reinforce existing (equality-subverting) norms that crimes against women should result in limitations on women's activities. In addition, the rule's result--limiting third-party care--could create less safe environments, which could in turn encourage women to further restrict their own activities, like going out at night.336 Still, the many cultural sources of gender-restrictive norms, and the many direct legal limitations on private and public obligations to provide crime-safe environments make the indirect effects of a rape victim comparative fault rule difficult to isolate.

2. Effect of Victim Care.--It is unclear whether situational crime prevention measures, by third parties or victims, will actually deter crime, or whether they will merely displace it. To the extent that third-party situational prevention techniques are believed to reduce crime, there is no reason that citizen precautions could not reduce the number of rapes in ***1472** like fashion. Still, there are reasons to believe that third-party precautions are likely to be more effective than citizen precautions. Third parties have a wider range of situational crime prevention options than do individual citizens, and these precautions may affect more people over a longer period of time.337 Although citizen crime prevention research is blossoming in response to citizen demand for information about the ways in which to promote their own safety, citizen restriction is unlikely to be an effective method of crime prevention because citizens need so much more of it in order to protect themselves.338 Moreover, some of the methods of increased citizen precautions may promote individual safety at the expense of aggregate safety.339 And citizen precautions may be less likely than third-party precautions to be effective because they are more likely to respond to rape myths rather than concrete knowledge of specific safety information. Third parties are often in a unique position to know the number, type, and severity of prior harms as well as the level of risk at a given

location.
Moreover, in the rape context, the aggregate effect of citizen precautions on the number of rapes is a particular cause for concern as increased restrictions and lack of freedom for women may be conducive to more, not less, gender-based violence. "Macrosocial research on rape suggests that the prevalence of rape is positively correlated with a variety of social phenomena, including the acceptance of gender inequality."[340]

3. Lost Third-Party Care.--Although a contributory negligence rule is designed to promote caution by plaintiffs, it may just as easily encourage negligence "by giving the defendant reason to hope that he will escape the consequences" of his negligence.[341] Here, where third parties are sophisticated repeat players, commerce--unlike citizens--may respond directly to a citizens' liability rule with decreased insurance or precautions. *1473 [342] Consequently, the marginal deterrence lost from third-party defendants may more than offset the marginal deterrence gained through victim fault defenses.

In the context of third-party liability, there is already reason to think that those parties may take too few precautions to prevent foreseeable rape. First, because of the baseline no-duty rule, third parties must account for very few of the consequences of their lack of precautions. Accordingly, third parties already have fewer incentives to guard against foreseeable intentional torts than they do against foreseeable negligence.
Second, third-party incentives are likely to be inadequate because of the failure of markets in safety-related information. Without accurate safety information, customers and others to whom a duty is owed, who face ordinary collective action problems, are even less able to evaluate or bargain for a greater level of precaution. The lack of adequate safety information stems from many factors. In the first place, accurate safety information may be inaccessible because of widespread misrepresentation or deliberate nondisclosure of safety risks. Third parties' fear of losing business as a result of crime may lead to the inefficient solution that businesses simply try to conceal prior crimes from the unsuspecting public,[343] and at the very least do not affirmatively publicize them to assist citizens in doing business elsewhere. In addition, safety-related data is extremely malleable,[344] and manipulation of such data may be common.[345]

Finally, even when safety-related data is available, it is often difficult to interpret. In the context of higher education, legislation was critical in making safety information accessible.[346] Institutions of higher education are now required to disclose the number of crimes reported to campus police.[347] While this information may be helpful, it is unlikely to reflect *1474 the true extent of campus crime.[348] Moreover, it is unclear whether the underreporting would be a consistent percentage at each school, or whether it would be dependent on other factors like differences in the number of students living on campus or within the jurisdiction of campus police. Without being able to account for other differences, the crime reports do not give students enough information to accurately assess their relative risks at different institutions. In addition, the information is of extremely limited use. Beyond decisions about which university to attend, the information does not assist students in making meaningful determinations about their own protection once on campus.

Better consumer information regarding safety could assist citizens in making more accurate safety comparisons and could increase third-party accountability for taking care. There is no doubt that promotion of better safety-related data is an independently valid goal. However, given the current failure of safety information, in the absence of lawsuits some third parties may have too few incentives to take care.

4. Positive Externalities of Third-Party Care.--Even if increased third-party precautions would be greater than optimal, the overprecaution may nevertheless provide a useful subsidy. Even scholars who expressly argue that the law should blame crime victims concede that victim blame may not be appropriate in rape cases given distributional concerns.[349] Rape already imposes differential burdens on women and their participation in the economy. Requiring greater precautions by third parties creates a subsidy to lighten some of these restrictions.

Though some have focused on potential positive externalities of citizen care, the substantial negative externalities of women's precautionary measures must also be acknowledged.[350] When a significant percentage of the population won't go out alone at night to see a movie or to go shopping, not only are women's liberties chilled, but a vast amount of potentially advantageous economic activity is chilled as well. Individuals are deterred from utility-maximizing pursuits, and businesses lose potentially profitable business to the extent that their customers cannot time- *1475 shift the full measure of their economic activity. Businesses also lose valuable potential employees, and women lose opportunities for full participation in the economy. While some businesses may voluntarily respond to these considerations, particularly if a large percentage of their potential customers and employees are women, many will not.[351] As such, some environments will feel safe only to men and not women, and some commerce and employment opportunities will be accessible only to men and not to women. Greater third-party care can help women participate more equally in commerce.

Minimizing victim precaution is a positive goal, not only because it promotes equal participation in the economy, but also

because much victim precaution may be overprecaution.352 Citizens consistently overestimate the risk of violent victimization by strangers.353 To the extent that third parties take greater care by creating safer environments, or at least environments that seem safer, they may reduce excessive victim precautions.

As has been noted, the state may benefit from increased privatization of security. However, privatization of security measures may be best achieved by third parties. In the civil law context, a refusal to blame victims may lead private businesses and other third parties to undertake additional safety precautions. Increased security by third parties may provide more of a benefit to the state than additional security measures taken by potential victims because of the potential for more systemic *1476 crime prevention strategies, as well as greater ease in overcoming collective action problems.354

Accordingly, abolishing the contributory fault rule is not likely to increase the prevalence of rape, and may even decrease it, or at least further other economic and social goals.

D. Additional Problems in Comparative Apportionment Schemes

Both traditional defendant culpability and newer comparative apportionment paradigms pose harms to victim freedom and equality without obvious gains to deterrence. Comparative apportionment jurisdictions that allow rapists themselves to diminish their liability based on rape victim fault, to any extent and in any circumstances, exacerbate those harms, particularly in relation to the expressive function of the law. To hold that a rapist's responsibility should be diminished by a rape victim's failure to use reasonable care to prevent rape is to explicitly shift responsibility for raping from rapists to rape victims. Without detailing the many reasons why a rapist's intentional fault should not be diminished by a rape victim's negligence--a proposition that is a radical break from traditional law--there is an additional harm in letting persons who have intentionally caused harm to others, particularly the kind of egregious harm at issue in rape cases, shift the responsibility for their acts to their victims. The message that victims can be at fault for rape when they did not consent to sex suggests that men have at least a partial entitlement to sex with unconsenting women who behave in certain ways, and that women, by their conduct, ask to be raped despite their nonconsent. This reasoning ignores the entitlement nature of intentional torts.355 If a woman does not consent to sex, the fact that she did consent to a drink or the like should not make the rapist's act "her fault."356

E. A Summary

The allocation of rights under current comparative fault approaches accepts as given the baseline level of violence in the broader culture. Such a system views rape as normal and rape victims as correspondingly obligated.357 Under this theory, violence is the legally accepted reality; *1477 the law does not strive to transform real violence through legal rules. Instead, the law not only accepts, but also legitimates and reinforces this reality. Requiring citizens to take measures to protect themselves from rape in order to invoke third-party obligations translates the reality of male rape into a legal obligation for women to limit their full participation in public and private spheres or to pay extra costs for the privilege of doing so.358

The question of women's 'duty' to take reasonable measures to protect themselves from rape is ultimately a question of entitlements.359 Should women have a legal entitlement to enter into situations in which it is foreseeable that they may be raped--to open a door when someone knocks, to take public transportation home at night, to go to a party and drink with a man, or more? Should the law allow women to exercise the full range of their civil liberties or should it require them to cede some portion of those liberties based on the existence of violent criminal conduct directed at them in exchange for third-party protection? It is only by making the rights-denying assumption that women have no legal entitlement to engage in certain conduct that a court can conclude that a rape victim's conduct was, to any extent, a legal cause of her own rape. Because the current denial of entitlements diminishes women's freedom and equality, without having any clear impact on deterrence, courts should embrace citizen no-duty rules.

IV. A Proposed Framework for Analyzing Contributory Fault Defenses: Creating a Citizens' Privilege

A traditional paradigm focuses solely on the defendant's culpability; a comparative apportionment paradigm recognizes citizen entitlements, if at all, only to a limited extent with respect even to intentional tortfeasors. This Article argues that a third option is both possible and desirable--one that recognizes both that rapists' responsibility for their acts should not be reduced because of rape victim negligence, and that potential rape victims enjoy a legal entitlement not to shape their conduct around the reality of pervasive rape, even in suits involving third-party defendants. This Part outlines a general no-duty rule that would give women a legal entitlement to act on the assumption that others will not rape them. Given the continued reality of violence against women, this legal entitlement will not necessarily mean that women will no longer act in fear of rape, but simply that the law will not require them to do so in order to take advantage of other socially designed protections. After *1478 addressing some potential criticisms of a full entitlement approach, the next Part suggests two more modest

proposals that combine both defendant-culpability and plaintiff-entitlement concepts.

A. A Complete No-Duty Rule

One answer to the problems inherent in using pervasive rape as a baseline around which to fashion citizens' duties is simply not to do so. Courts could breathe new meaning into the traditional tort law rule that plaintiffs have no duty to take care to prevent the intentionally inflicted harm of rape.360 Courts could do this by establishing that even in a society in which rape is foreseeable, a citizen may reasonably proceed upon the assumption that others will not rape her. This would mean that a rape victim's alleged fault could never be raised as a defense by any defendant. Even when the rape victim's conduct seems plainly unreasonable by prevailing norms--she forgot to lock her door, she went drinking with a group of men she barely knew--defenses of rape victim fault would be barred.361

In rape cases, I support a complete no-duty solution because it is the only rule that would establish the basic tenet that rape is not women's fault, either individually or collectively. No other solution, current or alternative, would provide that answer. A complete no-duty rule could be part of a broader rule that citizens have no duty to shape their conduct around intentional torts, or specific egregious intentional torts (like rape, robbery, and murder), or some other broader category. Alternatively, the complete no-duty rule simply could apply in the context of rape--where a duty rule threatens both citizens' liberty and women's equality--and partial no-duty rules could be crafted for other intentional torts that involve some but not all of those interests.

A complete no-duty solution is both traditional in its conception of citizens' duties, and contemporary in its steadfastness to that principle even in cases of third-party liability. The key hurdle to adoption of a citizen no-duty rule is for courts to recognize that comparative fault defenses do raise issues of duty.362 These duty issues are present in comparative ***1479** fault analyses even though "duty" per se is not always acknowledged as an explicit element.363 And the existence or nonexistence of a duty is a question of law for the court to decide.364

B. Benefits

A citizen no-duty approach would benefit victims and potential victims by acknowledging, in and out of the courtroom, that the law does not require them to forgo their liberties as a result of rape and fear of rape. The no-duty approach refuses to translate the reality of violent crime directed against women into trials that blame women for rape or norms that further restrict women's liberties. A no-duty approach also acknowledges that potential rape victims have significant nonlegal incentives to take precautions to avoid victimization, although such precautions will not necessarily reduce or eliminate the risk of rape.

In jurisdictions applying a traditional defendant-culpability paradigm, a broad no-duty approach would not alter rapists' inability to invoke comparative fault defenses. In comparative apportionment jurisdictions, on the other hand, a complete citizens' no-duty rule would be a way to prevent rapists from diminishing their responsibility based on allegations of rape victim comparative fault.

C. Potential Concerns

The most significant criticism of a citizen no-duty rule is that such a rule would be unfair to third parties, who would no longer be able to assert the victim's comparative fault, but would still have obligations to shape their own conduct around crime. If third parties must exercise reasonable care to protect women from rape, the argument goes, why shouldn't women themselves be held to such an obligation? Although some of the answers to this question are implicit in Part III, in view of its significance, I will address it more explicitly here.

From a fairness perspective, it is no more difficult to reconcile the existence of limited third-party duties of care with a citizen no-duty rule than it is to reconcile limited third-party duties with the current absence of a general third-party duty, or the current presence of a more general ***1480** citizens' duty. There are many reasons to believe that third parties should be legally required to take greater precautions than the general citizenry. Third parties have special control over some safety-related decisions and at times have access to superior safety-related information; they often occupy special relationships that traditionally impose higher duties of care. The risks created by third parties are nonreciprocal risks of physical harms to others. Moreover, although citizens have autonomy interests in voluntarily entering situations, even situations that may involve danger, allowing third parties to expose others to dangerous situations involuntarily harms citizens' autonomy.365

In addition, third-party liability more often concerns enterprise liability than individual precautions. This is significant for several reasons: Enterprises do not have citizenship rights to lose, may receive consideration for their services, can more easily foresee hazards when dealing with large groups of people, can take fewer and sometimes less invasive precautions to

prevent larger possibilities of harm, and can more easily spread losses across a broader group of consumers. Moreover, a requirement that third parties take some precautions, but that citizens need not, includes citizen freedoms in what is sought to be protected by third-party liability rules. As such, institutions are more likely to be structured around assumptions of citizen freedom rather than citizen restriction.

In terms of equality, in the context of rape, women are empowered by enhancing others' incentives to make the world safe for them, not by minimizing or eliminating those incentives.366 While imposing on women a legal duty to take precautions against rape curtails women's freedoms, imposing a similar duty on third parties would increase those freedoms by promoting rape prevention efforts. The result requires third parties to create spaces that are safe enough for everyone--men and women.

To say that a court should not consider a woman's conduct to be a legal cause of her rape does not imply that women are feeble and powerless to control their own conduct. What it does say is that a woman can exercise the full range of her liberties--to open a door, to ride the subway alone, to engage in any other number of actions that others might think imprudent or unwise given the realities of violence--without being considered a legal cause of any violent crime that may be directed against her. The statement that shopkeepers and hotels are at times a legal cause of rape does not impose the same expressive harms that are caused by saying that women are a legal cause of rape. Moreover, blaming third ***1481** parties does not threaten replication of the long history of victim-blaming that has prevailed in rape trials.

While women will still suffer disproportionately from the harms of rape under any tort scheme, the financial costs of rape under this rule will be somewhat less gender-based. In the interest of equality, laws sometimes require that losses be spread across broader groups.367 Certainly this is fair in the context of rape, where women bear more of the costs not because they create more risks, but because men create more risks to them.

Finally, in terms of deterrence, women have substantial nonlegal incentives to avoid their own victimization, while third parties have fewer such incentives. This is not to suggest that third parties have no incentives to take reasonable measures to protect patrons against violent crime. A hotel may reasonably fear that a violent assault on its premises may cause it to lose business from other patrons. But poor markets in safety-related information make that prospect less likely than it should be.

In light of freedom, equality, and deterrence considerations, there are significant reasons to impose greater liability on third parties than on women.

To say that a citizen no-duty rule can be reconciled with a third-party limited duty rule is not to say that a citizens' no-duty rule is without limitations. To the extent that third-party liability raises problems, any broadening of it--through this rule or others--may be problematic for the same reasons.368 Nevertheless, courts have generally concluded that those limitations are outweighed by the advantages of third-party liability.369 And, these problems can be more effectively addressed through doctrines that do not blame the victim.370

The reverse concern, that third-party liability is defined too narrowly, could also lead to criticism of a citizen no-duty rule. Defining third-party duties more expansively may best increase citizens' security, and women's ability to participate in society as equals. If broad third-party duties are desirable, limiting citizens' duties could harm women's interests by leading to increased, or at least continued, restriction of third-party duties. Thus any gains from abolishing an expansive notion of contributory fault ***1482** would be more than offset by the losses associated with continued third-party restrictions. However, neither policy nor logic dictates that third-party duties cannot be drawn more broadly than citizens' duties. Indeed, contributory fault doctrines have often been construed more narrowly than have doctrines of fault, and there are particular reasons for such asymmetries in this context. Moreover, if courts are ambivalent about third-party liability, they may find ways to curtail it through a number of doctrines--from rape victim comparative fault defenses, to comparisons of rapist and third-party fault, or through direct limitations on third-party duties. As such, ambivalence to third-party liability would need to be confronted in whatever form it takes.

The other drawbacks to a no-duty approach are primarily practical problems. A no-duty rule returns rape victims to an all-or-nothing rule, preventing the compromise solutions afforded by comparative fault.371 While these compromise solutions are often inappropriate where the issue is duty, breach, or proximate cause,372 they may nevertheless be appropriate in some situations to reflect the probabilistic evidence of actual causation--for instance, in a case where a rapist could have entered the victim's apartment through a door with a faulty lock or a window that was left open, and there is no evidence as to how the rapist entered the apartment.

Moreover, "[c]omparative negligence systems increase the pressure on concepts of duty, negligence and causation, any one of which might bar the plaintiff completely."373 As such, courts that want to keep rape victim fault out of the case in

comparative fault analyses must be equally vigilant not simply to allow defendants to raise victim fault arguments through other elements of the case--for example, by claiming that the third party had no duty because the possibility of rape was an open and obvious danger, that the third party breached no duty because it could not reasonably foresee the victim's conduct, or that the victim's conduct was a superseding cause of the harm. Courts may also find it desirable to instruct jurors expressly on citizen entitlements so that jurors will be less likely to implicitly blame the victim.

Despite these drawbacks, a complete citizen no-duty rule is still significantly better than the current system, because it confronts third-party *1483 duty questions directly rather than through destructive conceptions of rape victim fault.[374]

V. More Minimal Entitlements

Courts reluctant to take a broad view of women's entitlement to act without fear of rape should at least adopt modest protections of citizen entitlements. Instead of using defendant culpability as the sole factor for determining when to allow plaintiff contributory fault defenses, courts should also consider citizen interests independent of the culpability of the defendants that they sue. Under an approach that recognizes both defendant culpability and citizen entitlement, at a minimum, courts should completely bar rapists from invoking rape victim comparative fault defenses, and should curtail third-party use of rape victim comparative fault defenses. To limit rape victim fault defenses in the third-party context, courts can either develop specific plaintiff no-duty rules, or, in the alternative, narrow the plaintiff's duty by reference to the third-party defendant's breach of duty.

A. Establishing Specific Baseline Entitlements

One way to constrain rape victim comparative fault defenses within the context of third-party liability is by direct reference to the interests that animate the need for those constraints. Without creating an exhaustive list of those interests, negligent third parties could be barred from raising comparative fault defenses when the duty imposed on the plaintiff as a condition of recovery is a duty that would exceed the scope of protections required by third parties; unduly burden an individual's ordinary rights of citizenship if required directly; undermine equal protection norms; be borne by groups of citizens who are systematically unlikely to be able to adequately care for themselves; or otherwise produce results that are unlikely to increase aggregate citizen safety.

This approach differs from a complete entitlement approach because it might still allow some defenses of rape victim fault. For example, in the case in which a rape victim left a door unlocked, the defense of contributory fault would be allowed if a third party would have had an obligation to lock the door; the interest in an unlocked door was not particularly significant; both a reasonable man and a reasonable woman would have locked the door, and the jury would have made the same determination of negligence if the plaintiff had been a man; the victim knew or should have known of crime in the area she was in; locking the door would have been effective in averting the attack; and locking doors *1484 would not likely decrease aggregate safety. How many defenses would meet these requirements is unclear.

1. Symmetry.--One of the central problems with the current law is that third-party and victim duties are already asymmetrical: Third parties have limited duties toward others, which are tightly controlled by courts, and victims have a general duty to protect themselves, over which courts exercise little, if any, review. For courts that insist on some notion of "symmetry" between third-party and citizen duties, true symmetry demands that citizen duties also be limited by courts as a matter of law. This is not to suggest that courts' expansive view of their role in resolving the duty issue in third-party cases is correct.[375] Indeed, in many cases, it seems that courts are actually resolving the breach question, which should ordinarily be left to the jury. Still, courts that do take an aggressive view of their own role in third-party cases, based on a perceived need to limit duties related to criminal conduct, should be equally sure to protect those duties for citizens as well as third parties.

2. Citizenship Interests.--Courts should also be reluctant to permit comparative fault defenses where the rape victim "fault" alleged is an activity that involves significant citizenship interests. Recognition of victims' rights to take certain risks without relieving defendants of liability may be based on a collective desire not to exclude groups from activities that are central to citizenship.[376] Thus, even though it may be risky for a person to go outside alone at night, walk down the public streets, take public transportation alone, accept available employment, or associate with men, these are nevertheless significant facets of citizenship, that courts should not lightly restrict.[377] Indeed, the Constitution itself has been construed to include a "right to travel," a "right of locomotion," a right to "freedom of movement," and a "right to associate with others."[378] While there has been considerable recent debate about what those rights mean and require,[379] the questions are substantially easier where, as here, the restrictions would both formally restrict citizen liberties and likely result in ultimate liberty restrictions. Moreover, whether the Constitution actually requires restrictions on tort liability, as has been held in *1485 some contexts, or whether constitutional values simply influence tort law norms, prudential concerns suggest that citizenship interests be taken into account.

3. Formal Equality Interests.--Courts should be equally unwilling to mandate as a condition of third-party recovery precautions that would require women to take greater precautions than men. First, such differential restrictions on women, though socially accepted, do not appear justified by the underlying risks to women and men. Although women are disproportionately likely to be the victims of rape, they are much less likely to be the victims of other major crimes. In light of this lower rate of overall victimization, requirements that women restrict their liberties in ways that men do not appears unsound. Second, even if additional restrictions of women seemed reasonable in light of women's increased risk of gender-based crimes such as rape, legal requirement of gender-specific precautions would still be inappropriate. Differential restrictions on women and men would violate principles of formal equality if directly required by courts or other government officials. They are no less harmful when required by juries as a condition of full tort law recovery. If a reasonable man would go out at night, to work, to travel, or just to drink with strangers, a reasonable woman should be entitled to do the same. These liberties are important to women's economic and social well-being; for the law to be otherwise sends the message that women are less than full citizens and their freedoms are not as valued as men's. "If state tort law furthers discrimination . . . then it will impede the accomplishment of Congress' goals in enacting Title VII."[380]

To ensure that a woman need only take precautions that a man would be required to take, courts can specifically instruct jurors that the precaution required by the law is the least precaution required of either a reasonable woman or a reasonable man. A court might tell jurors: "The law requires that women and men be treated equally. As such, a woman need only take as much care for her safety as a man would also be required to take. Accordingly, if you find that a reasonable man or a reasonable woman would have acted as the plaintiff did, you must find that the plaintiff's conduct did not constitute comparative negligence, regardless of whether the plaintiff is a man or a woman. However, if you find that both a reasonable man and a reasonable woman would have taken precautions that the plaintiff did not, you may find that the plaintiff's acts constitute comparative negligence." Although this solution is problematic for the essentialist assumptions it encourages about the reasonable man and the reasonable woman, it still seems like a better course for avoiding the subordination that plagues the current case law.[381]

Not only should the jury be instructed to take equality into account, but courts should also devise better means of reviewing jury comparative ***1486** fault determinations for equality concerns. One method would be to give the jury a special verdict form asking what the plaintiff's and the defendant's exact negligence was.[382] Another would be for appellate courts to apply a less deferential standard of review. Courts could then be more vigilant in disallowing rape myths or expansive conceptions of victim fault.[383]

4. Groups Systematically Unable to Care for Themselves.--Since one goal of third-party liability is to deter rape, courts should limit rape victim comparative fault defenses for groups that are systematically unlikely to be able to care for themselves--i.e., where expecting plaintiffs to take reasonable care would be unrealistic or harmful to the long-term interests of protecting the group. The classic examples of groups systematically unable to care for themselves are children and adults with mental disabilities.[384] In these contexts, third parties can foresee that the plaintiffs may not be able to care for themselves. Of course, groups that are unlikely to be able to protect themselves need not be exclusively defined by pervasive disabilities. Persons involved in repetitive tasks, under extreme duress, or unable to obtain adequate safety information about a particular location may also have more limited capacities for self care.

5. Deterrence Goals.--Finally, although some citizen safety measures may be thought to increase a particular citizen's safety without loss to aggregate citizen safety (like providing adequate door locks), other measures may actually be expected to decrease aggregate safety (such as requirements that citizens not go out at night). Courts should consider whether the plaintiff's conduct is conduct that will provide deterrence in the aggregate.

6. Limitations.--A no-duty approach that attempts to define particular citizen interests poses difficult line-drawing problems for courts. Judicial determination of significant and insignificant interests would be difficult and time consuming. Moreover, a case-by-case determination of the value of particular citizen interests might not adequately account for those concerns, since every liberty looks small and insignificant in isolation. In addition, while the strength of citizen interests is an important factor that is not presently accounted for, that strength may vary depending on other circumstances, including the culpability of the defendant's conduct. Consequently, while courts adopting this solution may be able to create a more narrow and well-defined exception, they also may find ***1487** that the complexities of the task outweigh the benefits of such a refined tool.

B. A Partial No-Duty Rule

Another approach that would allow courts to limit victim comparative negligence defenses without so much attention to particularized limits is a doctrine that I will term the "separate spheres analysis." Under this approach, courts would divide the rapist's intentional rape and the third party's negligent fault into two separate spheres. Courts would then evaluate the third-party defendant's comparative fault defense with respect to each of these spheres. If the defendant is arguing that the

plaintiff's negligence was the legal cause of the rape, the defense would be barred. If, on the other hand, the defendant is arguing that the plaintiff's conduct caused the third-party defendant's negligence, the defense would be permitted. Under this rule, it is not the status of the defendant--intentional tortfeasor or negligent third party--that would determine whether comparative fault doctrines can be invoked.385 Instead, the substance of the comparative fault defense invoked would be dispositive. Courts could draw a bright line rule allowing defendants to assert the victim's contribution to the defendant's negligence, but not her own alleged negligence.

Such an approach would permit defendants to raise comparative fault defenses, but only in an extremely narrow category of cases in which the plaintiff herself is responsible for the specific negligence allegedly caused by the third party. Such a framework is consistent with other contexts in which a negligent defendant raises a comparative fault defense against the victim of an intentional tort. In accountant malpractice cases, for example, this type of analysis is employed. Accountant malpractice cases are similar to rape cases because they typically involve three parties--a business that has been defrauded (the plaintiff), a defendant accountant (a third-party defendant), and, implicitly if not explicitly, the person who defrauded the business (an intentional tortfeasor). In that context, many courts have adopted rules that permit the allegedly negligent accountant to claim comparative negligence by the plaintiff, but only when the plaintiff's conduct is alleged to have caused the defendant's breach of duty.386 Evidence of the plaintiff's purported comparative negligence ***1488** is properly excluded as irrelevant where such conduct did not cause the professional's breach of duty.387

Under this distinction courts have repeatedly refused to allow defendants to assert plaintiffs' unwise or risky business conduct as a defense.388 The view that the plaintiff's risky or perhaps unwise conduct does not bar, or even diminish, his suit against negligent accountants has been adopted by the majority of American jurisdictions.389 Although a few courts have changed the rule after the emergence of comparative fault, others have not.390

The rationale for cases that deem irrelevant defenses of comparative negligence unrelated to a defendant's own breach of duty is that the very purpose of accountant liability is to protect plaintiffs, even negligent plaintiffs, from intentional misconduct by others. Thus, were a broad comparative fault rule to apply, the defendant could protect itself from liability by asserting plaintiff's role in the very conduct that its actions were designed to prevent. In the leading case, National Surety Corp. v. Lybrand, the court wrote:

We are, therefore, not prepared to admit that accountants are immune from the consequences of their negligence because those who employ them have conducted their own business negligently. The situation in this respect is not unlike that of a workman injured by a dangerous condition which he has been employed to rectify. Accountants, as we know, are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible.391

***1489** The policy reasons that animate the rule employed in National Surety regarding accountants' liability apply with equal or greater force in third-party negligence cases concerning rape. The very purpose of third-party liability is to protect plaintiffs, even unwise plaintiffs, from intentional misconduct by others.

Although the majority of rape victim comparative fault defenses will be barred by this approach, there is some concern that recognition of any rape victim comparative fault defenses will undermine the legal privilege that citizens are afforded not to take reasonable care to prevent rape. But once narrowly confined, these defenses pose fewer problems because they focus on allocating responsibility for the third-party defendant's negligence. Under this approach, citizens' duty would not be to take reasonable care to avoid rape, but rather, to take reasonable care not to thwart third-party protections implemented for their benefit.

Still, to ensure that this exception is an exception, courts must be careful to operate at a narrow level of specificity with respect to the defendant's negligence. Thus, if the defendant's alleged negligence is a failure to provide adequate lighting, only defenses that assert that the plaintiff's negligent conduct caused the failure to provide adequate lighting would be allowed. Defenses that the plaintiff should not have been in the inadequately lit place, for example, would be barred. Any effort to assert that the plaintiff's conduct was improper beyond her alleged contribution to the defendant's specifically defined negligence, would in reality assert the plaintiff's negligent contribution to the rape--a defense which, as previously explained, should not be allowed.

Conclusion

When "everyone knows" that a reasonable woman in our society should fear rape, why should the law nevertheless give women a legal entitlement to conduct their lives without fear? Because the current law, which does not afford women this entitlement, not only reflects the tragic reality of rape and fear of rape in our society, but legitimates and reinforces that reality by translating it into victim-blaming comparative fault defenses and liberty- and equality-curtailing legal obligations.

An entitlement-based analysis, on the other hand, would reject the idea that rape victims themselves are at fault for the harm

inflicted upon them. Women should not be considered a legal cause of rape. A citizen ***1490** no-duty analysis recognizes this basic principle of freedom and equality by refusing to allow any defendant to raise the plaintiff's alleged comparative fault in its defense.

Many women alter their conduct in myriad ways because of fear of rape and will continue to do so regardless of the tort law comparative fault rule. The reality of rape, the fear of rape, and the social meaning of that fear will continue to distort women's activities and lives. But the law should not require these distortions, either affirmatively or as a condition of tort law recovery. It should instead seek to counteract them.[392]

Footnotes

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1 See, e.g., Susan Brownmiller, Against Our Will: Men, Women and Rape 347-404 (1975); Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977); Susan Estrich, Real Rape 57-104 (1987); Peggy Reeves Sanday, A Woman Scorned: Acquaintance Rape on Trial (1996).

2 See, e.g., Robin Warshaw, I Never Called It Rape 144 (1988) ("Taking acquaintance-rape complaints to civil court is a new approach that offers many victims a better way to fight back than they may find through criminal law channels."); Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chi. L. Rev. 795, 840-41 (1993) (arguing against restrictions on pornography and addressing as a future strategy civil actions stemming from sexual violence); cf. Camille LeGrand & Frances Leonard, Civil Suits for Sexual Assault: Compensating Rape Victims, 8 Golden Gate U. L. Rev. 479, 480 (1979) (noting that rape victims "often are diverted to civil attorneys by the police themselves").

3 See Warshaw, supra note 2, at 144; Holly J. Manley, Comment, Civil Compensation for the Victim of Rape, 7 Cooley L. Rev. 193, 199 (1990) (noting the civil law's lower standard of proof as "[o]ne major advantage" of such actions); Sunstein, supra note 2, at 841 ("An important advantage of [the civil action] route is that the 'reasonable doubt' standard of criminal law need not be met, and recovery can occur under the civil law's more lenient 'preponderance of the evidence' standard."); see also Dean v. Raplee, 39 N.E. 952, 954 (N.Y. 1895) ("If this was a criminal case, where the prosecution is bound to prove the charge beyond a reasonable doubt, the appeal would be entitled to prevail. But here [in a civil action] a preponderance of proof is sufficient.").

4 See Gail M. Ballou, Recourse for Rape Victims: Third Party Liability, 4 Harv. Women's L.J. 105 (1981); Maureen Balleza, Many Rape Victims Finding Justice Through Civil Courts, N.Y. Times, Sept. 20, 1991, at A1.

5 See, e.g., Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

6 The term "civil rape cases" is used to describe all cases in which rape is the underlying harm suffered by the plaintiff.

7 See, e.g., Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 734, 735 n.5 (D. Minn. 1994) (holding that a bus company could amend its answer to allege defenses of consent, assumption of risk, and contributory fault because of evidence that the plaintiff, who according to witness testimony cried and pleaded with the rapist and other passengers, "did not sound an alarm during the course of conduct, nor did she report [the rapist's] behavior on a contemporaneous basis," such that "a Jury might well conclude that the Plaintiff is not entitled to recovery"); Kirkwood v. McFarland, 47 So. 2d 74, 76-77 (La. Ct. App. 1950) (rejecting plaintiff's civil action for rape on the ground that she did not cry out or physically resist the alleged date rape).

8 In terms of damages, for example, courts may not recognize the severe harm rape causes in the absence of other physical injuries. See, e.g., Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 133-34 (5th Cir. 1987) (holding that a jury award of $228,000 to a woman who "was forcibly dragged to an abandoned house, held in fear of her life for over an hour during which time she was sexually assaulted in four episodes," and "left naked, bound and gagged," was excessive because "[a]n even view of her injury includes the alleviation that she was not beaten and required only minimal medical attention"). Damages may also be reduced in light of the

victim's prior sexual experiences. See Birkner v. Salt Lake County, 771 P.2d 1053, 1061 (Utah 1989) (holding that with respect to a woman sexually assaulted by her therapist, defense counsel's questions about whether victim's former husband ever kissed her and touched her breast when they engaged in sexual relations while married were appropriate because "[t]he jury was entitled to consider [[[plaintiff's] prior [sexual] experience in assessing damages" and finding it "difficult to understand why [the plaintiff thought] that this evidence was improper"). Damage assessments such as these do not ask "What is the damage that rape causes?" as much as they ask "How damaged is the victim?" With this latter question, defendants may attempt to reduce their responsibility for the harm of rape by portraying rape victims as damaged people. See Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 77 (La. Ct. App. 1989) (defendant argued that gang rape did not cause rape victim's emotional problems; "unstable" home environment and an "overprotective parent" did). And even when issues like the victim's failure to make a prompt outcry do not eliminate recovery, that same factor still has been used to reduce the victim's damages. See Gavrik v. Burlington, C.R. & N. Ry. Co., 108 N.W. 327, 329 (Iowa 1906).

9 Within this Article, the terms "comparative fault" and "contributory negligence" refer interchangeably to the defenses of contributory negligence, comparative fault, and assumption of the risk. These defenses either diminish the defendant's liability or relieve him entirely of a duty to the plaintiff. The reasoning behind comparative fault and contributory negligence theories is that even when a defendant has breached a duty of care, the plaintiff might by her actions disentitle herself to any relief. The defense of assumption of the risk may also relieve the defendant of a duty. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 65, at 451-52 (5th ed. 1984). For the purposes of this Article, these doctrines do not materially differ.

10 See, e.g., Wassell v. Adams, 865 F.2d 849, 852, 856 (7th Cir 1989); Morris, 539 So. 2d at 71.

11 See Restatement (Third) of Torts: Apportionment of Liability § 1 cmt. c reporters' note (Proposed Final Draft (Revised) 1999) [hereinafter Restatement 1999 Draft] ("Applying comparative responsibility to intentional torts is not the majority rule," and much of the recent support for such comparison of responsibility "is not a comparison of a defendant with a plaintiff"); see also McGill v. Duckworth, 944 F.2d 344, 352 (7th Cir. 1991) (stating the general rule that plaintiff's contributory negligence does not provide a valid defense to an intentional tort).

12 See Restatement 1999 Draft, supra note 11, § 1 cmt. c reporters' note (noting that some of the support for comparative responsibility "is in cases comparing a plaintiff's responsibility with that of an intentional defendant"); see also Morris, 539 So. 2d at 77-78 (comparing rapist and rape victim fault) (overruled by statute, La. Civ. Code Ann. art. 2323(c) (West 1997)).

13 See, e.g., McGill, 944 F.2d at 352-53.

14 See Malone v. Courtyard by Marriott L.P., 659 N.E.2d 1242, 1245, 1249 (Ohio 1996) (holding that a hotel that failed to respond to repeated guest phone calls that "someone might be getting hurt" was not liable for its negligence because the rape victims were themselves negligent since they "invited [the acquaintance rapist] to their room, had drinks with him, went out to several bars, and upon return again allowed him in their room" among other factors).

15 I use the term "entitlement" instead of "right" partly because a right, at least in Hohfeldian terminology, must be enforceable against one with a duty. In that strict sense, there is no right to go out at night. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1090 (1972) (describing entitlements as "the first order of legal decisions"). By using the term "citizen" I mean to suggest that these entitlements stem from citizenship concerns, not that the entitlements should be restricted to United States citizens.

16 The term "no-duty" is a somewhat odd locution with respect to plaintiffs. The terms "privilege" or "right" may seem more apt. See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions (1966) (identifying and distinguishing fundamental legal relations); see also Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law 23 (1985) (noting that the victim of a negligent tortfeasor was "bound not to take risks of harm which he or she had no right to take.... Of course, the key to all that was the word right--what risks did one have a right to take without thereby 'assuming' the risk of injury... ? It all depended how one's 'rights' were defined."). Still, neither of these terms completely solves the problem. "Privilege" assumes a baseline of plaintiff obligation from which this rule would be an indulgence. And "right" is incomplete, since issues of plaintiff's fault are related to, but not necessarily identical to, issues of defendant's duty (because of different symbolic issues, for example). In the absence of a perfect term, I have chosen to employ the Restatement's "no-duty" terminology. No-duty cases are ones in which the plaintiff has no duty to protect herself from certain tortious conduct. "Put differently, they are cases in which the plaintiff has a liberty (or right) to be free from constraints imposed by the defendant." Dan B. Dobbs, The Law of Torts § 200 (forthcoming, 1999) (carefully detailing cases in which risks

are entirely allocated to defendants); see also Richard A. Epstein, Torts § 8.2.1 (1999) (including "duty" as one of the elements of contributory negligence). However, a plaintiff's "duty" is not a primary one, and so parallels with a defendant's duty are not necessarily warranted.

17 See ALI Conference Report, 66 U.S.L.W. 2726-27 (1998).

18 See Restatement 1999 Draft, supra note 11, § 3 cmt. d.

19 The Restatement's first "final draft" adopted the highly controversial position that a defendant's intentional conduct and other parties' negligent conduct (such as failure to take care to prevent rape) should be routinely compared within a single apportionment of liability--a dramatic break from traditional tort law rules that bar comparisons of intentional and negligent fault. See Restatement (Third) of Torts: Apportionment of Liability § 1 cmt. c reporters' note (Proposed Final Draft 1998) [hereinafter Restatement 1998 Draft]. This proposal raised the alarming prospect, already possible under the comparative apportionment schemes of several jurisdictions, that rape victim "fault" not only will be compared with negligent third-party fault, but also with the fault of rapists themselves. The Restatement has wisely backed away from much of its original position on the need to compare intentional and negligent fault, and now takes "no position" on the issue of whether defendants' intentional conduct and plaintiffs' negligent conduct should be compared. Restatement 1999 Draft, supra note 11, § 1 cmt. c reporters' note. However, the Restatement still raises the possibility that rapists can diminish their own liability based on a negligent third party's fault. So, for example, a rapist could say that he bears less than 100% liability for the rape because the hotel in which he raped the victim had inadequate security precautions. Although the rapist would still be jointly and severally liable to the victim for the hotel's share of liability, see Restatement 1999 Draft, supra note 11, § 22, the rapist could ultimately reduce his liability to the negligent tortfeasors through the doctrine of contribution. See Restatement 1999 Draft, supra note 11, §§ 32 cmt. e; 33 cmt. b, illus. 1.

20 This greater need for plaintiff no-duty rules is due to the absence of other limits on comparing intentional defendant and negligent plaintiff fault in comparative apportionment jurisdictions.

21 See, e.g., Ozaki v. Association of Apartment Owners, 954 P.2d 644 (Haw. 1998) (denying recovery to murder victim under Hawaii's modified comparative negligence statute where jury found that victim was five percent at fault for her own murder because she cursed at murderer waiting outside her apartment door and tried to get inside her apartment); Smith v. Officers of Kart-N-Karry, Inc., 346 So. 2d 313 (La. Ct. App. 1977) (holding that cashier who was shot to death during grocery store armed robbery was contributorily negligent and had assumed the risk of being killed because he had knowledge that the store he worked in was unprotected and nevertheless continued to work there); Bonpua v. Fagan, 602 A.2d 287 (N.J. Super. Ct. App. Div. 1992) (holding that defendant who was convicted of criminal aggravated assault sufficiently alleged comparative negligence of victim who called defendant a "faggot" while defendant was talking to his girlfriend); Exxon Corp. v. Tidwell, 816 S.W.2d 455, 469 (Tex. App. 1991), rev'd on other grounds, 867 S.W.2d 19 (Tex. 1993) (implying that issues of teenaged service station employee's comparative fault and assumption of risk in armed robbery shooting were appropriate issues for evidentiary consideration).

22 See William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 150 (1987) (defining three categories of intentional torts).

23 See Ballou, supra note 4, at 106.

24 See B. Scott Andrews, Comment, Premises Liability--The Comparison of Fault Between Negligent and Intentional Actors, 55 La. L. Rev. 1149, 1157 (1995).

25 See, e.g., Ledbetter v. Concord General Corp., 651 So. 2d 911, 916 (La. Ct. App. 1995) ("'Although all batteries are not rapes, all rapes necessarily are batteries.' " (quoting Paul v. Montesino, 535 So. 2d 6, 7 (La. Ct. App. 1988))). Battery occurs when a person acts intending to cause a harmful or offensive contact with the plaintiff, and such a contact actually results. See Restatement (Second) of Torts §§ 13, 18 (1965).

26 See, e.g., Deborah S. v. Diorio, 583 N.Y.S.2d 872, 874 (Civ. Ct. 1992) (victim sued rapist for intentional sexual assault, battery, and infliction of emotional distress).

27 See Smith v. Superior Court, 198 Cal. Rptr. 829, 834 (Ct. App. 1984), overruled on other grounds by Cedar-Sinai Medical Center v. Superior Court, 74 Cal. Rptr. 2d 248 (1998) (explaining that in California "many torts have analogues in the Penal Code," and discussing the different purposes of criminal and tort law liability).

28 "It was [plaintiff's] right, as a matter of law, to go through life... secure from any forcible invasion of her person by another. To have such rights wantonly trespassed upon ought not to be regarded as a trivial matter." Ellig v. Powell, 240 N.W. 271, 273 (Neb. 1932).

29 See Leslie Bender, An Overview of Feminist Torts Scholarship, 78 Cornell L. Rev. 575, 590 (1993) ("Although criminal law may result in the incarceration of a rapist, the survivor must resort to a private law remedy to recover damages for physical and emotional harm."). Although criminal courts may require rapists to provide restitution to rape victims, civil law offers broader possibilities for compensation, reflecting a variety of factors: 1) the victim can initiate suit on her own regardless of whether the police or prosecutors elect to credit her charge; 2) the rapist may be compelled to testify or his silence may be used against him; and 3) the oft-cited lowering of the victim's burden of proof. Cf. Nubert S. Field & Leigh B. Bienen, Jurors and Rape 95 (1980) ("An individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.").

30 "In a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" Merest v. Harvey, 128 Eng. Rep. 761, 761 (1814).

31 See, e.g., Harris v. Neal, 116 N.W. 535 (Mich. 1908) (upholding trial court judgment for plaintiff who sued rapist in civil action); Jensen v. Lawrence, 162 P. 40 (Wash. 1916), aff'd, 166 P. 793 (Wash. 1917) (same). Victims may have been precluded from recovery before the 1900s. See Lea VanderVelde, The Legal Ways of Seduction, 48 Stan. L. Rev. 817, 842-45 (1996).

32 See, e.g., Deborah S. v. Diorio, 583 N.Y.S.2d 872 (Civ. Ct. 1992); Pletnikoff v. Johnson, 765 P.2d 973 (Alaska 1988); Delia S. v. Torres, 184 Cal. Rptr. 787 (Ct. App. 1982), overruled on other grounds by Christensen v. Superior Court, 820 P.2d 181 (Cal. 1991); Standard v. Buckner, 561 S.W.2d 329 (Ky. App. 1978); Christensen v. Boucher, 24 N.W.2d 782 (Iowa 1946); Shaw v. Fletcher, 188 So. 135 (Fla. 1939); Ellig v. Powell, 240 N.W. 271 (Neb. 1932); Pashayan v. Kazanjy, 138 A. 723 (N.J. 1927).

33 42 U.S.C. § 13981(b) (1994) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender.").

34 See United States v. Morrison, 1999 WL 459152 (granting petition for writ of certiorari to review constitutionality of the Violence Against Women Act); see also Anisimov v. Lake, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (stating that cases would "be few and far between" where rape would not be considered an act of violence "motivated by gender" within the meaning of the Violence Against Women Act, and holding that plaintiff who had been fondled, grabbed, assaulted, and raped by her employer stated a viable cause of action under the Act).

35 However, claims against third parties may allege recklessness, which can be treated as either intentional or negligent torts.

36 See Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) (noting that "[a]s a rule, 'a person has no legal duty to protect another from the criminal acts of a third person' " (quoting Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996))); Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

37 See Dobbs, supra note 16, at § 322 (detailing these exceptions); see also David W. Robertson, Negligence Liability for Crimes and Intentional Torts Committed by Others, 67 Tul. L. Rev. 135, 181-82 (1992) (discussing justifications for holding parties liable in tort for failing to use reasonable care to prevent the criminal or intentionally tortious actions of third parties).

38 See, e.g., Restatement (Second) of Torts § 314(a) (1965) ("A common carrier is under a duty to its passengers to... protect them against unreasonable risk of physical harm .... An innkeeper is under a similar duty to his guests.").

39 See Restatement (Second) of Torts § 315(a) (1965) (an actor has a duty to "control the conduct of a third person so as to prevent him from causing physical harm to another [when] a special relation exists between the actor and the third person").

40 See id. at § 321(1) ("If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.").

41 See id at § 323 ("One who undertakes, gratuitously or for consideration, to render services for another which he should recognize as necessary for the protection of the other's person or things" is under a duty to exercise reasonable care).

42 See Steffensen v. Smith's Management Corp., 862 P.2d 1342, 1344-45 (Utah 1993); see also Doe v. Dominion Bank of Wash., N.A., 963 F.2d 1552 (D.C. Cir. 1992) (holding that commercial landlord has a duty to use reasonable care to safeguard tenants from foreseeable criminal conduct occurring in common areas within the landlord's control).

43 See Walther v. KPKA Meadowlands L.P., 581 N.W.2d 527, 535 (S.D. 1998) (noting that "a duty to protect a person from the unlawful acts of a third person" exists "if the following two conditions were met: (1) the existence of a special relationship between the landowner and the injured party, and (2) a finding that the intentional criminal acts were foreseeable"); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) ("The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care on a person who owns or controls premises to protect others on the property from the risk."); Uri Kaufman, When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises, 31 S. Tex. L. Rev. 89, 94-95 (1990).

44 See Laura DiCola Kulwicki, Comment, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule, 48 Ohio St. L.J. 247, 260-62 (1987); Michael J. Yelnosky, Comment, Business Inviters' Duty to Protect Invitees from Criminal Acts, 134 U. Pa. L. Rev. 883 (1986).

45 See Delta Tau Delta v. Johnson, 712 N.E.2d 968, 971 (Ind. 1999) (outlining tests of foreseeability); Kaufman, supra note 43, at 95-98 (outlining five different approaches courts have taken in determining when criminal attacks are foreseeable).

46 See McClung v. Delta Square L.P., 937 S.W.2d 891, 902 (Tenn. 1996) ("As a practical matter, the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred on or in the immediate vicinity of defendant's premises.").

47 See, e.g., Johnson v. State, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995), modified by 1995 Wash. App. LEXIS 267 (Ct. App. June 20, 1995) (discussing relevance of plaintiff's status as an invitee to defendant's duty of reasonable care).

48 See, e.g., Kentucky Fried Chicken, Inc. v. Superior Court, 927 P.2d 1260, 1270 (Cal. 1997) (limiting inviter's duty to comply with unlawful demand of robber on grounds of public policy).

49 See Gans v. Parkview Plaza Partnership, 571 N.W.2d 261, 269 (Neb. 1997) (reversing the grant of a third-party defendant's summary judgment motion where "fact finder could find it foreseeable that an unwelcome stranger would gain entry [to an office] at night through the unlockable door while [the office] was occupied by a lone woman").

50 See Berry Property Management, Inc. v. Bliskey 850 S.W.2d 644, 654 (Tex. App. 1993).

51 See Wassell v. Adams, 865 F.2d 849, 855 (7th Cir. 1989) (acknowledging that hotel may have duty to warn of the "dangers of the neighborhood"); cf. Shurben v. Dollar Rent-A-Car, 676 So. 2d 467, 468 (Fla. Dist. Ct. App. 1996) (holding that car rental agency had a duty to warn British tourist, who was subsequently shot, of foreseeable criminal conduct directed against tourists driving in rental cars that were identified as such).

52 See Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 715 (La. 1994).

53 See Wassell, 865 F.2d at 853 (rejecting motel's argument that "a warning would have been costly--it might have scared guests away," on the ground that "[t]he loss of business from telling the truth is not a social loss; it is a social gain").

54 McClung v. Delta Square L.P., 937 S.W.2d 891, 903 (Tenn. 1996).

55 Id.

56 Id. at 902, 904 n.13 (arguing that "using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk to customers," and noting a specific instance where such measures did reduce crimes on the premises).

57 See H. Jane Lehman, Renters See Safety in Lawsuits, Chi. Trib., July 31, 1994, § 16, at 1 (noting that in a sample of 800 suits brought against property owners, landlords and co-op associations were named as defendants in 38% of the suits, hotel and motel operators were named as defendants in 24% of the suits, and shopping malls and other retailers were named in 8% of the suits).

58 See, e.g., Ariz. Rev. Stat. Ann. § 33-1343 (West 1998) (preventing the tenant from restricting landlord access to the premises); Brock v. Watts Realty Co., 582 So. 2d 438 (Ala. 1991) (noting lease provision that prohibited affixing additional locks to or changing existing locks on any door, without the landlord's written consent); Berry Property Management, Inc. v. Bliskey, 850 S.W.2d 644 (Tex. App. 1993) (plaintiff was told that the lease prohibited measures that would make the unit inaccessible to the landlord, such as installation of a deadbolt lock, and was then raped when an intruder obtained access via the landlord's key); Balleza, supra note 4, at 137 (the rape victim explained that the rapist "had a say about who he was going to get, yet I had no say on how I would protect myself.").

59 McClung, 937 S.W.2d at 903.

60 Id. at 902.

61 See id. at 898 (citing recent cases from numerous jurisdictions). But see Rosen v. Red Roof Inns, Inc., 950 F. Supp. 156 (E.D. Va. 1997) (noting that Virginia has refused to adopt Restatement (Second) of Torts § 314A).

62 See Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev. 601, 649-50 (1992) (discussing the recent expansion of liability endorsed by courts); Fred C. Zacharias, The Politics of Torts, 95 Yale L.J. 698, 699 (1986) (discussing trend toward liberalized liability in the negligent security context). Although third-party liability is often traced to influential decisions of the 1970s, in fact, third-party liability for failure to protect against foreseeable crime was promoted and adopted in some contexts, particularly those involving defendants with heightened duties, well before that time. See Neering v. Illinois Cent. R.R. Co., 50 N.E.2d 497 (Ill. 1943) (upholding liability of common carrier); Danile v. Oak Parks Arms Hotel, 203 N.E.2d 706 (Ill. Ct. App. 1964) (affirming liability of hotel). In addition, vicarious liability for rape had also been recognized. See Garvik v. Burlington, C.R. & N. Ry. Co., 108 N.W. 327 (Iowa 1906) (affirming liability of railroad for rape of passenger by brakeman).

63 Because the essence of the negligence in a third-party action is the defendant's very failure to take reasonable precautions against a foreseeable crime, the fact that a crime occurred does not negate the third party's liability. A few courts mistakenly have continued to reach a contrary conclusion by using meaningless language of "superseding cause" to suggest that a third party cannot be held liable when the intervening cause is an intentional tort. See Leslie G. v. Perry & Assocs., 50 Cal. Rptr. 2d 785, 790-91 (Ct. App. 1996); Bell v. Board of Educ., 646 N.Y.S.2d 499, 499-500 (App. Div. 1996), rev'd on other grounds, 687 N.E.2d 1325 (1997). Under the contemporary view, however, "[i]n any case in which it can be said that the risk of harm by [an intentional tortfeasor] was one of the central reasons for deeming [the defendant's] conduct negligent, the legal cause issue should present no obstacle to recovery." Robertson, supra note 37, at 139.

64 When a third party owes a duty to others, it is "the duty to exercise reasonable care for their personal safety...." The third party "is not an insurer of [others'] safety under any and all circumstances." Murrow v. Daniels, 364 S.E.2d 392, 397 (N.C. 1988); see also Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) (discussing duty of landlord to take reasonable steps to protect his tenants).

65 See Keeton et al., supra note 9, § 52, at 347 ("Where two or more causes combine to produce such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.").

66 See, e.g., Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997).

67 See Keeton et al., supra note 9, § 48, at 330.

68 See, e.g., Thomas v. First Interstate Bank, 930 P.2d 1002, 1003-04 (Ariz. Ct. App. 1996) (comparative fault statute and joint and several liability statute required allocation of fault between allegedly negligent bank and nonparty murderer).

69 Cf. Ozaki v. Association of Apartment Owners, 954 P.2d 652 (Haw. Ct. App.) (appeal of case in which jury found murderer 92% at fault, victim 5% at fault, and third party 3% at fault), rev'd in part on other grounds, 954 P.2d 644 (Haw. 1998).

70 See, e.g., Ortega v. Pajaro Valley Unified Sch. Dist., 75 Cal. Rptr. 2d 777 (Ct. App. 1998) (reversing jury verdict which found that school district bore 100% responsibility and teacher bore 0% responsibility for molestation of student); Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 659 (Ct. App. 1994) (remanding case where jury apportioned most fault to agency and employee who failed to visit child on a monthly basis and not to woman who intentionally burned six-year-old). But see Hutcherson v. City of Phoenix, 961 P.2d 449 (Ariz. 1998) (upholding jury determination that city whose 911 operators failed to dispatch timely assistance to victim was 75% responsible for victim's murder and murderer was 25% responsible).

71 See Restatement 1999 Draft, supra note 11, § 1 cmt. a reporters' note (acknowledging that the line between first-order issues involving rules of liability and second-order issues about apportioning a loss between two or more persons "has been difficult to maintain").

72 It is difficult to understand why a jurisdiction would voluntarily embrace third-party liability as an initial matter, yet would then be willing to virtually eviscerate that obligation by requiring comparison with the intentional tortfeasor. The fact that some courts have done so appears to indicate both that comparative apportionment schemes have not been appropriately tailored to this problem, and that some courts continue to be ambivalent about the existence of third-party liability as an original matter. But if a desire to limit third-party liability is implicated in comparative apportionment cases, the method seems particularly paradoxical. Comparison of intentional and negligent fault could not only limit third-party liability but could also limit intentional tortfeasors' liability, through doctrines of contribution. In addition, reducing third-party liability through comparison with intentional tortfeasor misconduct may have the paradoxical result of imposing less liability on third parties who expose plaintiffs to more egregious harms than it does on those who expose plaintiffs to less egregious harms, since third-party negligence will look proportionately less culpable when compared with more loathsome acts.

73 See Welch v. Southland Corp., 952 P.2d 162, 163 (Wash. 1998) (ruling that "[i]ntentional acts are not included in the statutory definition of 'fault,' and a defendant is not entitled to apportion liability to an intentional tortfeasor").

74 See Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 606 (Kan. 1991) ("Negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); see also Restatement 1999 Draft, supra note 11, § 24 ("A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person."). It had also been suggested that joint and several liability could be retained based on the legal fiction that the two tortfeasors acted in concert. See Restatement 1998 Draft, supra note 19, § 24 cmt. b. Additional complexities are posed by comparison of intentional and negligent fault in states that have modified comparative fault regimes. See Ozaki v. Association of Apartment Owners, 954 P.2d 644, 649-50 (Haw. 1998) (negligent defendant would be jointly and severally liable with intentional tortfeasor for economic damages if its fault were greater than plaintiff's fault but not otherwise).

75 See Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719-20 (La. 1994) (stating that comparison of defendants' negligent and intentional torts would violate public policy when: 1) "the scope of [the third party's duty] clearly encompassed the exact risk of the occurrence which caused damage to plaintiff," 2) "application of comparative fault principles in the circumstances

presented... would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future." and 3) "a true comparison of fault based on an intentional act and fault based on negligence" is not possible).

76 See Field v. Boyer Co., 952 P.2d 1078, 1081 (Utah 1998) ("[Utah's statute] provides the mechanism for attributing fault only to plaintiffs, defendants, and persons immune from suit. It does not contemplate allocations of fault to nonparty tortfeasors.").

77 This Article does not address per se the initial question of whether and to what extent rapists and third parties should be liable. Compare Leslie G. v. Perry & Assocs., 50 Cal. Rptr. 2d 785, 795 (Ct. App. 1996) ("we find it difficult to say that [the victim's landlord] owed her a duty to protect her from criminal acts that not even the entire Los Angeles Police Department can prevent"), with Veazey, 650 So. 2d at 719 (holding that third-party defendant could be liable for poor security and for security-related misrepresentations).

78 See Dobbs, supra note 16, at § 200 ("Contributory negligence of a plaintiff was never a defense to claims for intentionally inflicted harm.").

79 See Restatement 1999 Draft, supra note 11, § 1 cmt. c (applying comparative responsibility to intentional tort is not the majority rule, but it commands significant support in courts that have addressed the question, especially in cases apportioning damages among defendants).

80 Restatement 1998 Draft, supra note 19, § 1 cmt. a ("The intellectual underpinning of comparative responsibility and its single set of percentages to compare different parties is that a single injury is more or less unitary."). Often courts that apply this single set of percentages to intentional and negligent torts in several liability jurisdictions seem to be returning to formalist notions of "scientific causation." See Morton J. Horwitz, The Doctrine of Objective Causation, in The Politics of Law 360, 361 (David Kairys ed., 1990) (noting that within objective causation "above all, it was necessary to find a single 'scientific' cause and thus a single responsible defendant, for any acknowledgment of multiple causation would open the floodgates of judicial discretion"). Comparative apportionment schemes differ from traditional claims of objective causation by acknowledging multiple causes of an injury, but are nevertheless similar in their liability-limiting objectives and in their requirement that for each percentage of fault only a single defendant can be "truly" responsible.

81 See, e.g., Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70 (La. Ct. App. 1989).

82 See, e.g., Provost v. Provost, 617 So. 2d 1267 (La. Ct. App. 1993) (battery award reduced by plaintiff's negligence); Jones v. Thomas, 557 So. 2d 1015 (La. Ct. App. 1990).

83 539 So. 2d 70 (La. Ct. App. 1989).

84 See id. at 72.

85 Id. at 73.

86 See La. Rev. Stat. Ann. §§ 14:98, 14:98.1 (West 1986); Morris, 539 So. 2d at 73.

87 See Morris, 539 So. 2d at 71-72.

88 See id. at 72. Jellystone was at fault for informing the minors of where they could go to purchase alcohol illegally after refusing to sell them alcohol directly. Telephone conversation with Scott Silbert, plaintiff's attorney (July 15, 1998).

89 See Morris, 539 So. 2d at 72-73.

90 Id. at 77.

91 Id. at 77-78.

92 Id. at 78.

93 Id.

94 See Morris v. Yogi Bear's Jelleystone [sic] Park Camp, 542 So. 2d 1378 (La. 1989) (denying cert., noting that the case had not been appealed and therefore that review would not be appropriate).

95 See La. Civ. Code Ann. art. 2323(C) (West 1997) (stating that "if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.").

96 While many comparative apportionment states have statutes holding intentional tortfeasors jointly and severally liable for other defendants' negligent fault, see Restatement 1999 Draft, supra note 11, § 22 cmt. b reporters' note, those statutes do not make intentional tortfeasors liable for any share of fault apportioned to the plaintiff.

97 See Restatement 1999 Draft, supra note 11, § 1 cmt. c reporters' note (noting that although much of the "growing support" for applying comparative responsibility to intentional torts "is in cases involving a comparison of defendants' responsibility, not a comparison of a defendant with a plaintiff," "some of the support" is "in cases comparing a plaintiff's responsibility with that of an intentional defendant."); see, e.g., Ozaki v. Association of Apartment Owners, 954 P.2d 644 (Haw. 1998); Bonpua v. Fagan, 602 A.2d 287, 288-89 (N.J. Super. Ct. App. Div. 1992); Barth v. Coleman, 878 P.2d 319, 322 (N.M. 1994). It is possible that despite the apparent consequences of comparing intentional tortfeasor and negligent plaintiff fault, some courts, when called upon to diminish defendants' damages, will craft ways to avoid this result.

98 Although the draft contained vague language counseling courts to be "sensitive" to the concerns raised by an intentional tortfeasor's claim of victim comparative negligence, Restatement 1998 Draft, supra note 19, § 1 cmt. c, it appeared to pose only one significant limitation on comparisons of rapist and rape victim fault--victim no-duty rules. See id. § 3 cmt. d reporters' note. However, the no-duty concept proposed in the original draft was narrow and would have granted plaintiffs the same limited entitlements with respect to rapists and third parties, with the result that at least some comparisons of rapist and rape victim fault would have been likely. See id. For example, to the extent that a court found a victim had a duty to hotel to lock her hotel room door, the rapist too would have been able to diminish his legal liability based on this "victim fault." A few other sections of the draft may have diminished comparisons of rapist and rape victim fault, such as the draft's elimination of the affirmative defense of assumption of risk and its redefinition of comparative fault by reference to harms to others. But none of these provisions would have been likely to prevent all such comparisons.

99 See id. § 1 cmt. b reporters' note ("A decision to include intentional tortfeasors in a comparative responsibility system supports a decision to count the plaintiff's negligence as a percentage reduction against an intentional tortfeasor.").

100 See id. § 1 cmt. c (citing the difficulty in applying "different apportionment rules to different parts of the same lawsuit" as the second 'rationale for including disparate bases of liability ... in a single system").

101 Restatement 1999 Draft, supra note 11, § 1 cmt. c.

102 See McGill v. Duckworth, 944 F.2d 344, 352 (7th Cir. 1991).

103 See Keeton et al., supra note 9, § 65, at 453.

104 See, e.g., Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989).

105 364 S.E.2d 392, 396 (N.C. 1988).

106 See id. at 396.

107 Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 735 (D. Minn. 1994).

108 See id.; see also McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991) ("McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety....").

109 See Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 132 (5th Cir. 1987).

110 See Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1331 (S.D.N.Y. 1996).

111 See id.

112 See Ledbetter v. Concord Gen. Corp., 651 So. 2d 911, 913-14 (La. Ct. App. 1995).

113 See Jackson v. Post Properties, Inc., 513 S.E.2d 259, 262-63 (Ga. Ct. App. 1999) (holding that "[a] question of fact exists as to the proper use of the window locks" and that "a jury must [also] determine whether [[[plaintiff's] move to a ground floor apartment was a failure to exercise ordinary care for her own safety").

114 See Wassell v. Adams, 865 F.2d 849, 855-56 (7th Cir. 1989).

115 See Scott Fetzer Co. v. Read, 945 S.W.2d 854, 858 (Tex. App. 1997), aff'd, Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998).

116 See Malone v. Courtyard by Marriott L.P., 659 N.E.2d 1242, 1246 (Ohio 1996).

117 See Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 77-78 (La. Ct. App. 1989). Within the context of third-party liability, the comparative apportionment cases are extremely similar to the majority approach: Third parties are presumptively allowed to take advantage of all victim comparative fault defenses. As such, where relevant to third-party liability, the comparative apportionment cases will be included in the status-based paradigm analysis.

118 See Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 735 n.5 (D. Minn. 1994) ("Without attempting to be exhaustive," the court listed many grounds for plaintiff's possible contributory negligence, including voluntary participation at certain times in consuming alcohol on the bus, "while in the company of one whose appearance forewarned others of his street-wise nature; an appearance that was corroborated when [the alleged rapist] advised the Plaintiff that he was a drug dealer.").

119 See Malone, 659 N.E.2d at 1243.

120 See Cook, 847 F. Supp. at 729, 735 n.5.

121 See Wassell v. Adams, 865 F.2d 849, 853 (7th Cir. 1989).

122 See Malone, 659 N.E.2d at 1244-45.

123 See id.; cf. Dye v. Schwegman Giant Supermarkets, Inc., 599 So. 2d 413, 417 (La. Ct. App.) (noting victim's active resistance to robber and expert testimony that her response was "inappropriate"), rev'd on other grounds, 607 So. 2d 562 (1992).

124 See Cook, 847 F. Supp. at 728, 734 (defense accused plaintiff of contributory negligence for drinking with boisterous and visibly intoxicated rapist where plaintiff testified that the rapist "started pestering me about having a beer. I didn't want it, and I kept telling him I didn't want it. And finally I just took it so maybe I thought he would leave me alone, you know, because he kept pestering me, you know. That didn't work.").

125 Susan Estrich, Rape, 95 Yale L.J. 1087, 1118 (1986).

126 See Margaret T. Gordon & Stephanie Riger, The Female Fear 112-13 (1989) (describing the myriad ways in which women change their conduct because of their fear of rape).

127 865 F.2d 849 (7th Cir. 1989).

128 See id. at 850-51.

129 See id. at 851.

130 See id.

131 Id. at 853.

132 Id. at 852.

133 See id. at 852.

134 Id. at 854.

135 Id. at 856.

136 See id. ("If we were the trier of fact," the court wrote, "persuaded that both parties were negligent and forced to guess about the relative costs to the plaintiff and to the defendants of averting the assault, we would assess the defendants' share at more than 3 percent.").

137 See William Powers, Jr., Border Wars, 72 Tex. L. Rev. 1209, 1210-11 (1994) (noting that unlike the "property paradigm" which "gives individuals entitlements to do as they please with their own property," tort law "requires people to act reasonably under the circumstances").

138 See Wassell, 865 F.2d at 856 ("The cost of the security guard, whether on all nights or just on busy nights--or just on unbusy nights--might be much greater than the monetary equivalent of the greater vigilance on the part of Susan that would have averted the attack.").

139 Id. at 855.

140 The incommensurability problem with the risk-utility test is not exclusive to the rape context. See Cass R. Sunstein, Incommensurability and Valuation Law, 92 Mich. L. Rev. 779, 795-99 (1994) (showing some ways in which economic analysis misses other normative commitments); see also Michael D. Green, Negligence = Economic Efficiency: Doubts, 75 Tex. L. Rev. 1605, 1640-42 (1997) (noting that the "incommensurability problem" is one impediment to an economic risk-utility test).

141 The concern that courts cannot adequately review jury determinations in comparative fault schemes has been raised as a critique of comparative fault more broadly. See Carol A. Mutter, Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee, 57 Tenn. L. Rev. 199, 234 (1990) (citing critics of comparative fault who contend that juries' apportionment of fault with percentages is "uncontrollable"). Those concerns are particularly acute when "strict liability" torts and intentional torts are added to the mix, since courts in such cases have even less clear standards for how jurors are supposed to apportion fault. See Geoffrey C. Hazard, Jr., Foreword to Restatement 1998 Draft, supra note 19 (noting that comparisons "between an actor charged with negligence and an actor charged with intentional misconduct" are "impossible in theory," but nevertheless maintaining that this comparison has proved "entirely feasible in practice").

142 Wassell, 865 F.2d at 855 (noting that a warning against opening doors to strangers is unnecessary information for a reasonable person--'[e] veryone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night').

143 Id.

144 See id. at 853 (restating defendant's argument that "a warning would have been costly--it might have scared guests away").

145 See Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 735 & n.5 (D. Minn. 1994).

146 While there is a high correlation between alcohol use and victimization, it is still a leap to assume that but for the victim's consumption of alcohol she would not have been raped. It is not clear whether the jury would have made that leap in this case, but it is certainly easy to see how it, or a jury in a similar case, might do so.

147 See Tanja H. v. Regents of the University of California, 278 Cal. Rptr. 918 (Ct. App. 1991) (university was not liable to student acquaintance rape victim because of its failure to enforce its policy against underage drinking in dormitories).

148 952 P.2d 1078, 1082 (Utah 1998) (Stewart, J., concurring in part and dissenting in part).

149 Id. at 1088 (Stewart, J., concurring in part and dissenting in part). In support of this proposition, Justice Stewart quoted a Michigan case that found that "[a] person's obligation to guard himself from injury caused by design is insignificant, if existent at all, compared to his obligation to guard himself from injury caused by another's simple lack of care." Id. at 1084 n.4 (Stewart, J., concurring in part and dissenting in part) (quoting Melendres v. Soales, 306 N.W.2d 399, 403 (Mich. 1981)).

150 At least one other court's holding appears consistent with that principle. In Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990), the appellate court refused to allow a third-party defendant to assert that a rape victim, who had been repeatedly raped by a superintendent, assumed the risk of rape. The court held that the woman "did not, and could not, assume the risk of rape whatever her knowledge of the risk." Id. at 32. The court reached its conclusion by examining the contractual underpinnings of the assumption of risk doctrine. It then found that "[g]iven the state's strong policy against [[[violent acts such as rape], we do not believe Kansas courts would sanction a contract, whether implied or express, with such an illegal subject matter." Id.

151 374 S.E.2d 761, 762-63 (Ga. Ct. App. 1988).

152 Id. at 766.

153 See id.

154 Id.

155 A sympathetic reading of the Hawaii Supreme Court's decision in Dunlea v. Dappen, 924 P.2d 196 (Haw. 1996), also suggests a limited rape victim no-duty concept. The Dunlea court noted that the comparative fault defenses asserted by a father who allegedly raped his minor daughter were so "offensive," "frivolous," and "repugnant" that their mere assertion "would have warranted appropriate sanctions." Id. at 200 n.6. However, because a case decided by the Hawaii Supreme Court two years later (Ozaki v. Association of Apartment Owners, 954 P.2d 644 (Haw. 1998)) would apparently allow a murderer to reduce his liability for murder because of the victim's comparative negligence, the court's refusal to allow a comparative fault defense in Dunlea would seem to be based on the victim's particular entitlement--as a child, or as a rape victim.

156 See Carmen P. v. PS & S Realty Corp., 687 N.Y.S.2d 96, 99 (App. Div. 1999) ("Plaintiff did look through her peephole and only opened the door in the mistaken belief that the intruder was a UPS delivery man. It is for the jury to decide whether to reduce or deny her recovery based on this action.").

157 Restatement 1999 Draft, supra note 11, § 3 cmt. d.

158 See id. § 3 cmt. d reporters' note.

159 See id. ("The entitlement insulates the individual from an ad hoc, post hoc evaluation of his or her conduct by a jury.").

160 The Restatement 1998 Draft originally attempted to outline specific cases in which a no-duty rule would be appropriate. See Restatement 1998 Draft, supra note 19 § 3(d). However, those attempts ran into difficulty because the specific enumeration of particular entitlements seemed to suggest an underlying lack of entitlements, which was particularly problematic in light of the Draft's apparent support for comparing plaintiff and intentional tortfeasor fault.

161 McLain v. Training and Dev. Corp., 572 A.2d 494, 497 (Me. 1990); Dobbs, supra note 16, § 200; Keeton et al., supra note 9, § 67, at 477-78.

162 See Gail D. Hollister, Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault, 46 Vand. L. Rev. 121, 132 (1993).

163 See id.

164 However, after the adoption of comparative apportionment schemes, some attention has been paid to entitlement concepts because courts no longer have any other way in which to limit defenses of victim fault.

165 The Restatement 1998 Draft originally applied no-duty rules as the sole limit on comparisons of plaintiff and intentional tortfeasor fault. However, the Restatement 1999 Draft acknowledges that not only may no-duty rules apply, but also in some jurisdictions a plaintiff's negligence does not reduce recovery from an intentional tortfeasor, although it could reduce recovery from other tortfeasors.

166 Roscoe Pound, An Introduction to the Philosophy of Law 169 (1925).

167 See Calabresi & Melamed, supra note 15, at 1090 ("The first issue which must be faced by any legal system is one we call the problem of 'entitlement.' ").

168 See, e.g., Kentucky Fried Chicken, Inc. v. Superior Court, 927 P.2d 1260 (Cal. 1997) (rejecting shopkeeper's duty to comply with intentional tortfeasor's unlawful demand as contrary to public policy because it would encourage similar unlawful conduct); Hill v. Charlie Club, Inc., 665 N.E.2d 321 (Ill. App. Ct. 1996) (finding that it is not reasonable to impose duty on hotel owner to investigate in order to discover every known offender who might enter premises).

169 See, e.g., Timberwalk Apartments Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998) ("If a landowner had a duty to protect people on his property from criminal conduct whenever crime might occur, the duty would be universal. This is not the law.").

170 See Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1332 (S.D.N.Y. 1996).

171 See Ledbetter v. Concord Gen. Corp., 651 So. 2d 911, 915 (La. Ct. App. 1995).

172 Cf. McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991) ("Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety...."); Greycas, Inc. v. Proud, 826 F.2d 1560, 1566 (7th Cir. 1987) ("Due care is the care that is optimal given that the other party is exercising due care. It is not the higher level of care that would be optimal if potential tort victims were required to assume that the rest of the world was negligent." (citations omitted)).

173 Timberwalk, 972 S.W.2d at 756 (quoting Lefmark Management Co. v. Old, 946 S.W.2d 52, 56 (Tex. 1997)).

174 Id. at 757. To find crime foreseeable, "there must be evidence that other crimes have occurred on the property or in its immediate vicinity." Id. (holding that one sexual assault within a one-mile radius in the previous year, and six assault-type crimes in a neighboring apartment complex, did not make rape by person who allegedly came in unlocked access gate and sliding door in victim's apartment foreseeable).

175 Third parties need not necessarily keep themselves informed about safety issues. See id. at 759 ("Property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area.").

176 See, e.g., R.B.Z. v. Warwick Dev. Co., 725 So. 2d 261, 264 (Ala. 1998) (stating that a rape that resulted from an apartment complex's failure to institute safety precautions to protect master keys was not foreseeable because there "was no showing of any prior misuse of a master key" in this complex, even though the complex manager's husband had been previously convicted of rape). See also Boren v. Worthen Nat'l Bank, 921 S.W.2d 934, 940 (Ark. 1996) (recognizing "the duty of a business owner to protect its patrons from criminal attacks... only where the owner or its agent was aware of the danger presented by a particular individual or failed to exercise proper care after an assault had commenced").

177 See, e.g., Leslie Bender & Perette Lawrence, Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents, 69 Chi.-Kent L. Rev. 313 (1993).

178 See generally Elizabeth Stenko, The Case of Fearful Women: Gender, Personal Safety and the Fear of Crime, in 4 Women and Criminal Justice 117 (1992); see also Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women's L.J. 81, 94 (1987) (arguing that women respond to pervasive fear of violent male sexuality by "redefining" themselves).

179 Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1333 (S.D.N.Y. 1996).

180 Cf. Mary E. Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1232 (1986) (arguing that women's interests in employment are too "easily trumped" by a potential fetus through sex-specific fetal vulnerability policies in the workplace).

181 Violence Against Women Act of 1993, H.R. Rep. No. 103-395, at 25 (1993).

182 See Bureau of Justice Statistics, U.S. Department of Justice, Special Report NCJ-126826, Female Victims of Violent Crime 2 (1996) ("In 1992-1993, a majority of women victims (78%) indicated that the offender who victimized them was a person known to them, sometimes intimately.... This is in contrast to the victim-offender relationships in male victimization that more frequently involve strangers."); cf. Katherine Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev.

568, 576-78 (1997) (outlining research that suggests that "the class of rapists is neither small nor particularly likely to be depraved").

183 See Steven R. Schlesinger, How Justice Department Collected the Data for its Rape Study, N.Y. Times, May 24, 1985, at A24 (noting that its recent study "The Crime of Rape" concluded that "a third of the completed rapes occurred in the home").

184 See Bender, supra note 29, at 579 (interspousal tort immunity bars wives from recovering for rape, suggesting that a woman assumes the risk of rape by marrying a man).

185 Some courts have taken a restrictive view of a woman's duty to take precautions to protect others from a violent husband. See Fiala v. Rains, 519 N.W.2d 386 (Iowa 1994) (woman had no duty to warn date about her extremely jealous ex-boyfriend). A contrary view could let his violence control her life. See, e.g., Wilkins v. Siplin, 13 Cal. Rptr. 2d 634, 635 (Ct. App. 1992) (finding woman negligent for failing to warn co-worker of husband's violence and letting husband into locked cabin, and therefore liable for her husband's assault upon male co-worker).

186 Of course, the duty of due care is a duty of due care under the circumstances, and a jury can take account of exigent circumstances. But not all people will be able to take reasonable care when faced with a situation of crime against them--maybe a woman exercising due care in this exigent situation should have run earlier, but this woman, for whatever reasons, was unable to take that care. To penalize people for not being rational in moments of the most extreme irrationality (crime) seems like a bad idea from the outset. Good Samaritan laws have provided ex ante protection to others in just these kinds of exigent circumstances. The emergency doctrine provides even broader protection in states in which it applies.

187 "Nearly two-thirds of all forcible rapes occurred during childhood and adolescence." Panel Discussion, Men, Women and Rape, 63 Fordham L. Rev. 125, 136 (1994).

188 It is foreseeable that some children may not be able to take appropriate care to protect themselves from rape. The legal system should be set up around that assumption. Cf. Zerby v. Warren, 210 N.W.2d 58, 62 (Minn. 1973) ("Rape may be the one area in which it is important to encourage supervision of the trial process.").

189 See generally Restatement (Second) of Torts § 463 cmt. b (1965); Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801, 1828 (1997) (harms to self, or to others' financial interests, do not give rise to the same moral indignation as physical harms to others).

190 See Dan B. Dobbs, Accountability and Comparative Fault, 47 La. L. Rev. 939, 943 (1987) (noting that "the lodestone at the center of tort law is the common belief that people ought to be held accountable for their wrongs and correlatively responsible for themselves," but outlining a limited duty/risk principle that should survive under comparative fault); see also George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 551-56 (1972) (arguing that strict liability may be the appropriate moral rule for nonreciprocal risk creation).

191 See Parish v. Truman, 603 P.2d 120, 122 (Ariz. Ct. App. 1979).

192 See Dobbs, supra note 190, at 970 ("A defendant who inflicts an unreasonable risk upon multitudes of people and does so by a condition that remains risky not for a few moments but over a long period of time, must anticipate that some of those upon whom the risk is inflicted may be in no position to protect themselves.").

193 At times, third-party precautions may affect citizens' liberties. For example, security cameras may raise privacy concerns. Similarly, equality concerns could also affect third parties. For example, it would be problematic if Jewish organizations were held to have greater obligations than other community organizations due to the fact that Jewish institutions might be subject to increased risk of violent hate attacks. Direct restrictions upon third-party precautions that overly restrict citizens' freedom or equality may be warranted in some situations.

194 Doctrines relating to invitees are an example of this, as are recreational use statutes.

195 See Francis H. Bohlen, The Basis of Affirmative Obligations in the Law of Tort, 53 Am. L. Reg. 209, 220 (1905) ("This, then, is the original conception of a duty to take precaution to insure the safety of others who have voluntarily come into contact with the obligor. It was an incident of the assumption of a business carried on for gain....").

196 See Robert L. Rabin, Some Thoughts on the Ideology of Enterprise Liability, 55 Md. L. Rev. 1190, 1192 (1996).

197 This concept is similar to the problems raised by unconstitutional conditions. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989) (arguing for a broad construction of the doctrine of unconstitutional conditions that precludes government from granting a benefit on the condition that the beneficiary surrender a constitutional right).

198 232 U.S. 340, 350 (1914).

199 511 S.W.2d 255, 259-60 (Tex. 1974).

200 See id. at 260 ("Plaintiff could have remained inside his house, but in doing so, he would have surrendered his legal right to proceed over his own property.... The latter alternative was forced upon him against his will and was a choice he was not legally required to accept.").

201 In these cases, the harm done by the plaintiff's exercise of rights is more certain than in the rape context. See Munn v. Algee, 924 F.2d 568 (5th Cir. 1991) (jury should consider the religion of husband and wife in determining reasonableness of refusing a blood transfusion following an automobile accident); cf. Montgomery v. Terminal R. Assoc., 392 N.E.2d 77 (Ill. App. 1979) (railroad worker had no duty to undergo back surgery to mitigate injuries suffered in an accident).

202 See Hopper v. Carey, 1999 WL 744151 (Ind. Ct. App.) (barring contributory negligence claim on the basis that a driver did not have a "duty" to wear a seat belt); see also Davis v. Knippling, 576 N.W.2d 525, 528-29 (S.D. 1998) ("A clear majority of states have judicially refused to admit evidence of a plaintiff's nonuse of an available seat belt as proof of failure to mitigate damages likely to occur in an automobile accident.").

203 Gregory C. Keating, The Idea of Fairness in the Law of Enterprise Liability, 95 Mich. L. Rev. 1266, 1277-83 (1997) (arguing against "the implicit premise that persons are always and everywhere obligated to arrange their lives in ways that maximize overall social wealth").

204 See id. at 1376.

205 Id. at 1314.

206 See Becker, supra note 180, at 1222.

207 See Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989).

208 See Baker, supra note 182, at 587 ("The most comprehensive study of citizens' perceptions of rape found that sixty-six percent of one sample group believed that women's behavior or appearance provokes rape." (citing Field & Bienen, supra note 29, at 54-57)).

209 See, e.g., Sandra Davidson, Blood Money: When Media Expose Others to Risk of Bodily Harm, 19 Hastings Comm. & Ent. L.J. 225, 228 (1997) (listing cases highlighting the tension between First Amendment freedoms and civil liability). The rape context is considerably more sympathetic than the free speech context because a rape victim's conduct poses a risk only to herself, while the publications at issue in the free speech cases posed risks to others--less deserving candidates for privilege. In addition, many of the First Amendment cases involve commercial speech.

210 Compare Hutcherson v. City of Phoenix, 961 P.2d 449, 451 (Ariz. 1998) (complete deference to the jury), with New York Times v. Sullivan, 376 U.S. 254, 285 (1964) (clear and convincing evidence based on the appellate court's independent examination of the whole record).

211 See Keating, supra note 203, at 1376 ("People do not forfeit a share of their authority over their own lives and property simply because they suffer the misfortune of having those lives and that property violated by accidental injury.").

212 That males, particularly subpopulations of men such as boys and prisoners, are subject to rape does not diminish the gendered nature of the crime. See Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 Cornell L. Rev. 1169, 1200-82 (1998) (citing Catharine MacKinnon for the argument that "sexual abuse of men by men is a phenomenon deeply connected with the subordination of women"); Katherine Franke, What's The Wrong of Sexual Harassment?, 49 Stan. L. Rev. 691, 696 (1997) ('Sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism.').

213 944 F.2d 344 (7th Cir. 1991).

214 Id. at 350.

215 See id. at 351.

216 Id. at 351.

217 Id.

218 Id. at 352-53 (citation omitted).

219 Id. at 353.

220 An overbroad notion of assumption of risk would allow a shopkeeper who failed to properly care for an icy parking lot to claim that an elderly plaintiff who slipped on the ice "could have refrained... from leaving her home in inclement weather when she was well aware of the icy conditions outside." Id. at 355 (Cudahy, J., concurring in part and dissenting in part).

221 Id. (Cudahy, J., concurring in part and dissenting in part).

222 Id. at 354 (Cudahy, J., concurring in part and dissenting in part).

223 See Wex S. Malone, Some Ruminations on Contributory Negligence, 1981 Utah L. Rev. 91.

224 See Metropolitan Atlanta Rapid Transit Auth. v. Allen (MARTA), 374 S.E.2d 761 (Ga. Ct. App. 1988).

225 But see Malone v. Courtyard by Marriott L.P., 659 N.E.2d 1242 (Ohio 1996) (affirming verdict that hotel was not liable to one rape victim for failure to respond to emergency calls because rape victim had voluntarily gone drinking with the acquaintance who raped her, and granting hotel new trial on jury verdict awarding damages to the other rape victim).

226 Ronald V. Clarke, Situational Crime Prevention, 19 Crime & Just. 91, 105 (1995) (citations omitted). Target hardening is making the target of a crime less accessible. See id. at 110.

227 See id. at 115-16.

228 See H. Jane Lehman, supra note 57, at 1 (against the backdrop of successful lawsuits brought by crime victims for landlords' "shoddy security practices," "property owners and managers are starting to take more extensive security precautions, according to the rental property industry").

229 See McLean v. Kirby Co., 490 N.W.2d 229, 239 (N.D. 1992) (employee who had been convicted of two assault charges with weapons earlier in the year and had a charge of criminal sexual conduct pending against him used company "gift" set of knives to rape plaintiff in her home on the pretense of demonstrating Kirby vacuum cleaners); see also Read v. Scott Fetzer Co., 990 S.W.2d 732, 736 n.1 (Tex. 1998) ("As a result [of a prior lawsuit, defendant] put warnings in its training manuals of the need to do a 'thorough criminal background check." ').

230 McClung v. Delta Square L.P., 937 S.W.2d 891, 904 n.13 (Tenn. 1996).

231 See Accidents and Murders Cause Most Job Deaths, N.Y. Times, April 25, 1998 at A16 (the Center for Disease Control estimates that homicide is now the second leading cause of death for workers).

232 See Exxon Corp. v. Tidwell, 816 S.W.2d 455, 460 (Tex. App. 1991).

233 See Jo Thomas, Experts Take a 2d Look at Virtue of Student Jobs, N.Y. Times, May 13, 1998 at A16.

234 See Exxon Corp. v. Tidwell, 816 S.W.2d 455, 469 (Tex. App. 1991).

235 McGill v. Duckworth, 944 F.2d 344, 352 (7th Cir. 1991).

236 See, e.g, Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. Rev. 213 (1987).

237 See Kenneth W. Simons, The Puzzling Doctrine of Contributory Negligence, 16 Cardozo L. Rev. 1693, 1702-07 (1995) (distinguishing victim negligence from victim strict responsibility).

238 The current baseline is problematic from both an antisubordination and a formal equality perspective.

239 "Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender." Catharine MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1301 (1991); see also Brande Stellings, Note, The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship, 28 Harv. C.R.-C.L. L. Rev. 185, 185 (1993) ("All of the precautions in the world cannot eradicate the single biggest risk factor for rape--[women's] femaleness.").

240 See Gordon & Riger, supra note 126, at 4-5; see also Kenneth F. Ferraro, Fear of Crime: Interpreting Victimization Risk 85 (1995) ("Virtually all investigations which examine fear across different victimizations show important gender effects for each offense as well as for overall fear.").

241 See Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women, 106 Harv. L. Rev. 517, 539 (1993) (noting limitations on mobility as a result of rape and harassment, for instance "whether to go to the movies alone, where to walk or jog, whether to answer the door or telephone").

242 Whether rape is a hate crime has been a topic of recent debate. Compare Julie Goldscheid, Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement, 22 Harv. Women's L.J. 123, 124-25 (1999) ("Congress, in enacting the 1994 Violence Against Women Act, expressly recognized the connections among domestic violence, rape, and sexual assault and other hate crimes."), with Owen D. Jones, Sex, Culture and the Biology of Rape: Toward Explanation and Prevention, 87 Cal. L. Rev. 827, 924 (1999) ("While it is possible that a statutory mechanism designed to deter and fairly compensate for violent hate crimes [VAWA] may be equally effective in the context of sexual violence, 'biobehavioral theories suggest that view may be overly optimistic." ').

243 See Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (upholding Wisconsin's sentence enhancement for bias-related crime enacted because "this conduct is thought to inflict greater individual and societal harm").

244 See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2376 (1989) ("The constitutional commitment to equality and the promise to abolish the badges and incidents of slavery are emptied of meaning when target-group members must alter their behavior, change their choice of neighborhood, leave their jobs, and warn their children off the streets because of hate group activity.").

245 The vast majority of rape victims are women. It is estimated that 1-10% of rape victims are male. However, homosexual rape may be particularly subject to underreporting and may be significantly higher for particular subpopulations which include prisoners and minors. See Stellings, supra note 239, at 186 n.3.

246 However, those categories need not be understood as essential or biologically determined. See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 2 (1995) (arguing that sexual identity "must be understood not in deterministic, biological terms but according to a set of behavioral, performative norms").

247 See MacKinnon, supra note 239, at 1302 ("Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status."). The same critique would apply if, for example, a defendant were to argue that an African American plaintiff did not act reasonably when she moved into neighborhood in which racist violence had been threatened.

248 See Stellings, supra note 239, at 188 (arguing that rape diminishes capacity of women to participate in society). To the extent that it is actually effective, imposition of a legal duty curtails women's liberty; to the extent that it is not effective, it imposes the symbolic harms addressed infra without any arguable reduction of the harm. Whether the harm is purely symbolic or instrumental as well does not alter the analysis. "[T]he impact of the symbolic and instrumental effects of rape law reform were intended to be complementary." Ronet Bachman & Raymond Paternoster, A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?, 84 J. Crim. L. & Criminology 554, 555 (1993).

249 "Gender-based violence bars its most likely targets--women--from full [participation] in the national economy." S. Rep. No. 103-138 at 54 (1993).

250 See Jackson v. Post, 513 S.E.2d 259, 263 (Ga. Ct. App. 1999) (holding that the jury "must determine whether [plaintiff's] move to a ground floor apartment was a failure to exercise ordinary care for her safety").

251 "Victimization rates of men exceed those of women in all violent crime categories except rape and sexual assault." Bureau of Justice Statistics, supra note 182, at 3.

252 See, e.g., Wassell v. Adams, 865 F.2d 849, 851 (7th Cir. 1989) (noting that the hotel owners sometimes warned "women guests" about the crime in the area); Gordon & Riger, supra note 126, at 113-14.

253 Gordon & Riger, supra note 126, at 113.

254 Id. at 114.

255 "In 1994 women were about two-thirds as likely as men to be victims of violence." Bureau of Justice Statistics, supra note 182, at 1.

256 Gordon & Riger, supra note 126, at 114.

257 Id. at 115.

258 This legal strategy attempts to control crime by controlling its victims. See Molly Giles, Obscuring the Issue: The Inappropriate Application of In Loco Parentis to the Campus Crime Victim Duty Question, 39 Wayne L. Rev. 1335, 1348 (1993).

259 Becker, supra note 180, at 1222.

260 Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit' ': A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 392 (1993).

261 See Giles, supra note 258, at 1349.

262 See Becker, supra note 180, at 1258-60 (noting that employers are unlikely to adopt gender exclusive policies with respect to men's heightened risks. The employer would more likely remove the hazards than remove the men.).

263 See generally Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 814-16 (1991).

264 Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 78 (La. Ct. App. 1989).

265 See Miles v. Louisiana Landscape Specialty, 697 So. 2d 348, 351 (5th Cir. 1997) ("comparative fault is not applicable to the intentional tort of sexual assault and battery of a minor"). This result might have been shaped solely by Louisiana's change in law. It is difficult to know whether the same result might nevertheless have been reached under the prior law.

266 See Peterson v. Gibraltar Sav. & Loan, 711, So. 2d 703, 714 (La. Ct. App. 1998), rev'd on other grounds, 733 So. 2d 1198 (La. 1999).

267 Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 132 (5th Cir. 1987) (emphasis added).

268 For a discussion of principles of formal equality, see, e.g., Sylvia A. Law, Rethinking Sex and the Constitution, in Feminist Jurisprudence 82, 82-90 (Mary Becker et al. eds., 1994).

269 In cases of victimization, "[a]sking juries and judges to decide what a reasonable woman would have done may generate new stereotypes about appropriate sexual behavior for all women...." Larson, supra note 260, at 470. This is not to suggest that the reasonable woman standard may not make sense in other contexts in which it furthers anti-subordination goals. See, e.g., Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Feminism Unmodified 32-45 (1987); Naomi R. Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 Cornell L. Rev. 1398, 1404-06 (1992). In some other contexts, the reasonable woman standard acknowledges the reality of women's lives, rather than translating that reality into subordination. See, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that the reasonable person standard "tends to be male-biased and tends to systematically ignore the experiences of women").

270 "[S]ociety views women who drink as sexually promiscuous and acceptable targets for sexual assault." Karen M. Kramer, Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes, 47 Stan. L. Rev. 115, 121 (1994). Under society's double standard regarding intoxication, "[i]f the rapist was drunk, it reduces his culpability, but if the victim was drunk, it increases her culpability." Id. at 115. "[S]ociety demands that if [a woman] wants to avoid being the target of sexual aggression,

she should not participate in social drinking." Id. at 122.

271 See Malone v. Courtyard by Marriott L.P., 659 N.E.2d 1242, 1248 (Ohio 1996) (upholding jury verdict finding victim who recently met and went to bars with attacker 51% at fault, which fault ultimately barred her recovery); cf. E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard, 18 Berkeley J. Emp. & Lab. L. 56, 82 (1997) ("The reasonable person standard is ideally suited for subordinating sexual minorities who do not conform to the majority's norms.").

272 Compare Scott Fetzer Co. v. Read, 945 S.W.2d 854, 862 (Tex. App. 1997), with Malone, 659 N.E.2d at 1248.

273 See Scott Fetzer Co., 945 S.W.2d at 862 (discussing risk to homebound women of ill-intentioned salespeople).

274 See Ledbetter v. Concord Gen. Corp., 651 So. 2d 911 (La. Ct. App. 1995) (grandmother who was employed as "traveling salesperson" was 35% at fault for rape that occurred in her hotel room with her granddaughter present because she did not double-check door lock before going to sleep).

275 See Malone, 659 N.E.2d at 1248.

276 See Amy Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law, 63 U. Cin. L. Rev. 269, 284 (1994) ("It is not enough to say that Wassell knew about male violence and therefore should have known not to operate the door. Judge Posner's conclusion depends on something more. It depends upon an image of violence awaiting Wassell on the other side of the motel-room door. If it was not dangerous outside, then it could not have been careless to open the door. Is every outside dangerous?").

277 See Peterson v. Gibraltar Sav. & Loan, 711, So. 2d 703, 705 (La. Ct. App. 1998) ("As he exited the interior of the building and entered the parking garage, two black men dressed in blue jeans and T-shirts forced him into a car at gunpoint" and raped him), rev'd, 733 So. 2d 1198, 1200 (La. 1999) (also noting that the attackers were "two black men"); Kastely, supra note 276, at 280-86 (citing, e.g, Wassell v. Adams, 865 F.2d 849, 851 (7th Cir. 1989) ("it was a respectably dressed black man")).

278 See Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1331 (S.D.N.Y. 1996) (noting that the rapist "did not look suspicious"); Malone v. Courtyard by Marriot L.P., 641 N.E.2d 1159, 1162 (Ohio Ct. App. 1994) (describing the rapist as professionally dressed).

279 See generally Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 150-55 (1987) (discussing harms of racist assumptions).

280 Cf. Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. Cal. Rev. L. & Women's Stud. 133, 182 (1992) (noting that the best interest of the child standard is so open-ended it "facilitates the operation of all forms of bias," and discussing several forms of bias against women that arise in cases decided under that standard).

281 See generally Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996).

282 See id. at 2026 ("Prevailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces, possibly including law." (footnote omitted)).

283 See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (stating that an accounting firm could not use gender-stereotyped criteria in making partnership decisions).

284 S. Rep. No. 102-197 at 47 (1991) (quoting testimony of Gill Freeman, "Women and Violence," hearing before the Senate Judiciary Committee).

285 If the First Amendment requires extensive limits on tort law actions, see, e.g., Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (First Amendment barred wrongful death action against filmmaker even though murderer had just seen its film about gang violence, "The Warriors," and had uttered a line from the film while committing the murder.); BJF v. Florida Star, 491 U.S. 524 (1989) (First Amendment prohibited imposition of civil damages against newspaper for publishing rape victim's full name in violation of state statute), it would seem that the Fourteenth Amendment could require similar limitations. For example, the Constitution could bar state tort law from explicitly requiring women to act in gender-specific ways in order to receive financial compensation through the state's tort system. See Shelley v. Kraemer, 334 U.S. 1 (1948) (action of state courts in enforcing private race-restrictive covenant constitutes state action for purposes of the Fourteenth Amendment). The problem seems no less difficult because the state itself has not articulated an explicitly discriminatory rule, but has instead delegated excess discretion to jurors to make such discriminatory decisions. See Georgia v. McCollum, 505 U.S. 42, 54 (1992) (holding that a defendant's discriminatory exercise of a peremptory challenge is state action and a violation of Equal Protection); cf. Larkin v. Grendel's Den, 459 U.S. 116 (1982) (delegation of regulatory power to churches violates First Amendment); Buyeks-Roberson v. Citibank, 162 F.R.D. 322, 330 (N.D. Ill. 1995) (plaintiffs could bring class action race discrimination claim based on practice of excess subjectivity in decision-making). That said, I am dubious about increasing efforts to constitutionalize the law. See Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128-29 (1999) (ruling that state tort law claims were barred by Noerr-Pennington). And it seems that even in the First Amendment context, many of the laws that do not jail a speaker or suppress an idea, but merely require that the speaker bear the financial costs of the foreseeable harm caused by his speech, ought to be curbed, when appropriate, by prudential rather than constitutional limits.

286 See Calabresi, supra note 16, at 34.

287 Cf. Rejent v. Liberation Publications, Inc., 197 A.D.2d 240, 245 (N.Y. App. Div. 1994) ("[T]he notion that while the imputation of sexual immorality to a woman is defamatory per se, but is not so with respect to a man, has no place in modern jurisprudence. Such a distinction, having its basis in a gender-based classification, would violate constitutional precepts.").

288 Calabresi, supra note 16, at 83.

289 See generally Stenko, supra note 178; see also West, supra note 178.

290 Restatement (Second) of Torts ch. 17 scope note (1965) (emphasis added).

291 Keeton et al., supra note 9, § 65, at 451.

292 See Special Verdict Form, Ozaki v. Association of Apartment Owners, Civ. No. 91-3551-10, at 2-3 (Haw. 1st Cir. Ct. May 2, 1994) (asking the jury "Was the [murdered plaintiff] negligent?," and "Was the negligence of [[[plaintiff] a legal cause of the injury to the Plaintiff?" and reporting an answer in the affirmative to each question).

293 Estrich, supra note 125, at 1094.

294 See id.; Gordon & Riger, supra note 126, at 120.

295 See Panel Discussion, supra note 187, at 127, 131 ("Rape is different because it overwhelmingly involves male perpetrators and female victims" and "because of the shame and stigma associated with it and the resulting psychological and physical harm" (footnote omitted)); Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1332 (S.D.N.Y. 1996) ("Although her boyfriend arrived and tried to comfort her, her reaction was to apologize repeatedly, as if she had done something wrong.").

296 See Bender, supra note 29, at 586.

297 See Estrich, supra note 1, at 32.

298 Dorothy E. Roberts, Book Review, 44 J. Legal Educ. 462, 462 (1994).

299 Id. at 464.

300 Permitting defendants to assert the plaintiff's alleged contribution to the rape may also encourage defendants to assert racist stereotypes of "chronically promiscuous" African American women, since defendants are exculpated from liability for their own negligence to the extent that they can portray the rape victim as having "asked for it." See Darci E. Burrell, Myth, Stereotype, and the Rape of Black Women, 4 UCLA Women's L.J. 87, 89 (1993) (citing Angela Y. Davis, Rape, Racism and the Myth of the Black Rapist, in Women, Race & Class 172, 182 (1983)).

301 In the context of criminal rape law, where there has been reform over time, one statistical analysis concludes that a "symbolic effect that rape law reform may have had... is a reduction in rape victims' perceptions that the legal process would stigmatize them, which in turn made them more likely to report their victimization." Bachman & Paternoster, supra note 248, at 574. In addition, "subsequent to rape law reforms, rape offenders were more likely to be sent to prison. This increased probability of incarceration in recent years was not due to the general punitiveness of the criminal justice system." Id.

302 Similar concerns have prompted limitations on discovery in rape cases, like rape shield laws, e.g., Fed. R. Evid. 412.

303 See Leonore M.J. Simon, Sex Offender Legislation and the Antitherapeutic Effects on Victims, 41 Ariz. L. Rev. 485, 524 (1999) (noting that "[p]arents do not educate their daughters (and sons) about the dangers of dating relationships or avoiding high risk situations" and suggesting that this is "unfortunate").

304 See generally Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. Rev. 213, 217 (1987) ("The problem with applying the notion of consent here is that, under the circumstances, the consent is quite limited. I would rather play professional football with the risk of a brutal blow than not play at all. But I would also rather play and not run that risk.").

305 In wanting more for women than acquiescence in their present sexual constraints, feminism places itself into intellectual tension with liberal understanding of consent and choice.... [L]iberal thought frequently treats the mere presence of a choice as a sufficient moral justification for otherwise unjust, degrading, or exploitative relationships.... [I]nquiry into either the circumstances of [the individual's consent] or its consequences implies disrespect for the individual who chose her situation.
Larson, supra note 260, at 428.

306 See Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620-21 (6th Cir. 1986) (noting that in certain societies, reasonable people are used to "sexual jokes, sexual conversations and girlie magazines" at work); Estrich, supra note 263, at 814-16.

307 See Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304, 305-06 (1995) (arguing that feminists who posit an "unconstrained" female agency fail to account for all vagaries of socioeconomic conditions).

308 See Simons, supra note 304, at 217-18.

309 Ted R. Miller et al., National Institute of Justice, Victim Costs and Consequences: A New Look 1 (1996).

310 Id. at 5.

311 See id. at 19 ("Taxpayers and insurance purchasers cover almost all the tangible victim costs of arson and drunk driving. They cover $9 billion of the $19 billion in tangible nonservice costs of larceny, burglary, and motor vehicle theft. They cover few of the tangible expenses of other crimes. Victims pay about $44 billion of the $57 billion in tangible nonservice expenses for traditional crimes of violence--murder, rape, robbery, assault, and abuse and neglect."). These expenses may be covered by first-party or third-party insurance. The availability of first-party insurance to cover the costs of rape would diminish loss spreading but not equality or other distributional concerns.

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

313 See July 15, 1998 telephone interview with Scott Silbert, plaintiff's attorney from Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70 (La. Ct. App. 1989) (noting that the intentional tortfeasors in that case were covered by insurance, but that the insurance company later broadened its intentional tort exclusion to bar coverage of intentional acts committed by any person covered under the insurance policy, not merely intentional acts committed by the insured).

314 See, e.g., Cal. Ins. Code § 533 (West 1993).

315 See Virginia Cope, Third-Party Liability: Victims' Rights Movement Spurs Expansion in Law, 24 Trial 85 (1998) ("Forty-four states now have victims' compensation programs, and, in 1984, the federal government created the Crime Victims Fund, which had provided more than $44 million in funds to victims' programs.").

316 See Charlene L. Smith, Victim Compensation: Hard Questions and Suggested Remedies, 17 Rutgers L.J. 51 (1985) (arguing that current victim compensation schemes are inadequate due to a misunderstanding of victims' circumstances and due to financial constraints).

317 Although loss-spreading arguments have been called "outdated" in light of the widespread availability of first-party insurance, see Mark Geistfeld, Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities, 45 UCLA L. Rev. 611, 627 (1998), the lack of first party insurance for crime-related losses makes this criterion more relevant.

318 See Guido Calabresi, The Cost of Accidents 39 (1970) ("accident losses will be least burdensome if they are spread broadly among people").

319 Bureau of Justice Statistics, supra note 182, at 3.

320 See Graham Farrell, Preventing Repeat Victimization, 19 Crime & Just. 469, 477 (1995) (noting that revictimization constitutes a large portion of all victimization).

321 See S. Rep. No. 103-138 at 54 (1993) ("almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime").

322 Schwartz, supra note 189, at 1831.

323 Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393, 1432 (1996).

324 Cf. Calabresi, supra note 16, at 34 (using the example of driving by those of the "risky age" of 16-24).

325 Thomas S. Ulen, Firmly Grounded: Economics in the Future of the Law, 1997 Wis. L. Rev. 433, 441 (1997).

326 Third-party and victim precautions may be suboptimal compared to intentional tortfeasor avoidance. From that perspective, the possibility of an "optimal level" of citizen precautions may start as, at most, a second-best solution. See Landes & Posner, supra note 22, at 154 ("We do not want A [the victim of the intentional tort] to spend $10 on self-protection. If he did, B would not injure A, but there would still be a social loss of $10, which can be avoided by making B liable."); see also Stephen F. Williams, Second Best: The Soft Underbelly of Deterrence Theory in Tort, 106 Harv. L. Rev. 932, 933 (1993) (noting that the theory of the second best "holds that where the conditions for optimality cannot be fully satisfied, correction of the flaws in only some of the conditions

will not necessarily lead to an improved outcome").

327 Cf. George L. Priest, Can Absolute Manufacturer Liability Be Defended?, 9 Yale J. on Reg. 237, 241-42 (1992). In a perfect market, the parties could bargain around the legal rule. See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

328 Gordon & Riger, supra note 126, at 21.

329 See id. at 15.

330 See id.

331 See Steven P. Croley, Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness, 69 S. Cal. L. Rev. 1705, 1733-37 (1996) (arguing that placing tort liability on firms rather than particular individuals making safety decisions may result in a lower incidence of unreasonable conduct).

332 See Gordon & Riger, supra note 126, at 21.

333 See id. One commentator even suggests that fear of rape may have a biological basis. See Jones, supra note 242, at 905 (asserting that "the fear of rape is a psychological predisposition in females").

334 Cf. Steven P. Croley & Jon D. Hanson, The Nonpecuniary Cost of Accidents: Pain-and-Suffering Damages in Tort Law, 108 Harv. L. Rev. 1785, 1903 (1995) (arguing that "pain and suffering itself constitutes a copayment mechanism" that guards against moral hazard because "pain-and-suffering losses are not fully compensable"). For a systematic analysis of nonlegal sanctions in the commercial context, see David Charny, Nonlegal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 375 (1990).

335 See Green, supra note 140, at 1609-10 n.23 ("the marginal deterrence provided by tort law when liability is imposed on defendants is greater than the marginal deterrence provided by tort law when liability is imposed on plaintiffs"); Stephen D. Sugarman, Doing Away with Tort Law, 73 Cal. L. Rev. 555, 560 (1985) ("There is, unfortunately, little reason to believe that tort law today actually serves an accident avoidance function."); Schwartz, supra note 189, at 1804 ("'[n]o one supposes' that the negligent conduct of motorists is in any way influenced by the prospect of liability") (quoting William L. Prosser, Handbook of the Law of Torts 444 (3d ed. 1964)).

336 Cf. Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 379, 416 (noting that "moderate" version of the tort law deterrence argument can generally be sustained, and specifically making that argument in the context of third-party liability).

337 See Clarke, supra note 226, at 109 (listing twelve techniques of situational prevention).

338 See, e.g., Karen Rodgers & Georgia Roberts, Women's Non-Spousal Multiple Victimization: A Test of the Routine Activities Theory, 37 Can. J. of Criminology 363 (1995) (exploring how much women must change their lifestyle to avoid victimization).

339 Cf. Tomas J. Philipson & Richard A. Posner, The Economic Epidemiology of Crime, 39 J.L. & Econ. 405, 415 (1996). Philipson and Poser note that some private and public expenditures on crime prevention are complements. For example, public expenditures that make people feel safer and bring people out into the street at night could make streets safer and thereby augment the benefits of such expenditures. As such, certain types of individual precautions--like refusing to go out at night--may make streets less safe rather than more.

340 Baker, supra note 182, at 577. Cf. Jones, supra note 242, at 839-40 (noting that feminist scholarship on rape suggests that "rape is a consequence of (a) social traditions that reflect male power and dominance, on the one hand, and female powerlessness and exploitation, on the other; (b) socially stratified and unequal gender roles; and (c) cultural attitudes about men, women, and rape,"

but focusing on biobehavioral influences).

341 Keeton et al., supra note 9, § 67, at 469.

342 See generally Croley, supra note 331. The doctrine of foreseeable misuse embraces a similar policy rationale--deterrence may be better achieved by defendants than by plaintiffs.

343 See Wassell v. Adams, 865 F.2d 849, 853 (7th Cir. 1989) (where defendant argued that a warning would have scared away guests); Schmidt v. HTG, Inc., 961 P.2d 677, 682 (Kan. 1998), cert. denied, 119 S.Ct. 409 (1998) (parole officer did not inform employer that employee was a paroled sex offender "because he was concerned that [the employee] would be fired" even though that failure to disclose placed female employees at "risk of harm," and employee ultimately killed coemployee who accepted a ride home with him).

344 For example, the city of Tucson simply decriminalized gasoline thefts to obtain an instant dramatic drop in its crime rate. See Paul Weber, Giving Up to Crime, Phoenix Gazette, Jan. 12, 1996 at B4.

345 See Fox Butterfield, As Crime Falls, Pressure Rises to Alter Data, N.Y. Times, Aug. 3, 1998, at A1.

346 Student Right-to-Know and Campus Security Act §§ 101-205, 20 U.S.C. § 1092 (1994) (requiring colleges and universities to provide an annual report on campus crime to students, staff, and applicants on request).

347 See id.

348 For example, in 1996 the University of Arizona reported that it received no reports of rape or sexual assault. In that same year, Arizona State University reported only three rapes. See University of Arizona Campus Safety and Security Report 1996-1997; Arizona State University Police Department Record 965. While it is possible that these statistics reflect the actual number of rapes at those schools, the numbers seem improbably low. See Todd Hardy, Likins Says Campus Crime 'Has to be Reported,' Arizona Daily Wildcat, Oct. 10, 1997 (new university president stresses importance of 'fully and honestly disclosing all information about crime on this campus' amidst newspaper questions about the university's past reporting practices).

349 See Alon Harel, Efficiency and Fairness in the Criminal Law: The Case for a Criminal Law Principle of Comparative Fault, 82 Cal. L. Rev. 1181, 1209 (1994).

350 Fear of gender-based violence "deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.... [W]omen often refuse higher paying night jobs in service/retail industries because of the fear of attack." S. Rep. No. 103-138, at 54 & n.70 (1993).

351 See, e.g., Jackson v. Post Properties, Inc., 513 S.E.2d 259, 262-63 (Ga. Ct. App. 1999).

352 One legal commentator argues that crime victims' nonlegal incentives to protect themselves from violent crime are suboptimal due to positive externalities of victim precautions. According to this theory, potential victims' precautions contribute "to the general well-being of other potential victims" because the precautions will "increase the costs of crime for the criminal, thereby reducing the number and severity of his crimes," and because "the relative immunity of cautious victims [from crime] contributes to a general societal feeling of security and stability." Harel, supra note 349, at 1195. In addition, Harel argues that "the state itself benefits from victims' precautionary measures because such measures reduce the cost of the enforcement system." Id. When these two positive externalities are coupled with the author's assertion that imposition of a legal duty would "increase victims' incentives to invest in precautionary measures," he concludes that providing legal incentives for potential victims to take precautionary measures against crime will promote efficiency and reduce crime. Id. at 1196. This commentator goes so far as to propose a criminal law principle of comparative fault under which "criminals who act against careless victims would be exculpated, or would have their punishment mitigated," although he himself admits that such a proposition seems unjust. Id. at 1181. Harel asks whether "protection of victims [can] be better achieved by perceiving the victim (in addition to the criminal) as an agent," and concludes that in many circumstances other than rape it can be. Id. at 1189.

353 See Research & Forecasts Inc., America Afraid: How Fear of Crime Changes the Way We Live 43-44 (1983) (stating that the fear of crime "far outstrips the reality" and using the case of rape as an illustration).

354 Cf. Philipson & Posner, supra note 339, at 407 (noting that 'the University of Chicago has one of the largest police forces in the state of Illinois').

355 See generally William J. McNichols, Should Comparative Responsibility Ever Apply to Intentional Torts?, 37 Okla. L. Rev. 641 (1984).

356 For situations in which the defendant made a negligent or unreasonable mistake about another's consent, it may be more desirable to allow a claim of "negligent rape" than to permit a judgment for intentional rape to be diminished based on the victim's asserted comparative negligence. See Note, Real Reform?, 101 Harv. L. Rev. 1978, 1981 (1988) (reviewing Estrich, supra note 1, and characterizing her argument as supporting a "negligent rape" standard).

357 See McGill v. Duckworth, 944 F.2d 344, 345 (7th Cir. 1991) ("prisons are dangerous places").

358 See Brownmiller, supra note 1, at 15 (arguing that rape is a culturally sanctioned process by which men keep women in a state of fear).

359 See Keeton et al., supra note 9, § 53, at 357-58 ("The statement that there is or is not a duty begs the essential question--whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.... '[D]uty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that plaintiff is entitled to protection.").

360 See Restatement (Second) of Torts § 302B cmt. d (1965) ("In the ordinary case [an actor] may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law.").

361 Other attempts to find places where an absolute no-duty rule would result in an injustice to third parties have left me even more convinced that this category of cases is small and would raise more problems to include than to exclude. The recurrent hypotheses about difficult cases, such as one in which a woman leaves her hotel room door open with a sign that says "please rape me," makes me doubt courts' ability to apply a limited exception.

362 See Calabresi, supra note 16, at 23 (noting that the victim of a negligent tortfeasor was "bound not to take risks of harm which he or she had no right to take.... Of course, the key to all that was the word right--what risks did one have a right to take without thereby 'assuming' the risk of injury... ? It all depended how 'rights' were defined.").

363 See Olshefski v. Stenner, 599 A.2d 749, 750 (Conn. App. Ct. 1991) ("Contributory negligence...is the duty of the plaintiff to exercise reasonable care to avoid harm to herself."); Keeton et al., supra note 9, § 65, at 453 (contributory negligence involves a duty only if we "ingeniously" say "that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence").

364 See H.B. v. Whittemore, 552 N.W.2d 705, 707 (Minn. 1996); Ward v. Lange, 553 N.W.2d 246, 250 (S.D. 1996); Leon Green, Mahoney v. Beatman: A Study in Proximate Cause, 39 Yale L.J. 532, 542 (1930) ("Certainly, juries have nothing to do with imposing duties or defining them.").

365 See Dobbs, supra note 190, at 976 ("even in a world where we strive for autonomy and the self-responsibility that goes with it, we are highly dependent on many others for our own personal safety").

366 See Larson, supra note 260, at 434 ("When a proposed sexual regulation does not limit the range of sexual choices available to an individual woman, but instead reinforces her power to choose for herself, feminists should support that use of state power," as should others.).

367 See Calabresi, supra note 16, at 40.

368 For example third-party liability does not necessarily address the root causes of rape. Furthermore, the aggregate effects of increased situational crime prevention measures are unclear, and increased third-party liability could result either in some crime-increasing effects or other social losses, such as discouraging businesses from locating in neighborhoods with higher crime rates. See McClung v. Delta Square L.P., 937 S.W.2d 891, 900 (Tenn. 1996) ("Business may react [to expanded liability] by moving from poorer areas where crime rates are often the highest.").

369 See, e.g., Dobbs, supra note 16, § 323 ("The defendant's relationship to the plaintiff has been recognized as a ground for requiring the defendant to take affirmative acts in a substantial body of cases.").

370 For example, the federal government could provide subsidies for premises liability insurance in high crime areas.

371 See 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, 1342-43 (1984) (arguing that virtually all of the "duty-risk" limitations that Wex Malone would ask courts to determine "are properly left to triers of fact as part of their assessment of the degree of fault of the parties").

372 See Malone, supra note 223, at 113 ("My remaining fears arise from an awareness of the indiscriminate range of uses to which contributory negligence and assumption of risk have been put in the past and my own apprehension that the alluring invitation to avoid all conceptual niceties by adjusting damages [through comparative fault] will serve to enhance, rather than to minimize, past confusion.").

373 Dobbs, supra note 190, at 953.

374 See Malone, supra note 223, at 108 ("The all-important point, however, is that the proper effect to be accorded the victim's misbehavior cannot be considered in isolation from the nature of the duty or rule whose breach is chargeable against the defendant.").

375 Certainly courts can have a role in determining third-party duties, as they should in setting citizen duties. See generally Green, supra note 140.

376 See Calabresi, supra note 16, at 34 ("The unfettered participation of people from such risky categories in driving, jobs, and other activities that are essential to being a part of our society may be as important to the society (and the groups involved) as the lives that such participation may take.").

377 See City of Chicago v. Morales, 119 S. Ct. 1849, 1857 n.19 (1999) ("'We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others.' " (quoting Brief for United States as Amicus Curiae)).

378 City of Chicago v. Morales, 687 N.E.2d 53, 65 (Ill. 1997), aff'd, 119 S. Ct. 1849 (1999).

379 See id; see also Toni Massaro, The Gang's Not Here, 2 The Green Bag 25 (1998) (criticizing the order-maintaining concept of policing that undergirded the Chicago ordinance at issue in Morales).

380 UAW v. Johnson Controls, Inc., 499 U.S. 187, 210 (1991).

381 See Cahn, supra note 269, at 1433-35.

382 See Baker, supra note 182, at 614 ("One way of cabining the inevitable disadvantages of allowing too much judicial discretion in an area rife with stereotypes and bias is to require written decisions by judges.").

383 See id. ("Rape may be the one area in which it is important to encourage supervision of the trial process.").

384 "Children below a certain age are frequently held, as a matter of law, to be incapable of contributory negligence." Calabresi, supra note 16, at 25; see also Zerby v. Warren, 210 N.W.2d 58, 62 (Minn. 1973) (holding that contributory fault defense was not available against minor).

385 Neither is this substantive analysis premised on the identity of the plaintiff, whether rape victim or other third party. Cf. Travis Morgan Dodd, Note, Accounting Malpractice and Contributory Negligence: Justifying Disparate Treatment Based upon the Auditor's Unique Role, 80 Geo. L.J. 909, 910 (1992) (arguing for strict limitations on the use of contributory negligence defenses in malpractice suits against accountants).

386 See, e.g., Cereal Byproducts Co. v. Hall, 132 N.E.2d 27, 29-30 (Ill. App. Ct. 1956), aff'd, 115 N.E.2d 14 (Ill. 1958) ("No fact or circumstance is cited contributing in the slightest degree to the negligence of defendants in making the audit.").

387 See National Surety Corp. v. Lybrand, 9 N.Y.S.2d 554, 563 (App. Div. 1939); cf. Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394, 1396-99 (10th Cir. 1990) (holding comparative fault defense unavailable in accountant liability case where no facts suggested that plaintiff's negligence caused or contributed to defendant's negligence).

388 For instance, in Congregation of the Passion v. Touche Ross & Co., 636 N.E.2d 503 (Ill. 1994), a professional malpractice/negligent misrepresentation case, the Illinois Supreme Court barred defendant's proposed comparative negligence defense. In that case, the plaintiff sued its auditors for failure to comply with Generally Accepted Accounting Principles, particularly in regard to its investigation and recording of investments. In response, the defendants sought to present evidence that plaintiff "knowingly employed investment advisors who utilized highly speculative investment strategies." Id. at 515. The Illinois Supreme Court concluded that defendant's proffered defense was appropriately rejected. According to the court, evidence concerning the general riskiness of plaintiff's investments did not suggest that plaintiff had caused the defendant's negligent failure to record investments and was therefore irrelevant. See id. at 516.

389 "[T]he better reasoned view, and the view supported by the weight of authorities which have considered the question, is that the negligence of a client in managing his business" should not be a defense in professional malpractice actions. David L. Menzel, The Defense of Contributory Negligence in Accountants' Malpractice Actions, 13 Seton Hall L. Rev. 292, 310 (1983).

390 See, e.g., Steiner Corp. v. Johnson & Higgins, 135 F.3d 684, 688 (10th Cir. 1998) (declining to change rule after shift to comparative fault).

391 National Surety, 9 N.Y.S.2d. at 563 (citation omitted). Other commentators have echoed this rationale. See Dodd, supra note 385, at 932-33 (comparing auditors to termite inspectors and arguing that it would be "illogical" to allow an inspector to assert the client's contributory fault in creating the conditions that led to the infestation because "[t]he purpose of the inspection is precisely to determine whether termites are present"); Carl S. Hawkins, Professional Negligence Liability of Public Accountants, 12 Vand. L. Rev. 797, 811 (1959) ("[C]ontributory negligence is a failure to use reasonable care in looking after one's own interests in the circumstances. And here one of the circumstances is that the plaintiff has engaged defendant to help protect his interests. There can be nothing unreasonable about plaintiff's conducting his affairs on the assumption that defendant is doing his job properly.").

392 Cf. Martin Luther King, Jr., Letter from Birmingham Jail, in Why We Can't Wait 76, 82 (1964) (explaining that it is difficult to wait for racial justice "when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form

in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people").

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RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 21

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Articles

COMPARATIVE FAULT TO THE LIMITS

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*978 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 *979 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 *980 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 *981 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 *982 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 ***983** 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 general[21] or in relation to the particular comparative-fault claim.[22]

*984 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]

***985** 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, ***986** 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 *987 "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 *988 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.

*989 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 ***990** 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 ***991** 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 ***992** 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 ***993** 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 ***994** 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.

***995** 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 ***996** 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 ***997** 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 *998 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 *999 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 *1000 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 ***1001** 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

***1002** 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 ***1003** 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 ***1004** 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 ***1005** 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 ***1006** 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 *1007 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 *1008 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 *1009 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 *1010 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 *1011 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

*1012 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 *1013 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 *1014 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- *1015 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 *1016 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 *1017 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 *1018 (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' *1019 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, ***1020** 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

***1021** 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

***1022** 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 ***1023**

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 *1024 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 *1025 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 *1026 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 *1027 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

***1028** 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

***1029** 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 ***1030** 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 ***1031** 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 ***1032** 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.

***1033** 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 ***1034** 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

***1035** 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 ***1036** 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.

***1037** 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.

***1038** 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 ***1039** 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 ***1040** 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 ***1041** 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 ***1042** 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 ***1043** 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 ***1044** 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 ***1045** of Liability for Physical Harm at last gives judges the discretion to recognize the contours and validity of these limits in tandem.

Footnotes

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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 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 SeeGunnell v. Ariz. Pub. Servs., 46 P.3d 399, 405 (Ariz. 2002) (enbanc) (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.").

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").

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.

20 SeeHutchison 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).

21 See Restatement of Apportionment, 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).

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.

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--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 SeeWright, 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).

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).

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. Shapo, Basic Principles of Tort Law P 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.

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.").

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 SeeHarms 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).

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 SeeDan 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).

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 SeeShapo, supra note 49, P 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. [;]
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.

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).

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, P 31.01, at 127.

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

87 SeeKenneth 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, P 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).

91 SeeRichard 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, P 31.03, at 130, P 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, P 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).

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. SeeSchwartz, 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").

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").

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

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--withdrew 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).

111 SeeChu 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. SeeWisconsin 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 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. SeeCrotta 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.").

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 SeeBohlen, 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. SeeChu 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).

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].

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)).

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).

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.

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.

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).

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 SeePonirakis 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 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 Cesarian 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).

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.

191 Id. at 171-72.

192 Id. at 172.

193 SeeEpstein, 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.

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, form 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 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 SeeDobbs, 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 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).

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 SeeMt. 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.

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

229 SeeRowe 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, 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).

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 SeeL. 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 Mediational 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 Mediational Model of Rape Recovery: Constructive Replication and Validation of a Cross-Sectional Model in Longitudinal Data (unpublished manuscript on file with author).

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 SeeGary 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 SeeDunlea 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").

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 SeeOlson 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-II, 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").

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.

258 SeeWilliams 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).

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 SeeDobbs, 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 SeeFlenory 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., Prof'l 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); 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 [plaintiff's] 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 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 SeeHennessey 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.").

281 SeeRoselyn 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., Rogeau 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 SeeSimeonoff 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.").

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).

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 SeeSchwartz, 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 SeeBaldwin 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).

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 SeeMelvin 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).

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

305 Id.at 285.

306 Id. at 287.

307 Id.

308 SeeBoomer 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 SeeKing 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.

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 SeeExxon 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.

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); Klingle 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).

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, P 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.

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); Bublick, 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.

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. Apr. 16, 2002).

340 Id. at *1.

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.

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 reporters note (citing Ky. Fried Chicken v. Superior Court, 927 P.2d 1260 (Cal. 1997)).

350 Dye v. Schwegman Giant Supermkts., 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....").

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).

360 SeeU.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.

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, P 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.

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 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").

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APPENDIX 22

The
LAW OF CRIME

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however, of most courts is that, as a rule, regardless whether a case be one of justifiable or excusable self-defense, a homicide cannot be said to be necessary where an assailed person could safely avoid it by retreat.[97] This does not mean, however, that one is obliged to retreat in all cases. Circumstances must be taken into consideration, including the reasonable safety with which a retreat can be made.[98]

In the case of *Brown v. United States*,[99] a case holding erroneous an instruction by the trial court that the party assaulted is always under the obligation to retreat so long as he can do so without danger of death or great bodily harm, Mr. Justice Holmes, speaking for the court, said: "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went further than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this court. Detached reflection cannot be demanded in the presence of an uplifted knife."

§ 436h. Place of Assault.

The question of retreat may be affected by the place of the assault. Thus, in many cases, it is held that when a man is without fault and is assaulted on a public street or

97 Bigham v. State, 203 Ala. 163, 82 So. 192; Brewer v. State, 160 Ala. 66, 49 So. 336; State v. Donnelly, 69 Iowa 705, 27 N. W. 369.

98 See State v. Gardner, 96 Minn. 318, 104 N. W. 971, 2 L. R. A. (N. S.) 49 (with annotations). See, also, for collected cases, 18 A. L. R. 1279.

99 Brown v. U. S. (1921), 256 U. S. 335, 41 Sup. Ct. 501.

highway, or in any other place where he has full legal right to be, he is not obliged to retreat but has the right to stand his ground.[1] However, some views in connection with assaults upon a street distinguish between simple and felonious assaults, holding that there is no duty to retreat in case of a simple assault, but when it is a question in a felonious assault, whether one shall retreat or another shall live, the sacredness of human life makes it one's duty to retreat before he can lawfully kill in self-defense.[2] In reply to this, it has been said that human life is sacred but human liberty is also sacred, and that one who is in no fault when assaulted feloniously upon a public street may justly defend that liberty even to the taking of his assailant's life if necessary.[3]

When one is assailed in his own house or upon his own premises it is generally agreed that there is no duty to retreat. As said by Mr. Justice Cardozo, in the case of *People v. Tomlins*:[4] "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there he may stand his ground and resist the attack."[5] On the other hand, if one intentionally seeks his adversary, or is a trespasser on his premises his duty to retreat, if reasonably possible, in case

1 People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Page v. State, 141 Ind. 236, 40 N. E. 745; People v. Macard, 73 Mich. 15, 40 N. W. 784; Erwin v. State, 29 Ohio St. 186; State v. Ballou, 20 R. I. 607, 40 Atl. 861; State v. Donahue, 79 W. Va. 260, 95 S. E. 834.

2 See Com. v. Drum, 58 Pa. 9.

3 State v. Bartlett, 170 Mo. 658, 71 S. W. 143; State v. Evans, 124 Mo. 397, 23 S. W. 8; State v. Hudspeth, 150 Mo. 12, 51 S. W. 483.

4 People v. Tomlins, 213 N. Y. 240, 107 N. E. 497, Ann. Cas. 1916 C. 916.

5 See, also, I Hale, P. C. 486; U. S. v. Alberty, 163 U. S. 499; 16 Sup. Ct. 864; Walker v. State, 205 Ala. 197, 78 So. 833; Elder v. State, 69 Ark. 648, 65 S. W. 938; State v. Perkins, 83 Conn. 360, 91 Atl. 265; Miller v. State, 74 Ind. 1; People v. Kuehn, 93 Mich. 619, 53 N. W. 721; Armstrong v. State, 11 Okla. Cr. R. 159; 143 Pac. 870; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172; Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962; Cf. State v. Dyer, 147 Iowa 217, 124 N. W. 629, 29 L. R. A. (N. S.) 459.

he should be assailed, is clear.[6] Even in one's own dwelling it is held that one should retreat if he was the aggressor.[7]

§ 437. Defense of Others.

If a servant, says Hale,[8] in defense of his master who has fled as far as he can to avoid death when assaulted by another, necessarily kills the assailant to save the master's life, this is homicide *defendendo* of the master, and the servant shall have a pardon of course (21 Hen. 7, 39a). The same law, continues Hale, applies to a master killing in the necessary defense of his servant, also to a husband or wife, a parent or child in defense of each other, because "the act of the assistant shall have the same construction in such cases, as the act of the party assisted should have had if it had been done by himself, for they are in a mutual relation one to another".

Neither Hale nor Blackstone speak of brother and sister in these relationships,[9] and the doctrine would seem to be limited to those who owe to each other the reciprocal duties of protection and allegiance.

By the common law, homicide in such cases was excusable rather than justifiable. However, either under statutes which exist in many states, or by force of what is said to be the common law,[10] homicides under conditions which would be justifiable or excusable if committed in self-defense, are also justifiable or excusable if committed in

6 Reed v. State, 2 Okla. Crim. R. 589, 103 Pac. 1042.

7 Maxwell v. State, 129 Ala. 48, 29 So. 981.

8 I Hale, P. C. 484. See, also, IV Blk. Comm. 186, to same effect.

9 And see Mitchell v. State, 43 Fla. 188, 30 So. 803, holding that the term "brother and sister" cannot by common law be incorporated within the Florida statute.

10 Warnock v. State, 3 Ga. App. 590, 60 S. E. 288; State v. Mounkes, 88 Kan. 193, 127 Pac. 637.

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APPENDIX 23

C

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Article

*35 THE VALUE OF GOVERNMENT TORT LIABILITY: WASHINGTON STATE'S JOURNEY FROM IMMUNITY TO ACCOUNTABILITY

Debra L. Stephens, Bryan P. Harnetiaux [FNd1]

I. INTRODUCTION

When the Washington legislature waived sovereign immunity of state and local governmental entities, it provided that those entities shall be liable for their "tortious conduct to the same extent as if [they] were a private person or corporation." [FN1] In so doing, the legislature aligned Washington with a nationwide trend to limit or eliminate the antiquated notion that the sovereign can do no wrong, instead favoring responsible, accountable government. [FN2] This movement was triggered in part by the passage in 1946 of the Federal Tort Claims Act, which waived the sovereign immunity of the United States. [FN3] Overall, the movement reflected the ***36** notion that "greater efficiency and justice would be attained by accompanying power with responsibility." [FN4]

In a recent article, Washington's Attorney General Rob McKenna and Senior Assistant Attorney General Michael Tardif argued that Washington's abolition of sovereign immunity should be re-examined because it has resulted in unacceptable government tort liability and escalating litigation costs. [FN5] That article also criticized court interpretations of government tort liability and the consequences of that liability. [FN6] In response to a perceived crisis, Tardif and McKenna urged the legislature to replace the current broad waiver with a scheme that precisely sets forth when the government is liable in tort. [FN7]

This Article takes a contrary view, commending both the legislature's choice to broadly waive sovereign immunity and judicial decisions defining the impact of this waiver. In doing so, this Article traces the development of government tort liability in Washington both before and after the state expressly abandoned sovereign immunity in 1961. Moreover, this Article demonstrates that the waiver of immunity did not create excessive governmental liability. Rather, the waiver has been implemented in a way that not only respects the prerogative of the state and local entities to govern, but also provides for greater government accountability and individualized justice for Washington citizens.

Part I of this Article traces Washington's history with the common law doctrine of government immunity from tort liability. It also identifies other distinct common law immunities protecting executive, legislative, and judicial functions--immunities that lay dormant during the reign of sovereign immunity. Part II discusses the legislature's broad waiver of sovereign immunity in 1961 and the legislature's subsequent reaffirmation of the waiver. It also notes isolated instances in which the legislature has partially restored immunity or otherwise limited tort liability. Part III addresses the development of case law interpreting the scope of government tort liability in light of the legislative waiver of sovereign immunity and examines the impact of the remaining related common law immunities for

executive, legislative, and judicial functions. Part III also examines the role of the "**public duty doctrine**," which has evolved as a conceptual*37 framework for assessing whether a predicate duty supports government tort liability in any given circumstance. Finally, Part IV exalts the continuing value of holding government accountable for its tortious conduct, treating such accountability as a legitimate means to encourage responsible government and achieve individual justice. Part IV also urges that any marked retreat from the broad waiver of sovereign immunity is unnecessary and unjustified, whether viewed from a fiscal or ideological standpoint.

II. A BRIEF HISTORY OF GOVERNMENT IMMUNITY IN WASHINGTON

A. Sovereign Immunity

From the formation of the United States, both the federal government and the several states adopted the notion of sovereign immunity that had prevailed in England since ancient times. [FN8] Historically, sovereign immunity was a common law doctrine imposed by the courts as a matter of policy. [FN9] This doctrine was well-settled when Washington became a state and so remained well into the twentieth century. [FN10] The framers of the Washington constitution implicitly acknowledged default application of the doctrine in art. II, § 26: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Thus, since statehood, it has been understood that the legislature is constitutionally empowered to alter the common law doctrine of sovereign immunity. [FN11]

Early in the reign of sovereign immunity, the Washington Supreme Court required clear evidence that the legislature intended to waive sovereign immunity. For example, on two separate occasions at the beginning of the twentieth century, the court held that the legislature's mere authorization of a right to "begin an action" against the state was not a sufficient declaration that the state would be responsible for the tortious acts of its agents and employees. [FN12] The court required the legislature to *38 use unmistakable statutory language in order to demonstrate the legislature's consent to respondeat superior liability. [FN13]

While Washington common law regarding the sovereign immunity of the *state* was plain and all-encompassing, the same was not true with respect to the sovereign immunity of local governmental entities. [FN14] In Washington, as elsewhere, entitlement to immunity often turned on the particular nature of the entity. Geographical subdivisions of the state, such as counties and school districts, were deemed to partake fully in the state's immunity. However, municipal corporations, such as cities and towns, were treated differently because of their independent corporate status. [FN15] Functions performed by cities and towns were not immune if those functions were considered "proprietary" in nature. [FN16]

When local governmental entities were found to be immune from liability for tortious acts or omissions, they were not deemed immune in their own right. Instead, their immunity was said to derive from that of the state. [FN17] As a result, cities and towns were imbued with immunity when they were performing "governmental functions" similar to those performed by the state, unless that immunity had been waived by statute; however, if a function was "proprietary" or "corporate" in nature, that function was subject to tort liability. [FN18]

Prior to the waiver of sovereign immunity, courts developed a test to distinguish a governmental function from a proprietary function or, put another way, to decide whether an entity was "acting in a governmental capacity." [FN19] The test centered on whether the particular act was done for the benefit of all, rather than for the advantage of the governmental entity itself. [FN20] In other words, the overarching question was *39 whether the particular activity was undertaken for the common good. [FN21] Under this standard, a city or town performing a proprietary function was liable for its tortious acts to the same extent as a private corporation. While this criteria appears to be simple and straightforward, it proved to be difficult to apply. As in other jurisdictions, Washington's early case law revealed inconsistencies in the application of the governmental-proprietary dichotomy. [FN22]

The common law distinction between governmental and proprietary functions became obsolete once the Washington legislature waived sovereign immunity for state and local governmental entities. Nevertheless, this historical distinction has some lingering relevance because of the language later used by the legislature to describe the breadth of the waiver of sovereign immunity. [FN23]

B. Other Common Law Immunities

During the era of sovereign immunity in Washington and elsewhere other less-encompassing common law immunities also existed, although they did not receive the full attention of the courts until after the veil of sovereign immunity was lifted. These immunities corresponded to certain core functions performed by the legislative, judicial, and executive branches of government. [FN24] While legislative and judicial immunity each bear the name of the branch affected, the immunity for the executive branch is often referred to as "discretionary immunity." [FN25] Understandably, there was no need to widely discuss legislative, judicial, and discretionary immunities while sovereign immunity reigned because sovereign ***40** immunity was all-encompassing: a claim of sovereign immunity necessarily subsumed conduct giving rise to each of the narrower immunities.

Legislative immunity provides that a legislature and its members cannot be held responsible in tort for merely passing a statute that causes injury to a person. [FN26] Similarly, judicial officers (and quasi-judicial officers) are not subject to tort liability for fulfilling their adjudicative functions. [FN27] In turn, discretionary immunity insulates members of the executive branch from tort liability with regard to the implementation of laws. [FN28] Generally conceived, discretionary immunity is confined to conduct at the *policy-making* level, as opposed to the ministerial level. The American Law Institute noted the following:

> [W]ithin the scope of the executive branch are many agencies, officers and employees that are merely administrative. The State does not retain immunity for all of the acts or omissions that they perform. *It is only when the conduct involves the determination of fundamental governmental policy and is essential to the realization of that policy, and when it requires "the exercise of basic policy evaluation, judgment and expertise" that the immunity should have application.* Evangelical United Brethren Church of Adna v. State, (1965) 67 Wash. 2d 246, 255, 407 P.2d 440, 445. The purpose of the immunity is "to ensure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government ... [if] such a policy decision, consciously balancing risks and advantages, took place." Johnson v. State, 447 P.2d 352, 361 (Cal.1968). [FN29]

As discussed below, when the Washington legislature waived sovereign immunity, the policy-based discretionary immunity doctrine became a major focus of attention for the courts in determining when wrongful governmental conduct could be deemed tortious. [FN30]

III. THE WASHINGTON LEGISLATURE'S STEADFAST ADHERENCE TO A BROAD WAIVER OF SOVEREIGN IMMUNITY

Midway through the twentieth century, the doctrine of sovereign immunity was under serious attack. Its feudal origins were questioned, as was its stated rationale--that the doctrine was necessary to avoid undermining governmental interests and depleting public resources. [FN31] Courts ***41** and commentators recognized sound policy reasons for extending the deterrent, compensatory, and loss distribution functions of tort law to the state and local governmental entities. [FN32] In 1953, the Washington Supreme Court noted that case law and legal commentary reflected a "growing demand" for legislation imposing government accountability in tort. [FN33]

In 1961, the Washington legislature exercised its power under art. II, § 26 of the state constitution and categorically directed the manner in which suits may be brought against the state: "The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." [FN34]

Revised Code of Washington (RCW) 4.92.090 was immediately perceived as abolishing the state's sovereign immunity. [FN35] However, because the judiciary had not previously viewed consent to maintaining a suit or action as being equivalent to a waiver of sovereign immunity, there were some lingering questions whether this statutory language truly achieved this result. [FN36] But all misgivings about the legislature's intent were soon put to rest by the 1963 amendment to the same statute: "The state of Washington, whether acting in its governmental or proprietary capacity, *shall be liable for damages* arising out of its tortious conduct to the same extent as if it were a private person or corporation." [FN37]

In two cases decided shortly after these legislative pronouncements, the state supreme court interpreted RCW 4.92.090 as abolishing the doctrine of sovereign immunity in Washington, including any derivative immunity previously available to certain local governmental entities. [FN38] ***42** Recognition that the waiver applied to local government entities made particular sense: their immunity necessarily flowed from the immunity of the state itself. [FN39] Therefore, if the state's immunity was waived, then so was theirs. In 1967, the legislature codified the extent of the waiver of sovereign immunity *vis-à-vis* local governmental entities:

> All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents, or employees to the same extent as if they were a private person or corporation .... [FN40]

The Washington legislature's waiver of sovereign immunity is one of the broadest in the country. [FN41] However, the waiver is not without limitations. Rather, the waiver contains some procedural limitations, including provisions in the 1963 act requiring notice of claims, restricting execution on judgments, and providing for a specific fund from which payment of claims and judgments must be made. [FN42] More importantly, the 1961 and 1963 waiver provisions require that claims against the state must arise out of "tortious conduct to the same extent as if it were a private person or corporation." [FN43] The legislature did not define this clause, leaving it to the courts to determine its meaning. In particular, because "tortious" is a common law concept, the courts would determine whether the less-encompassing common law immunities for legislative, judicial, and discretionary acts still remained and whether those immunities could be raised by governmental entities to defeat tort liability. [FN44]

In the years since the Washington legislature waived sovereign immunity, it has, on occasion, partially restored immunity for certain ***43** types of conduct when it found sufficient justification. [FN45] However, the legislature has not retreated whatsoever from the notion of a broad waiver of sovereign immunity. In fact, the opposite is true. Perhaps the most comprehensive legislation after 1967 bearing upon government liability was enacted merely to refine the state risk management program by enhancing preventative measures for the stated purpose of diminishing civil liability exposure. [FN46] In undertaking this measure, the legislature clearly recognized the weight of additional civil liability on the state as a result of the waiver. Even so, the legislature did not re-examine the wisdom of the waiver, instead choosing to address the problem by improving risk management strategies:

> *In recent years the [S]tate of Washington has experienced significant increases in public liability claims.* It is the intent of the Legislature to reduce tort claim costs by restructuring Washington State's risk management program to place more accountability on state agencies, to establish an actuarially sound funding mechanism for paying legitimate claims, when they occur, and to establish an effective safety and loss control program. [FN47]

This 1989 legislation suggests a legislature resolute in its commitment to government accountability. Since then, the legislature has steadfastly adhered to its broad waiver of sovereign immunity and has continued to focus on preventative measures designed to minimize the state's tort liability exposure and related costs. [FN48] As will be seen in the next section, during this same period, the Washington courts have faithfully honored the legislature's intent in

waiving sovereign immunity, while also clarifying the application of remaining common law immunities that necessarily limit government tort liability.

*44 IV. JUDICIAL INTERPRETATION OF GOVERNMENT TORT LIABILITY IN WASHINGTON FOLLOWING THE WAIVER OF SOVEREIGN IMMUNITY

A central theme in Tardif and McKenna's call for Washington to re-examine its waiver of sovereign immunity is the assertion that judicial interpretation of the waiver expanded the scope of government tort liability beyond both the language of the statutory waiver and the Washington Supreme Court's decision in *Evangelical United Bretheren Church of Adna v. State*. [FN49] However, this assertion cannot withstand scrutiny. Since *Evangelical*, Washington courts have consistently interpreted the waiver of sovereign immunity as imposing liability for only "tortious conduct;" but the courts have also consistently recognized that other distinct common law immunities and judicial doctrines still protect essential acts of governing and shield governmental entities from unlimited civil liability. [FN50]

This Part surveys key Washington case law regarding government liability, beginning with an examination of *Evangelical* and how Tardif and McKenna misread that decision. It then explains how later cases have adhered to and clarified *Evangelical's* analysis, emphasizing that the common law immunities at issue in *Evangelical*--judicial, legislative, and discretionary immunity-- are rooted in separation of powers principles. Finally, this Part identifies the development of the **public duty doctrine** as a related judicial construct for distinguishing tortious from non-tortious conduct.

A. The Evangelical Decision

Evangelical was the first major decision to interpret the scope of government liability following the waiver of sovereign immunity. In *Evangelical*, the Washington Supreme Court considered the scope of tortious conduct for which the State was not immune under RCW 4.92.090. [FN51] According to the court,

> the legislative, judicial, and purely executive processes of government, including as well the essential quasi-legislative and quasi-judicial or discretionary acts and decisions within the framework of such processes, cannot and should not, from the standpoint of public policy and the maintenance of the integrity of our system of government,*45 be characterized as tortious however unwise, unpopular, mistaken, or neglectful a particular decision or act might be. [FN52]

The plaintiffs in *Evangelical* asserted four principal claims of liability against the state arising out of a fire set by a youth who had escaped from a state juvenile facility for children with behavior problems. [FN53] The plaintiffs alleged the state was negligent in 1) maintaining an "open program" at the facility, which allowed youths a substantial degree of freedom; 2) placing the boy in question in the open program; 3) assigning the boy to a boiler room work detail, given his proclivity for setting fires; and 4) failing to timely notify local law enforcement following the boy's escape. [FN54] The state countered that none of its actions could be regarded as tortious conduct subject to the waiver of sovereign immunity because they involved the exercise of administrative judgment and discretion. [FN55]

In addressing the plaintiffs' claims, the court recognized the need "to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins." [FN56] The court thus drew a distinction between tortious conduct, which is subject to civil liability since the waiver of sovereign immunity, and immunized conduct, which the court described as "discretionary," a term associated with purely executive processes that are comparable to the protected processes of the judicial and legislative branches. [FN57] Having drawn this distinction, the court considered various tests for separating discretionary from tortious conduct, including distinguishing between "planning" and "operational" decisions as under the Federal Tort Claims Act. [FN58] The point of such distinction is captured in U.S. Supreme Court Justice Jackson's observation in *Dalehite v. United States* that "it is not a tort for government to govern." [FN59]

The Washington Supreme Court ultimately adopted its own test based upon a series of questions intended to help distinguish "truly discretionary acts" from potentially tortious conduct:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental *policy, program, or objective*? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that *policy, program, or objective* ***46** as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of *basic policy evaluation, judgment, and expertise* on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? [FN60]

In view of these questions, the court assessed the plaintiffs' four separate allegations of tort liability and concluded that, as to the first two allegations, the state could not be held liable for the agency decision to create the open program at the juvenile facility or for the review board's decision to place the particular youth in that program. [FN61] These policy-based decisions were "not unlike those called for in the legislative and judicial processes of government," about which "widely divergent opinions can and do exist." [FN62] Furthermore, the decisions involved the balancing of competing policy objectives "between therapy and security." [FN63] In particular, the review board's placement decision was viewed as analogous to the decision of a parole board to release an inmate from a mental hospital, a decision that the court had previously recognized as quasi-judicial in character. [FN64] It appears it was this liability theory the court had in mind when it concluded that the plaintiffs' first two contentions involved acts that were "purely discretionary, if not in fact quasi-judicial in nature." [FN65]

In contrast, the court held that the state could be subject to tort liability on the plaintiffs' second two claims--for the managerial decision to assign the youth to the boiler room detail and for any failure to timely notify law enforcement of his escape. [FN66] While these acts did involve some degree of discretion in implementing the program in question, they were not "essential to the realization or attainment of the basic *policies and objectives* of the delinquent youth program of the state." [FN67] Rather, the acts involved merely ministerial processes incidental to the day-to-day operation of the facility. [FN68]

Tardif and McKenna, however, read *Evangelical* as interpreting the waiver of sovereign immunity to exclude liability for all "governmental ***47** functions." [FN69] They state, "*Evangelical* was a seminal case because it interpreted the private liability limitation in the waiver as excluding governmental functions from liability. *Evangelical* was significant because it immunized not only policymaking, but also operational steps taken by officials to implement policy." [FN70]

This interpretation misapprehends the Court's holding. First, *Evangelical* did not purport to interpret the scope of the waiver of sovereign immunity at all. The court gave every indication of accepting the all-encompassing language of the 1961 act as to tortious conduct, whether in a "governmental or proprietary capacity." [FN71] Instead, the court focused on the common law limits on tortious conduct *vis-á-vis* governmental entities when it stated, "it is not a tort for government to govern." [FN72] Thus, the court recognized that the legislative, judicial, and certain executive processes of government cannot be tortious. These common law immunities for judicial or quasi-judicial acts, legislative or quasi-legislative acts, and purely executive or discretionary acts were well-established prior to the waiver of sovereign immunity, but they only gained relevance after the state lost its more-encompassing sovereign immunity. [FN73]

Second, Tardif and McKenna misread *Evangelical* as suggesting that operational or managerial acts taken by officials to *implement* policy are subject to common law discretionary immunity. [FN74] In this regard, they criticize the *Evangelical* opinion for containing an "internal inconsistency," insofar as the court finds no liability for the review board decision placing the youth in the open program, but finds potential liability for the facility's assignment

of the youth to the boiler room detail. [FN75] When Tardif and McKenna describe this aspect of the decision as an inconsistency, they appear to misunderstand why the former decision involved basic policymaking, but the latter did not.

The initial placement of the youth in the open program involved a discretionary, quasi-judicial decision, made by an initial review board that had to balance the statutory policy goals of community safety and rehabilitation of the youth. [FN76] The legislature granted the responsible agency the discretion to establish and maintain programs to carry out the ***48** statutory policy objectives. [FN77] Within this framework, the decision that placement of a particular youth in the open program would best balance the twin policy aims of security and rehabilitation involved a basic policy judgment, akin to the quasi-judicial decision a parole board makes in deciding whether to grant parole to a particular person. [FN78]

In contrast, the decision to assign the youth to work the boiler room detail was merely a managerial decision implementing established policy in the day-to-day assignment of youths to work details. [FN79] As such, this decision *was* capable of being measured against established procedures and standards of care and *was* subject to generally applicable tort law analysis, including the foreseeability of harm. [FN80] Properly understood, there is no internal inconsistency in the court's decision in *Evangelical*.

Tardif & McKenna find an inconsistency because they erroneously read the decision to interpret the waiver of sovereign immunity "as excluding governmental functions from liability," [FN81] especially "the operational steps taken by officials to implement policy." [FN82] In fact, the *Evangelical* court drew no distinction between governmental and nongovernmental functions. Rather, the court drew a distinction between high-level policymaking and low-level operational acts to implement policy. It is true that all of these functions are "governmental" in some sense. But in finding potential tort liability for day-to-day management decisions, including assignment of the youth to the boiler room detail, the court recognized that there was no immunity for "operational," "ministerial," or "housekeeping" functions. [FN83] Discretionary immunity is thus confined to those "decisions which are essential to the realization or attainment of the basic *policies and objectives* of the delinquent youth program of the state." [FN84] In sum, the court appreciated the difference between the essential government formulation of "basic policies and objectives" and the merely operational "internal management" decisions made by government officials. [FN85]

The Washington Supreme Court's decision in *Evangelical* was pivotal because it established the framework for understanding the interplay between the legislature's broad waiver of sovereign immunity and the ***49** pre-existing common law immunities for basic judicial, legislative, and executive functions. As discussed below, cases since *Evangelical* have not departed from this framework, but rather have clarified the line between high-level policymaking and merely managerial acts, making clear that the policymaking/operational distinction is rooted in separation of powers principles.

B. Refinement of the Evangelical Decision

As *Evangelical* foreshadowed, courts were presented with a variety of new tort claims for government conduct following the waiver of sovereign immunity. Consequently, judicial decisions continued to revisit and refine the scope of government liability. Tardif and McKenna suggest that later key cases departed from *Evangelical*'s initial interpretation of the waiver of sovereign immunity and expanded government liability beyond "traditional" liabilities. [FN86] However, this argument misapprehends the holding in *Evangelical*, as previously discussed. [FN87] In fact, the key cases that Tardif and McKenna criticize are not only consistent with *Evangelical*, but they have also helped to clarify the sometimes fine line between high-level policymaking and low-level operational decisions.

A series of cases beginning with *King v. City of Seattle* in 1974 were instrumental in furthering the analysis in *Evangelical*. [FN88] These cases underscore that the *Evangelical* court's reasoning is founded upon the doctrine of separation of powers. For example, in *King*, the court noted that "immunity for 'discretionary' activities serves no

purpose except to assure that courts refuse to pass judgment on *policy decisions* in the province of coordinate branches of government." [FN89] This statement is consistent with the generally understood "main idea" behind discretionary immunity; namely, that "certain governmental activities are legislative or executive in nature[, and] any judicial control of those activities, in tort suits or otherwise, would disrupt the balanced separation of powers of ***50** the three branches of government." [FN90] Both before and since the waiver of sovereign immunity, tort litigation has been unable to scrutinize the basic activities of governing, including executive, legislative, and judicial functions. The legislature's broad waiver of sovereign immunity did not alter this fact. [FN91]

Separation of powers principles led to the four questions posed by the court in *Evangelical*. [FN92] These questions distinguish between high-level policy decisions and low-level implementation-of-policy decisions made by executive branch officials. The point of inquiry is not simply whether government officials exercised some discretion in the performance of their duties, but whether such discretion embodied basic policy decision-making. Applying the *Evangelical* framework, the court in *Mason v. Bitton* noted the following:

> To now hold that this type of discretion, exercised by police officers in the field, cannot result in liability under RCW 46.61.035 [emergency vehicle statute], due to an exception provided for basic policy discretion, would require this court to close its eyes to the clear intent and purpose of the legislature when it abolished sovereign immunity under RCW 4.92.090. If this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it. [FN93]

Emphasizing the separation of powers concerns that guided the decision in *Evangelical*, cases such as *Mason* have helped refine the discretionary immunity doctrine in a way that respects the legislature's waiver of sovereign immunity. These cases emphasize that imposing liability for merely managerial, operational, or ministerial functions does not implicate separation of powers concerns because these activities do not involve policymaking by a coordinate branch of government. Rather, such managerial acts involve merely the *implementation* of policy and may therefore be measured according to ordinary tort principles, including established standards of care. Just as the court in *Evangelical* was able to assess a basic managerial decision (assigning the youth to the boiler room detail) according to the standard of a reasonable supervisor, later courts have recognized tort liability when governmental decisions were ***51** subject to definable standards of care. [FN94] For example, later courts have held that government activity such as roadway design, maintenance, and signage is readily subject to ordinary negligence theories. [FN95] Even before the waiver of sovereign immunity, courts recognized that liability in this area was amenable to traditional negligence analysis. [FN96]

In contrast, courts cannot assess basic policy decisions against tort standards of "reasonableness." For example, a local business association sued Washington Governor Dixie Lee Ray based on her declaration of a state of emergency during the eruption of Mt. St. Helens in 1980. [FN97] One cannot imagine that a court hearing such a case would allow an "expert" governor from a neighboring state to testify how a reasonable governor would respond to a volcanic eruption in order to establish whether Governor Ray acted negligently on that occasion. On the contrary, so long as authorized by statute or constitutional provision, basic policy decisions of this sort are appropriately regarded as immune from judicial second-guessing through the medium of a tort duty analysis. [FN98] Similarly, political judgments are by nature open to dispute, and judicial review of such decisions might improperly "operate to make the judiciary the final and supreme arbiter in government, not only on a constitutional level, but on all matters on which judgment might differ." [FN99] For this reason, *Evangelical* and subsequent cases have carefully defined the distinction between policymaking and operational decisions.

***52** Rather than recognizing the separation of powers principles that undergird the analysis in *Evangelical*, Tardif and McKenna view the decision as interpreting discretionary immunity to embrace "governmental functions," including "operational steps." [FN100] As will be seen, this interpretation of discretionary immunity erroneously reflects the former "governmental-proprietary" dichotomy that was expressly discarded by the legislature when it waived sovereign immunity.

C. Discretionary Immunity Does Not Embrace All "Governmental Functions"

As discussed above, courts have recognized that governmental functions are subject to tort liability when they do not involve high-level policymaking. This view is consistent with the legislative waiver of sovereign immunity for both governmental and proprietary acts, and it is true regardless of whether the activity in question is one that *only* the government performs, such as licensing drivers or designing and maintaining public roads. [FN101] Tardif and McKenna's suggestion that such activities were not intended to be subject to the waiver of sovereign immunity because they involve basic governmental functions does not accord with the language of the waiver statutes. [FN102] Both RCW 4.92.090 and 4.96.010 waive sovereign immunity of the state and local governmental entities whether acting in a "governmental or proprietary capacity." [FN103] Tardif and McKenna discuss the pre-waiver distinction between governmental and propriety functions of municipal corporations [FN104] and argue that the discretionary immunity analysis in *Evangelical* essentially carries forward this distinction. [FN105]

As noted, however, the distinction between governmental and proprietary functions arose prior to the waiver of sovereign immunity as a way to identify those activities of certain municipal corporations in which the municipality partook in the state's sovereignty, ergo in the state's immunity. [FN106] Courts attempted to draw the line between functions ***53** a municipality performed as a subdivision of the state, which were immune by virtue of state sovereignty, versus those proprietary functions the municipality performed on behalf of itself, which were subject to tort liability. [FN107] Pre-waiver cases drew no distinction between high-level, basic policy decisions and merely operational decisions of the governmental entity. [FN108] Nor was the analysis necessarily concerned with whether the function involved an activity analogous to that performed by a private corporation. [FN109] The pre-waiver cases make clear that proprietary functions for which a political subdivision could be held liable in tort often involved matters of substantial discretion as well as activities for which no private counterpart was apparent. [FN110] Immunity for governmental functions, on the other hand, extended only as far as the state's sovereign immunity and went by the wayside with the waiver of sovereign immunity in 1961. [FN111]

Thus, by the time the court decided *Evangelical*, it did so in the context of the legislature's categorical waiver of the state's sovereign immunity, which rendered obsolete the former governmental-proprietary distinction. [FN112] Tardif and McKenna's unsupported assertion that *Evangelical* interpreted the waiver "as excluding governmental functions from liability," [FN113] is a misreading of the court's opinion. As explained previously, [FN114] the *Evangelical* court was concerned with interpreting the term "tortious conduct" in RCW 4.92.090, and it held that essential acts of governing embodied in basic policy decisions cannot be deemed tortious. [FN115] This holding reflected separation of powers concerns that necessarily limit tort liability, notwithstanding the otherwise categorical waiver of sovereign immunity. [FN116] Indeed, it would have been anomalous for the court to hearken back to the former governmental-propriety distinction, given its recognition that RCW 4.92.090 waived immunity for governmental functions. [FN117]

***54** Moreover, in waiving sovereign immunity, the legislature consented to imposition of liability against state and local governmental entities for tortious conduct "to the same extent as if [they] were a private person or corporation." [FN118] This language forecloses any reliance on the "governmental" nature of a particular activity as a basis for retaining sovereign immunity. In this regard, it is appropriate when assessing liability to draw analogies between the governmental defendant's conduct and comparable conduct performed in the private sector. [FN119] For example, the duty of a law enforcement officer may be analogized to that of a private security officer under similar circumstances. [FN120] Notably, the statutory language, "as if," [FN121] suggests that liability may be imposed even in areas in which no prior analogous liability has been found in the private sector, so long as a private entity would be subject to liability if the same theory were asserted against it in the first instance. A more restrictive analysis might have been required if the statutes imposed liability only for conduct "performed by" or even "to the same extent as" private defendants, rather than "as if ... a private person or corporation." [FN122]

Tardif and McKenna make the related assertion that the legislature intended to impose liability only for "ordinary torts," such as negligent driving or medical malpractice, which may be committed by public and private actors

alike. [FN123] However, this assertion is out of keeping with Washington case law and is unsupported by the language actually used by the legislature. As the courts have properly recognized, the waiver mandates that the sovereign mantle be disregarded so that governmental entities are subject to the same tort duty analysis as if sovereign immunity never existed.

*55 This interpretation of the waiver is supported by the fact that governmental defendants may not assert a defense to tort liability based on limited financial resources. [FN124] While the legislature was evidently concerned with the potential economic consequences of waiving sovereign immunity, it addressed this concern through risk management programs and by limiting the methods by which a tort victim may collect a judgment against the state or its subdivisions. [FN125] In *Bodin v. Stanwood*, a majority of the supreme court, comprised of the concurring and dissenting justices, properly rejected a municipality's argument that limited economic resources may provide a defense against claims of negligence. [FN126] Though dicta in an earlier decision suggested that a governmental defendant might have a defense based on funding limitations or budget allocations, [FN127] the holding in *Bodin* makes clear this is not the case. While a governmental entity, just as a private person or corporation, may offer certain cost evidence as bearing upon the exercise of reasonable care, there is no generally available "poverty defense." [FN128]

Following *Evangelical*, judicial interpretation of the scope of government tort liability has respected the legislature's directive that state and local governmental entities shall be liable for their tortious conduct, both governmental and proprietary, to the same extent as if they were a private person or corporation. At the same time, Washington courts have honored the common law doctrines providing for judicial, legislative, and discretionary immunity, consistent with the separation of powers principle underlying these doctrines.

Against this backdrop, the courts have also struggled to identify the sources of government tort duties, an inquiry that only became relevant with the waiver of sovereign immunity. Most notably, the "**public duty doctrine**" has emerged as an analytical framework for assessing the scope of tort liability in particular contexts.

*D. The **Public Duty Doctrine***

The **public duty doctrine** did not fully surface until after the waiver of sovereign immunity (though it is inaccurate to suggest that the doctrine*56 arose out of dissatisfaction with the broad scope of the waiver). [FN129] Washington borrowed the **public duty doctrine** from a series of New York cases involving government tort liability. [FN130] The basic rule expressed in the New York cases is that obligations imposed by statute or municipal ordinance do not, in and of themselves, support tort liability. [FN131] In Washington, this rather unremarkable principle reflects traditional tort duty analysis insofar as a statutory obligation is not generally regarded as imposing tort liability unless courts recognize that the statute creates a direct or implied cause of action. [FN132] This duty analysis only surfaces when a statute, administrative code, or ordinance is asserted as the source of the defendant's duty to the plaintiff--and significantly, this duty analysis is equally applicable to both public and private defendants. [FN133]

Since first recognizing the **public duty doctrine**, the Washington Supreme Court has described the doctrine and its exceptions as "focusing tools" for determining whether a duty is owed "to a nebulous public or whether that duty has focused on the claimant." [FN134] In some instances, the court has applied basic tort principles to carve out broad exceptions to the doctrine's rule of non-liability. [FN135] At the same time, the court has also imposed liability, without reference to the **public duty doctrine**, for a *57 governmental entity's breach of a common law duty not based on a statutory obligation. [FN136]

Over the years, both judges and commentators have expressed concern that the **public duty doctrine** operates as a judicial restoration of sovereign immunity in defiance of the legislature's waiver. [FN137] Recently, in response to such criticism and calls to abandon the **public duty doctrine**, the Washington Supreme Court clarified the doc-

trine's limited purpose and scope. [FN138] In *Osborn v. Mason County*, the court stated,

> Because a public entity is liable in tort "to the same extent as if it were a private person or corporation," former RCW 4.92.090 (1963) *and* former 4.96.010 (1967) (municipality), the **public duty doctrine** does not--cannot-- provide immunity from liability. Rather it is a "focusing tool" we use to determine whether a public entity owed a duty to a "nebulous public" or a particular individual. The **public duty doctrine** simply reminds us that a public entity--like any other defendant--is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the **public duty doctrine** applies is thus another way of asking whether the State has a duty to the plaintiff." In other words, the **public duty doctrine** helps us distinguish proper legal duties from mere hortatory "duties." [FN139]

This reasoning confirms that the **public duty doctrine** is not a substitute for sovereign immunity, but is merely a part of traditional tort analysis when an asserted duty is based on a statute, regulation, ordinance,***58** or the like. [FN140] Similarly, the doctrine's "exceptions" help define those instances in which a defendant's actions toward a particular person or class of persons may give rise to a duty in tort. [FN141] With this clarification in *Osborn*, the Washington Supreme Court has properly defined the tort duties of governmental entities in accord with prior case law, which has consistently imposed government liability except in narrow circumstances involving essential acts of governing. [FN142] Thus, *Osborn* has brought stability to the law.

Ultimately, the past four decades have seen positive growth in the understanding of the scope of government tort liability following the legislature's mandate. During this time, the law has not drifted away from the intent of the waiver statutes and the decision in *Evangelical*. Rather, as the law has developed, it has accomplished the goal of holding the state and local governments accountable for their tortious conduct to the same extent as if they were private actors. At the same time, the law has maintained its respect for the rights of state and local governments to govern. Though the incremental refinements that naturally occur in the development of case law have produced some ebb and flow in the scope of government tort liability in particular areas, the Washington Supreme Court has consistently held to the principles first announced in *Evangelical*. As will be discussed in the next section, this system of holding governmental entities liable in tort to the same extent as if they were private entities has tremendous value and should be exalted.

V. THE VALUE OF GOVERNMENT ACCOUNTABILITY FOR TORTIOUS CONDUCT

Because Tardif and McKenna tend to focus on the immediate costs of imposing tort liability on governmental entities, [FN143] their analysis downplays the value of tort liability. However, the social benefits of imposing tort liability must be appreciated. As Justice Utter observed in *King v. Seattle*, "[t]he most promising way to correct the abuses, if the community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit." [FN144] ***59** The immediate costs of imposing tort liability on governmental entities include direct litigation expenses and the payment of damages. However, just as in the private sector, the immediate costs are outweighed by the societal value of encouraging responsible conduct in two ways: through holding governmental entities accountable for tortious acts and through providing compensation to injured citizens. [FN145]

It has long been recognized that tort liability is a powerful tool for encouraging responsible conduct. [FN146] Indeed, a primary purpose of tort law is to provide for civil enforcement of social norms. [FN147] Private lawsuits often accomplish results that government action cannot achieve through criminal sanctions, regulatory enforcement, or other means. [FN148] Both public and private actors alter their behavior in response to tort liability, and any suggestion that tort liability is not an impetus for change in the context of governmental conduct rests on the doubtful premise that the government is uniquely unable to reform. [FN149]

Tardif and McKenna argue that governmental entities are unlike private entities because government is a sole-source provider of services that affect large numbers of people, and its resources are fixed by limited budgets, staff, and statutory mandates. [FN150] Governmental entities have repeatedly raised this type of argument, but the Washington Supreme Court has repeatedly rejected it, instead recognizing not only that governments are fully capable of conforming to standards of reasonable conduct, but also that the waiver of sovereign immunity does not equate to *60 absolute liability on the government. [FN151] On the contrary, plaintiffs seeking imposition of liability against a governmental defendant must still establish duty, breach, proximate cause, and damages, just as if they were suing a private defendant. [FN152] Further, a governmental entity may defend itself against claims of liability by showing that it acted reasonably according to common notions of feasibility and practicality. [FN153]

Moreover, circumstances involving sole-source providers, fixed resources, or statutory mandates are not unique to governmental entities; many private entities may also be sole providers of services that affect millions of citizens, operating with fixed budgets and subject to federal and state statutes and regulations. Even so, Washington has long understood the value of holding such entities accountable for their negligence despite their claims that exercising reasonable care would be too expensive or bad for business. [FN154]

Additionally, the value of tort liability does not lie solely in encouraging responsible conduct; tort liability also provides necessary compensation to injured victims. This compensatory function is arguably the greatest value that tort law provides. Indeed, the civil justice system is uniquely suited to address the individual needs of those injured by acts of negligence. [FN155] But Tardif and McKenna appear to discount the civil justice system's ability to accomplish this goal. They unduly criticize this most-revered institution for the redress of wrongs--including its central feature, the jury system--when they suggest that verdicts against governmental defendants are "excessive," [FN156] "punitive," [FN157] and "inflated by *61 emotion and outrage." [FN158] A jury of citizens, no less than a legislature of citizens, acts as the social conscience of the community and is well suited to weigh the value of imposing tort liability, both in terms of compensation and deterrence. In any event, procedural safeguards in court rules and statutes-- including post-verdict motions for remittitur or new trial as well as the right of appeal--alleviate the risk that excessive or improper jury verdicts will stand. [FN159] These institutional checks protect the integrity of the jury system.

Finally, there is some irony in Tardif and McKenna's suggestion that the perceived problems with government tort liability should be solved by legislative action that "replac[es] Washington's waiver with statutes that precisely define the extent of liability for state and local government functions." [FN160] Having criticized the judiciary's efforts at distinguishing between truly "discretionary" acts and tortious conduct, Tardif and McKenna conclude that the legislature will have no difficulty with this same task: "The history of the waiver in Washington and in other states provides the legislature with ample information to determine 'where in the area of governmental processes, orthodox tort liability stops and the act of governing begins.'" [FN161] However, Tardif and McKenna rely too much on the legislature's ability to precisely define the boundaries of tort liability without further judicial refinement--it is a rare statute that does not encounter some legitimate dispute over its proper scope and interpretation.

More importantly, there is no reason for the legislature to retrace its steps. The legislature fashioned a broad waiver of sovereign immunity that subjects governmental entities to tort liability *as if* they were private sector defendants. The Washington Supreme Court has properly recognized and effectuated this intent, and the legislature has not sought to retreat from its commitment to the broad waiver. In this matter, the lawmaking and interpretive functions of these two branches of government have worked as they should. All that remains is for the executive branch of the state to fully accept this framework of government tort liability and focus on implementing the legislature's risk management and loss prevention programs.

At this juncture, there is no need to ask the legislature to retrace its steps; patience should be the order of the day. While centuries of decision-makingg*62 g continue to give substance to the institution of tort law, Washington has only a few decades' experience with extending tort principles to governmental entities. This experience demonstrates that the broad waiver of sovereign immunity has served a valuable function in encouraging responsible gov-

ernment through greater accountability and in providing justice for injured citizens.

VI. CONCLUSION

The waiver of sovereign immunity in Washington has marked a tremendous step forward in social policy; it has enhanced both responsible government and individualized justice. As the law evolves, the value of recognizing government tort liability should continue to outweigh its costs.

The Washington legislature should not retreat from the broad waiver of sovereign immunity for state and local governmental entities. The broad waiver furthers respect for this state's system of government by imposing accountability for tortious conduct of government agents and employees. It also provides individualized justice through recovery of compensatory damages for Washington citizens who have been victimized by wrongful conduct of their state or local government. The continued viability of the broad wavier has been enhanced by appropriate funding and staffing measures, advances in risk management strategies, and, when justified by particular circumstances, selective restoration of immunity.

As the waiver of sovereign immunity has been put into effect, tort liability has been imposed on governmental entities. This process has been aided by the thoughtful and painstaking application of the common law by the Washington courts. The courts have extended traditional tort analysis into the governmental context and have recognized common law legislative, judicial, and discretionary (executive) immunities as limitations on government liability. In so doing, the courts have ensured that the specter of tort liability does not interfere with true acts of governance by state and local entities.

The over forty years of evolution and refinement of the law regarding government tort liability should not be abandoned at the very point in time when it seems that the controlling principles have been identified, and the law has begun to stabilize. The time and energy that would be involved in starting over would be better spent in further refining and supporting the system now in place.

The current system is an enlightened one, exalting the values of government accountability as well as individualized justice. Accomplishing both of these goals is understandably a difficult task--one that must ***63** be achieved over time. In the last forty-odd years, the legislature and the courts have made necessary adjustments and calibrations. While this process is by nature ongoing, a stable and largely predictable system of government accountability has emerged. Washington citizens should be proud of this system because it assures that Washington remains "among the forerunners of those states abolishing the almost universally condemned doctrine of sovereign immunity." [FN162]

[FNd1]. Debra L. Stephens and Bryan P. Harnetiaux are co-coordinators for the amicus curiae program of the Washington State Trial Lawyers Association Foundation. Ms. Stephens received her J.D. from Gonzaga School of Law in 1993. Mr. Harnetiaux received his J.D. from Gonzaga School of Law in 1973. Both authors serve as adjunct professors at Gonzaga School of Law, where they co-teach State Constitutional Law. The views expressed in this article are strictly those of the authors. Special thanks to the Spokane law firm of Winston & Cashatt for providing clerical assistance in the preparation of this article.

[FN1]. WASH. REV. CODE § 4.92.090 (2004) (waiving sovereign immunity of state government); *see also id.* § 4.96.010 (waiving sovereign immunity of local governmental entities).

[FN2]. *See* Charles F. Abbott, Jr., Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312, 314-16 (1961); 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.1 (2d ed. 1986).

[FN3]. 28 U.S.C. §§ 1346(b)(1), 2671-2680 (2000); *see also* Fowler, *supra* note 2, § 29.12 (describing this act as

"the most widely important piece of legislation affecting governmental immunity").

[FN4]. Edwin M. Borchard, *Government Liability in Tort [Part II]*, 34 YALE L.J. 129, 134 (1924); *see also* Kilbourn v. City of Seattle, 43 Wash. 2d 373, 375-76, 261 P.2d 407, 408 (1953) (referencing growing demand for legislation regarding government accountability in tort); Mayle v. Penn. Dep't of Highways, 388 A.2d 709 (Pa. 1978) (discussing history of sovereign immunity and policy reasons for abrogation of doctrine).

[FN5]. *See* Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Government Liability*, 29 SEATTLE U. L. REV. 1, 50-52 (2005).

[FN6]. *Id.* at 18, 46-47.

[FN7]. *Id.* at 50-52.

[FN8]. *See* RESTATEMENT (SECOND) OF TORTS ch. 45A, introductory cmt. at 393-94; *Id.* at § 895B cmt. a (1979).

[FN9]. *Id.* ch 45A, introductory cmt. at 392-93.

[FN10]. *See* Billings v. State, 27 Wash. 288, 291, 67 P. 583, 584 (1902) (recognizing the state as immune unless liability provided for by statute, as required by WASH. CONST. art. II, § 26); Kelso v. City of Tacoma, 63 Wash. 2d 913, 915, 390 P.2d 2, 4 (1964) (same); *see also* CODE OF 1881, § 1 (common law controls when not inconsistent with statute or constitution); Sayward v. Carlson, 1 Wash. 29, 40-41, 23 P. 830, 833 (1890).

[FN11]. *See Billings*, 27 Wash. at 290-91, 67 P. at 584 (liability of state determined by statute under WASH. CONST. art. II, § 26); Coulter v. State, 93 Wash. 2d 205, 207, 609 P.2d 261, 262 (1980) (same).

[FN12]. *See Billings*, 27 Wash. at 292-93, 67 P. at 584-85 (holding state statute, BAL. CODE § 5608, authorizing actions against the state, did not constitute a waiver of immunity); Riddoch v. State, 68 Wash. 329, 332-40, 123 P. 450, 452-55 (1912) (same, regarding statutory authorization for actions against state under REM. & BAL. CODE § 886).

[FN13]. *See Billings*, 27 Wash. at 293, 67 P. at 585; *Riddoch*, 68 Wash. at 332, 123 P. at 451.

[FN14]. *See* Abbott, *supra* note 2, at 316.

[FN15]. *See generally* RESTATEMENT (SECOND) OF TORTS § 895C, cmts. (1979); *see also* Kilbourn v. City of Seattle, 43 Wash. 2d 373, 375-79, 261 P.2d 407, 408-10 (1953) (recognizing the dichotomy in Washington law with respect to availability of immunity to certain entities, with immunity deemed abrogated by statute as to counties and school districts, but not as to municipal corporations such as cities and towns).

[FN16]. *See Kilbourn*, 43 Wash. 2d at 377, 261 P.2d at 409.

[FN17]. *Riddoch*, 68 Wash. at 334, 123 P. at 452; Kelso v. City of Tacoma, 63 Wash. 2d 913, 916-17, 390 P.2d 2, 5 (1964).

[FN18]. *See* Hagerman v. City of Seattle, 189 Wash. 694, 698-99, 66 P.2d 1152, 1154-55 (1937); *see also* Abbott, *supra* note 2, at 313, 315-16.

[FN19]. *Hagerman*, 189 Wash. at 697, 66 P.2d at 1154.

[FN20]. Abbott, *supra* note 2, at 317; Simpson v. Whatcom, 33 Wash. 393, 395-96, 74 P. 577, 578 (1903).

[FN21]. *Hagerman*, 189 Wash. at 699, 66 P.2d at 1154-55. In *Hagerman*, the court described the nature of a municipal corporation's governmental, as opposed to proprietary, function:

> It is quite apparent that there are certain kinds of public service that only the government can adequately perform. First among these are the administration of justice, the maintenance of peace by the enforcement of the law, the protections of persons and property against the ravages of fire, and the preservation of the public health against sickness and disease. It is in these fields that the principle of immunity from torts has its widest application and place.

189 Wash. at 699, 66 P.2d at 1154-55. This distinction was not applied to the state. *See Riddoch*, 68 Wash. at 334-35, 123 P. at 452; *see generally* Harper et al., *supra* note 2 § 29.4, at 615.

[FN22]. For example, street repair was considered proprietary, but operation of a health department truck on the streets by a city employee was not. *Hagerman*, 189 Wash. at 701-04, 66 P.2d at 1155-56 (collecting cases); *see generally* Fowler, *supra* note 2 § 29.6, at 620 ("[t]he American rules governing the tort liability of municipal corporations make a curious patchwork of immunity and responsibility").

[FN23]. *See infra* Part II.

[FN24]. *See generally* RESTATEMENT (SECOND) OF TORTS § 895B, cmt. c (1979); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (1965) (discussed *infra* Part III); Bender v. City of Seattle, 99 Wash. 2d 582, 588-89, 664 P.2d 492, 497-98 (1983).

[FN25]. *Bender*, 99 Wash. 2d at 588-89, 664 P.2d at 497-98.

[FN26]. RESTATEMENT (SECOND) OF TORTS § 895B, cmt. c (1979).

[FN27]. *Id.*

[FN28]. *Id.*

[FN29]. *Id.* at cmt. d. (emphasis added).

[FN30]. *See infra* Part III.

[FN31]. *See* Fowler, *supra* note 2 §§ 29.1-4, at 596-620.

[FN32]. Fowler, *supra* note 2 § 29.3 at 603-04.

[FN33]. *See* Kilbourn v. Seattle, 43 Wash. 2d 373, 376, 261 P.2d 407, 408 (1953).

[FN34]. Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)). This enactment did not include a statement of legislative intent. Further, neither the House of Representatives nor the Washington Senate Journals reveal any legislative history bearing on the underlying motivation for providing for government tort liability in Washington. The legislature's archives do not contain any bill reports that might explain precisely what motivated the legislature to waive sovereign immunity.

[FN35]. *See* Abbott, *supra* note 2, at 318, 323.

[FN36]. Abbott, *supra* note 2, at 318-22; *see also* Billings v. State, 27 Wash. 288, 291-92, 67 P. 583, 584 (1902); Riddoch v. State, 68 Wash. 329, 340, 123 P. 450, 454-55 (1912).

[FN37]. Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)) (emphasis added).

[FN38]. *See* Kelso v. Tacoma, 63 Wash. 2d 913, 916-19, 390 P.2d 2, 5-6 (1964) (holding 1961 act waived derivative sovereign immunity of local governmental entities); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 252, 407 P.2d 440, 443 (1965) (holding, based upon 1961 enactment, that "the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity in this state"); *Evangelical*, 67 Wash. 2d at 262, 407 P.2d at 449 (Finley, J., dissenting) (noting that the "1963 amendment was apparently enacted in the light of widespread judicial unwillingness to sound the final death knell for the archaic concept of sovereign immunity").

[FN39]. *Riddoch*, 68 Wash. at 334-35, 123 P. at 452-53.

[FN40]. Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

[FN41]. *See* Tardif & McKenna, *supra* note 5, at 2; *see also* Abbott, *supra* note 2, at 316; *Evangelical*, 67 Wash. 2d at 252, 407 P.2d at 443.

[FN42]. *See* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753-54 (codified as WASH. REV. CODE §§ 4.92.100-.110 (2004)) (requiring notice of claim against state and establishing procedure for filing claims); *Id.* at 754-55 (codified as WASH. REV. CODE § 4.92.040 (2004)) (prohibiting execution of any judgment against state and providing for method of paying judgments from state treasury); *Id.* at 754 (codified as WASH. REV. CODE § 4.92.130 (2004)) (providing for funding source for payment of judgments).

[FN43]. Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)); Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)). Similar language is found in the 1967 enactment regarding waiver as to local governmental entities. *See* Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

[FN44]. *See* Abbott, *supra* note 2, at 323-24.

[FN45]. *See, e.g.*, WASH. REV. CODE § 46.44.020 (2004) (relieving state and other governmental entities of liability by reason of any damage or injury due to the existence of a structure over a public highway where vertical clearance is 14 feet or more); *Id.* § 9.94A.843 (providing conditional immunity to state for release of information regarding sex offenders); *Id.* § 35.21.415 (providing qualified immunity for officials and employees of cities and towns relating to responsibilities for electrical utilities, but not for cities and towns); *Id.* § 4.24.210 (providing qualified immunity to private and public landowners making their property available for recreational activities).

[FN46]. Act of May 13, 1989, ch. 419, 1989 Wash. Sess. Laws 2270 (codified as amended at WASH. REV. CODE § 4.92 (2004)).

[FN47]. *See id.* (emphasis added)

[FN48]. *See generally* Act of April 3, 2002, 2002 Wash. Sess. Laws 1693 (codified as amended at WASH. REV. CODE § 4.92 (2004)) (amending risk management statutes).

[FN49]. 67 Wash. 2d 246, 407 P.2d 440 (1965); *see* Tardif & McKenna, *supra* note 5, at 6-7, 15-31.

[FN50]. *See supra* Part III.

[FN51]. *Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444.

[FN52]. *Id.* (citations omitted).

[FN53]. *Id.* at 252, 407 P.2d at 443.

[FN54]. *Id.*

[FN55]. *Id.*

[FN56]. *Id.* at 253, 407 P.2d at 444.

[FN57]. *Id.* at 253, 258, 407 P.2d at 444, 446-47.

[FN58]. *Id.* at 253-54, 407 P.2d at 444.

[FN59]. 346 U.S. 15, 57 (1953) (Jackson, J., dissenting); *see Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444.

[FN60]. *Evangelical*, 67 Wash. 2d at 255, 407 P.2d at 445 (emphasis added).

[FN61]. *Id.* at 258, 407 P.2d at 446-47.

[FN62]. *Id.* at 258, 407 P.2d at 447.

[FN63]. *Id.*

[FN64]. *Id.* (citing Emery v. Littlejohn, 83 Wash. 334, 145 P. 423 (1915)).

[FN65]. *Id.* at 259, 407 P.2d at 447.

[FN66]. *Id.*

[FN67]. *Id.* (emphasis added)

[FN68]. *Id.*

[FN69]. Tardif & McKenna, *supra* note 5, at 11.

[FN70]. *Id.*

[FN71]. *See Evangelical*, 67 Wash. 2d at 252, 407 P.2d at 443.

[FN72]. *Id.* at 253, 407 P.2d at 444 (quoting Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

[FN73]. *See id.*

[FN74]. Tardif & McKenna, *supra* note 5, at 11, 15-16, 43-44, 50-51.

[FN75]. *Id.* at 11.

[FN76]. *Evangelical*, 67 Wash. 2d at 257-58, 407 P.2d at 446-47.

[FN77]. *See id.* at 257, 407 P.2d at 446.

[FN78]. *Id.* at 258, 407 P.2d at 447; *see also* Taggart v. State, 118 Wash. 2d 195, 205-07, 822 P.2d 243, 248 (1992) (noting quasi-judicial immunity of parole boards).

[FN79]. *Evangelical*, 67 Wash. 2d at 259-60, 407 P.2d at 447-48.

[FN80]. *Id.* at 260, 407 P.2d at 447-48.

[FN81]. Tardif & McKenna, *supra* note 5, at 11.

[FN82]. *Id.*

[FN83]. *Evangelical*, 67 Wash. 2d at 259, 407 P.2d at 447.

[FN84]. *Id.*

[FN85]. *Id.*

[FN86]. Tardif & McKenna, *supra* note 5, at 15-16.

[FN87]. *See supra* Part III.A.

[FN88]. *See* King v. City of Seattle, 84 Wash. 2d 239, 246-47, 525 P.2d 228, 232-33 (1974) (holding city not immune from liability for arbitrary and capricious decision not to issue permits); *see also* Mason v. Bitton, 85 Wash. 2d 321, 328-29, 534 P.2d 1360, 1365 (1975) (finding no immunity for discretion exercised "in the field" by police officers engaged in high-speed chase); Bender v. City of Seattle, 99 Wash. 2d 582, 589-90, 664 P.2d 492, 498-90 (1983) (rejecting claim of discretionary immunity for decisions made during criminal investigation, which, albeit "discretionary," were not "basic policy decisions"); *compare* Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 476, 647 P.2d 481, 486 (1982) (recognizing discretionary immunity for governor's decision regarding scope and duration of restricted "red zone" designation following eruption of Mt. St. Helens), *cert. denied*, 459 U.S. 971 (1982).

[FN89]. *King*, 84 Wash. 2d at 246, 525 P.2d at 233.

[FN90]. W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 131, at 1039 (5th ed. 1984).

[FN91]. *See* RESTATEMENT (SECOND) OF TORTS § 895B, cmts. c-d (1979) (recognizing it is not a tort for a court to wrongly decide a case or for the legislature to pass a bad law); *see also* Abbott, *supra* note 2, at 323-24; ("it would be unthinkable, for example, to hold the state liable for the wrong decision of a judge or legislator"); *see generally*, KEETON ET AL., *supra* note 90, § 131.

[FN92]. 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1966); *see also* RESTATEMENT (SECOND) OF TORTS § 895B, cmt. d (1979) (citing *Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444).

[FN93]. 85 Wash. 2d at 328-29, 534 P.2d at 1365 (1975).

[FN94]. *See, e.g.*, Miotke v. Spokane, 101 Wash. 2d 307, 336-47, 678 P.2d 803, 819-20 (1984) (decision to build sewage bypass was not basic policy decision where measured against technical, engineering, and scientific judgment); Haberman v. Wash. Pub. Power Supply Sys., 109 Wash. 2d 107, 158, 744 P.2d 1032, 1055 (1987) (distinguishing between arguably immune decision to undertake nuclear power project versus technical means by which decision was implemented, subject to scrutiny under ordinary tort principles).

[FN95]. *See* Stewart v. State, 92 Wash. 2d 285, 294, 597 P.2d 101, 106-07 (1979) (holding that, while decision to build freeway involved basic policy decision, choices as to design and lighting were not protected by discretionary immunity); Riley v. Burlington Northern, 27 Wash. App. 11, 18 n.4, 615 P.2d 516, 519 n.4 (rejecting discretionary immunity for decision regarding roadway signing at railroad crossing), *review denied*, 94 Wash. 2d 1021, 615 P.2d 516 (1980); Ruff v. County of King, 125 Wash. 2d 697, 704-05, 887 P.2d 886, 889-90 (1995) (noting common law duty to exercise ordinary care in maintaining safe roadways). In appropriate circumstances, negligence may be established by reference to the standards set forth in the Manual of Uniform Traffic Control Devices (MUTCD). *See* Ottis Holwegner Trucking v. Moser, 72 Wash. App. 114, 122, 863 P.2d 609, 614 (1993) (noting that the "[f]ailure to comply with uniform state traffic control standards can be evidence of negligence"); *cf.* Kitt v. Yakima County, 93 Wash. 2d 670, 676-76, 611 P.2d 1234, 1237 (1980) (holding that violation of mandatory MUTCD provision constitutes negligence per se).

[FN96]. *See* Hewitt v. City of Seattle, 62 Wash. 377, 378-79, 113 P. 1084, 1085-86 (1911).

[FN97]. *See* Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 647 P.2d 481 (1982), *cert. denied*, 459 U.S. 971 (1982).

[FN98]. *Id.* at 471-73, 647 P.2d at 484-85 (holding governor's actions protected by discretionary immunity; applying four part test of *Evangelical*).

[FN99]. KEETON ET AL., *supra* note 90 § 131, at 1039.

[FN100]. Tardif & McKenna, *supra* note 5, at 11.

[FN101]. *See, e.g.*, LaPlante v. State, 85 Wash. 2d 154, 531 P.2d 299 (1975) (involving negligent licensing of taxi driver); Stewart v. State, 92 Wash. 2d 285, 597 P.2d 101 (1979) (involving negligent roadway design).

[FN102]. *See* Tardif & McKenna, *supra* note 5, at 11, 17, 42, 50-51.

[FN103]. *See* Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)); Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE §

4.96.010 (2004)).

[FN104]. *See* Tardif & McKenna, *supra* note 5, at 5-7.

[FN105]. *See id.* at 10-12, 50-51.

[FN106]. Hagerman v. City of Seattle, 189 Wash. 694, 698-99, 66 P.2d 1152, 1154-55 (1937); Riddoch v. State, 68 Wash. 329, 334, 123 P. 450, 452 (1912); *see also* Kelso v. Tacoma, 63 Wash. 2d 913, 916-17, 390 P.2d 2, 5 (1964); Abbott, *supra* note 2, at 313, 315-16. *See supra* Part I.A.

[FN107]. *See Kelso*, 63 Wash. 2d at 916-17, 390 P.2d at 5.

[FN108]. *See id.*

[FN109]. *See Hagerman*, 189 Wash. at 701-02, 66 P.2d at 1155-56.

[FN110]. *See, e.g.*, McLeod v. Grant County Sch. Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (holding school district liable for negligence resulting in rape of student); Berglund v. Spokane County, 4 Wash. 2d 309, 103 P.2d 355 (1940) (recognizing tort liability for negligent road maintenance, including failure to install sidewalk).

[FN111]. *See Kelso*, 63 Wash. 2d at 916-17, 390 P.2d at 5.

[FN112]. *See* Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 252-53, 407 P.2d 440, 443-44 (1965).

[FN113]. Tardif & McKenna, *supra* note 5, at 11.

[FN114]. *See supra* Part III.A.

[FN115]. *Evangelical*, 67 Wash. 2d at 253-54, 407 P.2d at 444.

[FN116]. *Id.* at 253-55, 407 P.2d at 444-45.

[FN117]. *Id.* at 252, 407 P.2d at 443.

[FN118]. WASH. REV. CODE §§ 4.92.090, 4.96.010 (2004). Although the majority opinion in *Evangelical* only commented on the original 1961 enactment, the 1963 statute, which remains in force to this day, has the same pivotal language. *Compare* Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)), *with* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)). The same language also appears in the 1967 enactment confirming the waiver of sovereign immunity as to local governmental entities. Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

[FN119]. *See Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444 (noting that tortious conduct "must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation"); *see also* J & B Dev. Co. Inc. v. King County, 100 Wash. 2d 299, 310-11, 669 P.2d 468, 475 (1983) (Utter, J., concurring) (noting analysis involves analogizing to private sector duties), *overruled on other grounds*; Taylor v. Stevens County, 111 Wash. 2d 159, 759 P.2d 447 (1988).

[FN120]. *J & B Dev.*, 100 Wash. 2d at 311, 669 P.2d at 475 (Utter, J., concurring) (noting this analogy and use of similar analysis in other states); *see also* Adams v. State, 555 P.2d 235, 240-41 (Alaska 1976) (recognizing liability of public fire inspector as analogous to duty of private insurance inspector).

[FN121]. WASH. REV. CODE § 4.92.090 (2004).

[FN122]. *Id.*

[FN123]. *See* Tardif & McKenna, *supra* note 5, at 7, 17-18.

[FN124]. *See id.* at 23 n.151.

[FN125]. *See* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753-54 (codified as WASH. REV. CODE §§ 4.92.100-.110 (2004)) (requiring notice of claim against state and establishing procedure for filing claims).

[FN126]. 130 Wash. 2d 726, 742-43, 927 P.2d 240, 250-51 (1996) (Alexander, J., concurring & Johnson, J., dissenting) (majority rejecting so-called poverty defense).

[FN127]. *See* McCluskey v. Handorff-Sherman, 125 Wash. 2d 1, 8-9, 882 P.2d 157, 161 (1994); *see also* Tardif & McKenna, *supra* note 5, at 23 n.151.

[FN128]. *See Bodin*, 130 Wash. 2d at 742, 927 P.2d at 250 (Alexander, J., concurring); *id.* at 743, 927 P.2d at 250-51 (Johnson, J., dissenting).

[FN129]. *See* Tardif & McKenna, *supra* note 5, at 48.

[FN130]. *See* Campbell v. Bellevue, 85 Wash. 2d 1, 9 n.5, 530 P.2d 234, 238-39 n.5 (1975).

[FN131]. *See, e.g.*, Motyka v. Amsterdam, 204 N.E.2d 635, 636-37 (N.Y. 1965) (holding there is no general liability to the public for failure to supply adequate police or fire protection); *see also* Kelly Mahon Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 887 (1992) (noting origins of **public duty doctrine**).

[FN132]. *See Campbell*, 85 Wash. 2d at 8-10, 530 P.2d at 238-39; *see also* Bennett v. Hardy, 113 Wash. 2d 912, 784 P.2d 1258 (1990) (recognizing implied cause of action for discrimination under WASH. REV. CODE § 49.44.090 (2004), based on analysis of RESTATEMENT (SECOND) OF TORTS § 874A (1979)). In addition to a direct or implied statutory cause of action, the court has recognized that a statute, ordinance, or the like may provide evidence of the standard of care for a common law action. *See, e.g.*, Hansen v. Friend, 118 Wash. 2d 476, 480-82, 824 P.2d 483, 485-86 (1992) (recognizing statutory standard of care under four-part test of RESTATEMENT (SECOND) OF TORTS § 286 (1965)).

[FN133]. *See Campbell*, 85 Wash. 2d at 9-10, 530 P.2d. at 238-39. Application of this analysis to private sector tort liability is evident in the New York cases discussed in *Campbell*. As explained in *Motyka*, the landmark "**public duty doctrine**" case in New York involved a *private* defendant providing services to the city under a contract and the terms of an enabling statute. *See Motyka*, 204 N.E.2d at 636-37 (citing H.R. Moch Co. Inc. v. Rensselaer Water Co., 159 N.E. 896 (N.Y.1928)).

[FN134]. J & B Dev. Co. Inc. v. King County, 100 Wash. 2d 299, 304-05, 669 P.2d 468, 472 (1983); *see also* Bailey v. Forks, 108 Wash. 2d 262, 265-68, 737 P.2d 1257, 1259-60 (1987) (outlining **public duty doctrine** and excep-

tions).

[FN135]. Four exceptions to the doctrine have thus far been identified: "legislative intent," "special relationship," "failure to enforce," and "rescue doctrine." *See Bailey*, 108 Wash. 2d at 268, 737 P.2d at 1260; *see also* Taggart v. State, 118 Wash. 2d 195, 218, 822 P.2d 243, 254 (1992) (noting, "[t]he question whether an exception to the **public duty doctrine** applies is thus another way of asking whether the State had a duty to the plaintiff"); *accord* Bishop v. Miche, 137 Wash. 2d 518, 530, 973 P.2d 465, 471 (1999).

[FN136]. *See* Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983) (holding action may lie for State's negligent release of mentally disturbed patient); *see also Taggart*, 118 Wash. 2d at 218 n.4, 822 P.2d at 254-55 n.4 (1992) (noting that *Petersen* was later described as effectively creating exception to **public duty doctrine**).

[FN137]. *See* Chambers-Castanes v. King County, 100 Wash. 2d 275, 290-95, 669 P.2d 451, 460-63 (1983) (Utter, J., concurring) (urging that the doctrine detracts from traditional tort analysis); Babcock v. Mason County Fire Dist. No. 6, 144 Wash. 2d 774, 795-802, 30 P.3d 1261, 1272-76 (2001) (Chambers, J., concurring) (criticizing doctrine); Beal v. City of Seattle, 134 Wash. 2d 769, 794, 954 P.2d 237, 249 (1998) (Talmadge, J., dissenting) (same); *see also* Mark McLean Meyers, Comment, *A Unified Approach to State and Municipal Tort Liability in Washington*, 59 WASH. L. REV. 533 (1984); Shelly K. Speir, Comment, *The **Public Duty Doctrine** and Municipal Liability for Negligent Administration of Zoning Codes*, 20 SEATTLE U. L. REV. 803 (1997). In response to criticism, numerous jurisdictions have abandoned the **public duty doctrine**, while only two that have addressed the issue have chosen to retain it. *See* Aaron R. Baker, Comment, *Untangling the **Public Duty Doctrine***, 10 ROGER WILLIAMS U. L. REV. 731, 747 nn.111-12 (2005) (collecting cases).

[FN138]. *See* Cummins v. Lewis County, 156 Wash. 2d 844, 133 P.3d 458 (2006); Osborn v. Mason County, 157 Wash. 2d 18, 134 P.3d 197 (2006). The *Cummins* court did not address whether the **public duty doctrine** should be abandoned, concluding the issue had not properly been preserved by the plaintiff.

[FN139]. 157 Wash. 2d at 27-28, 134 P.3d at 202 (citations omitted).

[FN140]. *See id.*

[FN141]. *Id.*

[FN142]. Osborn and aligned amicus curiae, Washington State Trial Lawyers Association Foundation, requested that the *Osborn* court abrogate the **public duty doctrine** because it was redundant with traditional duty analysis, but the court refused to do so. 157 Wash. 2d at 27, 134 P.3d at 202. While this result likely would have gone farther in eliminating skirmishes as to the impact of the doctrine, *Osborn* is sufficiently clear in identifying its limited purpose as a focusing tool, so as to avoid further misunderstanding of the doctrine. *See id.* at 32, 134 P.3d at 205.

[FN143]. Tardif & McKenna, *supra* note 5, at 13-14, 31-32, 41-42, 44-45.

[FN144]. 84 Wash. 2d 239, 244, 525 P.2d 228, 232 (1974)

[FN145]. Tardif and McKenna also note the general expansion of tort law since 1961, arguing it has had an adverse impact on government tort liability. *See* Tardif & McKenna, *supra* note 5, at 6-7, 33-35, 52. They suggest the legislature could not have contemplated this development at the time it waived sovereign immunity. *Id.* at 7. It is beyond the scope of this article to examine and defend either the advances in tort law that have occurred over the past forty-odd years or the impact of such advances on government liability. It is enough to note that Washington's legislature is deemed to be familiar with Washington case law, including developments in tort law, and the legislature has not sounded a retreat from its broad waiver of sovereign immunity. Moreover, in making governmental entities liable in

tort "as if ... a private person or corporation," the legislature clearly stated its purpose to eliminate the distinction between governmental and private defendants, not to establish the substance of tort law as applied to the state and local governments. *See* WASH. REV. CODE §§ 4.92.090, 4.96.010 (2004).

[FN146]. KEETON ET AL., *supra* note 90, § 4 at 25-26.

[FN147]. *Id.*

[FN148]. For example, it was a California jury verdict against Ford Motor Company that ultimately resulted in Ford's issuing a voluntary recall of its Pinto automobile, a step that Ford had not taken in the face of earlier regulatory action by the National Highway Transportation Safety Agency. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1018-19 (1991).

[FN149]. Tardif & McKenna, *supra* note 5, at 46-47.

[FN150]. *Id.* at 47.

[FN151]. *See* Taggart v. State, 118 Wash. 2d 195, 216, 822 P.2d 243, 253 (1992); Hertog v. City of Seattle, 138 Wash. 2d 265, 279-80 n.4, 979 P.2d 400, 408-09 n.4 (1999); Tyner v. Dep't Soc. & Health Servs., 141 Wash. 2d 68, 87-88 n.8, 1 P.3d 1148, 1158-59 n.8 (2000).

[FN152]. *See, e.g.*, *Taggart*, 118 Wash. 2d at 218-19, 822 P.2d at 254-55 (recognizing government liability based on traditional tort analysis, involving foreseeability of harm and pertinent policy considerations).

[FN153]. *See, e.g.*, Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 260-61, 407 P.2d 440, 447-48 (1965); *Tyner*, 141 Wash. 2d at 87-88, 1 P.3d at 1158-59; *see also* McCluskey v. Handorff-Sherman, 125 Wash. 2d 1, 19-23, 882 P.2d 157, 166-68 (1994) (Brachtenbach, J., concurring) (noting that cost evidence may be admissible to defend based on the feasibility or practicality of corrective measures); Bodin v. City of Stanwood, 130 Wash. 2d 726, 745-46, 927 P.2d 240, 250-51 (1996) (Johnson, J., dissenting) (noting that the cases that have allowed cost evidence have been concerned with practicalities, not financial strategy).

[FN154]. *See Bodin*, 130 Wash. 2d at 744-45, 927 P.2d at 250 (Johnson, J., dissenting) (noting judicial rejection of poverty defense whether raised by government or private person or corporation).

[FN155]. KEETON ET AL., *supra* note 90 § 4, at 20; *see also* Hunter v. North Mason High Sch., 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975) (noting "the right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to have a decent life").

[FN156]. Tardif & McKenna, *supra* note 5, at 52.

[FN157]. *Id.* at 49.

[FN158]. *Id.* at 51; *see also id.* at 31-32.

[FN159]. *See generally* WASH. R. CIV. P. 59 (new trial or amendment of judgment); WASH. R. CIV. P. 60 (relief from judgment); WASH. REV. CODE § 4.76.030 (2004) (remittitur or additur); WASH. R. APP. P. Title 2 (designating trial court decisions subject to appeal or other appellate review).

[FN160]. Tardif & McKenna, *supra* note 5, at 50.

[FN161]. *Id.* (quoting Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (1965)).

[FN162]. Abbott, *supra* note 2, at 327.

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RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 24

Restatement (First) of Torts § 504 (1938)
Restatement of the Law — Torts
Restatement (First) of Torts
Current through April 2011

Division 3. Absolute Liability
Chapter 20. Liability Of Possessors And Harborers Of Animals
Topic 1. Trespass By Livestock

§ 504. Liability For Trespass By Livestock

Link to Case Citations

(1) Except as stated in Subsection 2 and in § 505, a possessor of livestock which intrude upon the land of another is liable for their intrusion and for any harm done while upon the land to its possessor or a member of his household although the possessor of the livestock exercised the utmost care to prevent them from intruding.

(2) A possessor of land who by the common law applicable to that part of the state in which the land is situated or by statute, is required to fence his land to prevent the intrusion of the livestock is barred from recovery against the possessors of intruding livestock if he fails to erect and maintain the required fence.

***Comment on Subsection* (1):**

a. The word "livestock" is used to denote those kinds of domestic animals and fowls which are normally susceptible of confinement within boundaries without seriously impairing their utility and the intrusion of which upon the land of others normally causes harm to the land or to crops thereon. It does not include animals the intrusion of which is unlikely to do any substantial harm under ordinary circumstances and which cannot be kept within the boundaries of their possessor's land without substantially affecting the utility which has traditionally been ascribed to them. Thus, "livestock" includes horses, cattle, pigs and sheep and also poultry, unless by custom poultry are permitted to run at large, since when such animals intrude upon land they usually do harm by eating the grass, trampling down the crops, scratching or digging up the seeds or otherwise. On the other hand, it does not include dogs and cats which are difficult to restrain and unlikely to do any substantial harm by their intrusion.

The applicability of the rule stated in this Section depends upon the general character of the class to which the animal belongs and not upon whether it does or does not do substantial harm. If a domestic animal which is not "livestock," as that word is here defined, is known to have dangerous tendencies abnormal to its class, its possessor or harborer may be liable under the rule stated in § 509.

b. Possession of land not essential to liability. The rule stated in this Section is most often applied when the defendant is in possession not only of the livestock but also of the land upon which they are kept. Liability is imposed because of the possession of the livestock and not because of the possession of the land upon which they are kept. Therefore, their possessor is equally liable here as licensee or even as trespasser he keeps them upon land in possession of a third person. So, too, while, as stated in § 505, the possessor of livestock is not liable, in the absence of negligence, if they stray upon adjoining land while they are being driven along a public highway, he is liable if they stray from a public highway or other public place upon which he pastures or otherwise keeps them.

c. Liability of possessor of land who is also in possession of livestock. The liability stated in this Section is based upon the possession of the livestock. As to what constitutes possession, see Restatement of Torts, § 216. The possession of the land from which the livestock stray is not enough to make possessor liable under the rule stated in this Section. This is so whether they are on his land with or without his permission, so long as he does not have possession of them. Thus he is not liable for

RESPONDENT/
CROSS-APPELLANT'S
APPENDIX 25

Restatement (Second) of Torts § 504 (1977)
Restatement of the Law — Torts
Restatement (Second) of Torts
Current through April 2011

Division 3. Strict **Liability**
Chapter 20. **Liability** Of Possessors And Harborers Of Animals
Topic 1. **Trespass** By **Livestock**
§ 504. **Liability** For **Trespass** By **Livestock**

Link to Case Citations

(1) Except as stated in Subsections (3) and (4), a possessor of livestock intruding upon the land of another is subject to liability for the intrusion although he has exercised the utmost care to prevent them from intruding.

(2) The liability stated in Subsection (1) extends to any harm to the land or to its possessor or a member of his household, or their chattels, which might reasonably be expected to result from the intrusion of livestock.

(3) The liability stated in Subsection (1) does not extend to harm

(a) not reasonably to be expected from the intrusion;

(b) done by animals straying onto abutting land while driven on the highway; or

(c) brought about by the unexpectable operation of a force of nature, action of another animal or intentional, reckless or negligent conduct of a third person.

(4) A possessor of land who fails to erect and maintain a fence required by the applicable common law or by statute to prevent the intrusion of livestock, can not recover under the rule stated in Subsection (1).

Comment:

a. As to strict **liability** for the **trespass** of wild animals, see § 507, Comment *e*.

Comment on Subsection (1):

b. The word "**livestock**" is used to denote those kinds of domestic animals and fowls normally susceptible of confinement within boundaries without seriously impairing their utility and the intrusion of which upon the land of others normally causes harm to the land or to crops thereon. It does not include animals the intrusion of which is unlikely to do any substantial harm under ordinary circumstances and which cannot be kept within the boundaries of their possessor's land without substantially affecting the utility traditionally ascribed to them. Thus "**livestock**" includes horses, cattle, pigs and sheep and also poultry, unless by custom poultry are permitted to run at large, since when these animals intrude upon land they usually do harm by eating the grass, trampling down the crops, scratching or digging up the seeds or otherwise. On the other hand, it does not include dogs and cats, which are difficult to restrain and unlikely to do any substantial harm by their intrusion.

The applicability of the rule stated in this Section depends upon the general character of the class to which the animal belongs and not upon whether the animal does or does not do substantial harm. If a domestic animal which is not "**livestock**," as that word is here defined, is known to have dangerous tendencies abnormal to its class, its possessor or harborer may be liable under the rule stated in § 509.

*c. Possession of land not essential to **liability**.* The rule stated in this Section is most often applied when the defendant is in