

Perceptions of Morality and the Appeal of Tort Reform

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I. Introduction

Some years ago, I described American tort law as a system that reflected “social moral intuition” with the meting out of appropriate levels of punishment as the dominant societal understanding of the torts system’s function and purpose.¹ My description sought to explain the discernible trend in both legislation and judicial decisions which served to curb the movement of the 1960s and 1970s toward strict liability and return tort law to a fault-based system of law that insisted on finding, at the very least, that the defendant had been negligent as a condition of imposing liability. What I did not recognize at the time, however, was that the underlying social moral intuition that drives the development of tort doctrine was (and is) more complex than a simple fault/no-fault dichotomy. In fact, it appears there are at least two separate, though often overlapping, sets of intuitive judgments which are often evident in tort cases. The first deal with the tort claimant’s conduct and the circumstances under which he or she will be deemed to have forfeited the right to sue or be seen as disqualified from claiming compensation. The second deal with the defendant’s conduct and the circumstances under which it is viewed as fair or otherwise appropriate to require that party to pay.

Moreover, it appears that the social intuition underlying the right to sue and the obligation to pay has, for the most part, been fairly consistent over a relatively long period of time. While it is true, of course, that the relative stability of tort law has been obscured by a series of significant doctrinal changes during the 1960s and 1970s, changes

¹ Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. Cin. L. Rev. 1231 (1990).

during that period do not seem to be indicative of any major shift in the in fundamental societal understanding of when it is appropriate to sue or be sued.

This claim of relative long-term stability stands in opposition to a widely accepted understanding of the forces driving what might appear to be a pendulum swing of tort law back and forth from the late 19th Century and the present. Many holding that view posit that tort law is a political creature molded by the influence that the business community is capable of bringing to bear at any given point of time. During the late 19th Century, it is claimed, tort law was a product of the political clout of the railroads and assorted other commercial and industrial giants and doctrine was manipulated to minimize potential liability and thereby maximize profits.² During much of the 20th Century through the 1960s and 1970s, the country moved away from a commitment to unbridled laissez faire capitalism toward a system marked by public regulation of business. Corporate rights waned; state commitment to public welfare grew; and, in the shadow of what appeared to be the coming of a welfare state, compensation for injury as a means of accomplishing various instrumentalist goals emerged as the dominant basis for tort law. This was largely made possible by a widespread popular distain for business interests generally, and large corporate entities in particular.

As Gary Schwartz explained:

[Consider]...more general features in the public-policy mentality of the 1960s and early 1970s. One feature of public thinking in the 1960s was that major American corporations—and in particular, the Big Three automakers—were economic colossi that could easily bear whatever burdens might be imposed on them by way of regulation or liability. A second feature of public opinion was that these corporations should not be held in high respect; indeed, they should be frequently distrusted. When the steel industry announced price increases that somewhat insidiously

² Lawrence M. Friedman, *A History of American Law* 410-11 (1973) and Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 63-108 (1977).

evaded President Kennedy's efforts at jawboning, the President was widely quoted as saying that he now believed what his father had always told him: "all businessmen [are] sons-of-bitches." After a dramatic confrontation, the industry rolled back its prices. During the 1960s, the consumer movement was gaining force; this movement portrayed innocent consumers as needing strong protection from manufacturers, which frequently treat consumers in shabby ways. Ralph Nader's book, *Unsafe at Any Speed*, depicted General Motors as a villain for selling Corvairs with a known tendency to turn out of control. General Motors then portrayed itself as a foolish and inept villain when it conducted an investigation of Nader's private life. By the late 1960s, the environmental movement had begun to gather momentum; and that movement was able to project the image of major corporations as nasty, insidious polluters. The willingness of courts by the late 1960s to impose strong liabilities on major corporations (especially on product manufacturers) was almost certainly facilitated by this discrediting of corporations that was occurring in the public outlook.³

In the early 1980s, however, it is claimed that the political right flexed its muscle again. Beginning with its political ascendancy, marked by Ronald Reagan's election in 1980, conservative, pro-business politicians appointed like-minded judges with a resulting reemergence of a business-dominated tort system.⁴ To the extent that the business agenda could not be implemented solely through judicial rulemaking in the

³ Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern Tort Law*, 26 Ga. L. Rev. 601, 615 (1992).

⁴ See e.g. Roger I. Abrams, *Tort Law and "Family Values,"* 48 Rutgers L. Rev. 619 (1996), explaining:

The product liability revolution, a court-enforced reallocation of risk and loss, was a single piece within modern social welfare legislation. All society—or at least those who purchased and used products—would pay an increment so the unfortunate individual would not suffer an uncompensated loss. * * *

Political developments over the last few years, however, have reversed this trend and, in turn, changed the image of society's values we see reflected by our tort law principles. A conservative political tide has ripped away at the structure that maintained the social welfare system. A new cadre of federal and state judges, appointed or elected in the wake of this agenda, followed the electorate's direction. In order to promote the interests of the class of traditional defendants—product manufacturers and physicians, for example, who have been chilled by the prospect of unlimited, uncertain and uninsurable damage costs—political and judicial actors have revised tort law principles. The result has been a redefinition of societal values reflected in these principles.

Id. at 621-22.

context of common-law litigation, it was necessary for big business to aggressively take its case to the legislatures. Thus, organizations such as the American Tort Reform Association, the Business Roundtable and Chamber of Commerce, all lavishly funded by various foundations, lobbied Congress and the state legislative bodies seeking change in tort doctrine.⁵

The strategy employed by the business community to roll back the pro-plaintiff tort doctrine that came out of the 1960s and 1970s has been discussed, analyzed and criticized by many eminent commentators.⁶ In large part, it is claimed, the strategy has been to undermine the civil jury system by portraying jurors as either stupid or dishonest (or both) and bent on pursuing an anti-business agenda. Thus, for example, Jeffrey Abramson explained the use of the “Hamiltonian narrative.” “Hamiltonianism” he explained, “is the politics that popularized the slogan, “What's good for General Motors is good for America.”⁷

Hamiltonians are the great distributors of stories about the supposed redistributive instincts of civil jurors, even when evidence suggests otherwise. Hamiltonians remain sure that jurors: (1) despise the rich, especially doctors, (2) have it in for big corporations, (3) love to put their fingers in deep pockets and redistribute other people's money, and (4) break deadlocks by deciding no harm will be done by holding defendants liable, since their insurance companies will pick up the tab.

The Hamiltonian story works by finding some “poster boy” to represent juries out of control. Anecdote is the best vehicle of ridicule and the

⁵ See *The Attack on Trial Lawyers and Tort Law, Section 1 – Tort Reform Organizations and the Far Right*, <http://www.commonwealinstitute.org/reports/tort/Section 1.html> (hereinafter cited as “Attack on Trial Lawyers”).

⁶ See generally, Jay M. Feinman, *Un-Making Law: The Conservative Campaign to Roll Back the Common Law* (2004); David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 Colum. L. Rev. 2032 (2004); Michael L. Rustad and Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L. Rev. 1 (2002).

⁷ Jeffrey Abramson, *The Jury and Popular Culture*, 50 DePaul L. Rev. 497, 513 (2000).

Hamiltonians understand how to use the media's thirst for the latest scoop about jurors acquitting Imelda Marcos and then having roast pig with her at a lavish party that night, or about the jury that confessed that in calculating its \$10.5 billion award to Pennzoil against Texaco it added "\$1 billion to the award for each of the Texaco witnesses they had most despised." Almost everyone will have heard the tale of how some jury in New Mexico awarded \$2.9 million to a woman burned by McDonald's coffee. Then there is the one about the woman who sued for loss of her psychic powers after a CT scan, the prison inmate who sued himself for violating his own civil rights when he went to prison for twenty years on burglary convictions, or the West Virginia employee who parlayed a complaint that she hurt her back opening a pickle jar into a \$2.7 billion award of compensatory and punitive damages. Peter Huber's articles in *Forbes* magazine popularized the term "junk science" to summarize the way frauds were supposedly driving litigation.⁸

The foregoing, as a description of the strategy (successfully) employed by a pro-business political movement to alter the tort system, is certainly not inaccurate. It is, however, incomplete. It is too often assumed that the arguments put forth by the business community are little more than a cynical manipulation of a gullible public calculated to maximize profits by enlisting critically important political support from groups which, at first glance, might seem to be unlikely allies—the lower middle class and conservative Christian groups.⁹ Nevertheless, while fostering distrust of the jury may account for the increasing tendency of the courts to strip the civil jury of power within its traditional sphere of authority by converting jury questions into rules of law to be determined by the trial judge or on de novo review by appellate courts,¹⁰ the reallocation of the power to

⁸ *Id.* at 513-14 (footnotes omitted).

⁹ See Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 Rutgers L. Rev. 673, 734-35 (1996)(criticizing the Republican attempt to enact federal tort reform and arguing it would have a disproportionately harsh impact upon blue collar workers among others); Lisa A. Keister, *Conservative Protestants and Wealth: The Effect of Denomination, Race, and Asset Growth* (2005)(supporting thesis that conservative Protestant families tend to accumulate less wealth than other demographic groups)(<http://gsbwww.uchicago.edu/fac/ronald.burt/more/Keister.pdf>).

¹⁰ See Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damage Doctrines*, 47 Hastings L.J. 1255 (1996)(discussing revisions in the

decide, by itself, does not account for the content of the substantive tort doctrine as it has been emerging. Moreover, it often fails to explain the specific content of proposed and/or enacted tort reform legislation. In other words, while we know that the narrative strategy has been successful, it has not been explained why these narratives of gullible jurors, greedy plaintiffs and slick lawyers resonate so strongly among members of groups that would seem to have so little self-interest in the promotion of tort law that restricts their access to the courts, limits the types of claims that they may assert, and reduces the amount of compensation that may be recovered.

In this Article, I will attempt to identify the values reflected in post-1970s tort doctrine and, more importantly, demonstrate that, for the most part, the doctrinal changes, limitations and restrictions are largely consistent with long-standing social perceptions regarding how people ought to behave.¹¹ In other words, to recast an old cliché, ATRA and its allies are preaching to the choir.

There is one additional factor, though the extent of its significance cannot really be assessed without empirical study. Nevertheless, the ongoing influence exercised by conservative Christianity both before and after the 1960s and 1970s appears to be more important than is generally recognized.

authority of juries to decide cases). *Also see* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325 (1995)(making a compelling argument that the move toward restraining the power of the jury to decide cases is largely a racist and sexist reaction to the inclusion of women and minorities on juries).

¹¹ *Also see* Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 Ga. L. Rev. 725 (1992). Professor Wells argues that during the 1960s, “[a]mbitious judges and scholars viewed tort rules not as a direct reflection of the mores of the citizenry, but as a means of implementing social policy decisions arrived at through the application of philosophical, scientific, and technical knowledge to social problems. The recent loss of momentum for expanded tort liability may indicate that decisionmakers are increasingly skeptical of the new methodology.” *Id.* at 727.

The connection between conservative Christian theology and tort reform may seem, at first glance, to be tenuous at best. When an internet search of “tort reform” turned up numerous articles advocating reform published on sites that also focused on abortion, the death penalty, gay marriage, school prayer, creationism and other more obvious matters of concern to the religious right,¹² I assumed that I was seeing the product of a political coalition of convenience between big business and conservative Christians. In return for support of tax cuts, tort reform and similar economic issues which big business had an interest in promoting, conservative Christians got businesses’ support for their political agenda promoting moral issues and together elected first Ronald Reagan and later George W. Bush. In fact, however, my assumption was overly simplistic.

Conservative Christians (or at least some groups falling under that label) have long been committed to a libertarian, free market philosophy that, in effect, became an essential part of their theology.¹³ As Michael Lienesch explains:

Christian conservatives are Christian capitalists. In constructing their economic thinking, they borrow heavily from secular conservative writings, which they cite and combine in a seemingly unsystematic way. The writers they refer to most frequently include libertarians of the Austrian school of Friedrich A. Hayek and Ludwig von Mises, neoconservative economic thinkers such as Michael Novak, and the supply-side capitalists of the New Right, especially George Gilder. To these secular sources they add their own theological tenets and apply their own moral models, drawing especially on the examples of late-nineteenth-

¹² See e.g. Samuel Gregg, *Tort Reform and Thomas More: Lessons from a Christian Lawyer*, <http://www.acton.org/ppolicy/comment/article.php?id=216> (Sept. 8, 2004); Jordan Ballor, *Touting Tort Reform*, <http://www.acton.org/ppolicy/comment/article.php?id=189> (March 24, 2004); Ronald J. Rychlak, *Tort Reform as a Moral Issue*, <http://www.acton.org/ppolicy/comment/article.php?id=258> (April 6, 2005).

¹³ See C. Boyden Gray, *The Republicans’ Common Heritage*, 13 *The World & I* 88 (1998)(asserting the existence of a “common heritage of free-market economic thought as expressed by the classical liberalism of the nineteenth century and the fundamentalist mots of today’s evangelicals, which have the origins in the religious and political struggles of early nineteenth-century England.”).

century Christian capitalists like J. P. Morgan and John D. Rockefeller, along with entrepreneurs and small businessmen from more recent times. The result is a complicated conception of capitalism defined as a God-given system, “part of God’s plan,” as Jerry Falwell puts it, “for His people.”¹⁴

Perhaps more importantly, the Christian/libertarian link has a long history in America. As Phillip Hammond explained, during the early 19th Century “individualistic evangelicalism” became “the dominant religious perspective in America.”¹⁵ While this religion also championed the abolition of slavery,

no doubt more widespread...was the element in evangelicalism that contributed to its subsequent conservatism: the “paradoxical combination of libertarianism and traditionalism.” Developing throughout the century along with the American nation, this element became as close to an established theology—with a parallel moral consensus—as America will ever know. In the nineteenth century it motivated missionaries to build schools and cover native breasts. It encouraged capitalists to build factories and hedge their investments with philanthropy. It exalted rural and small-town ideals, saturating America with the idea that people should be free to do pretty much as they like, as long as they look out for themselves—and, of course, behave.¹⁶

Following the Civil War, there was a liberal-conservative split within American Protestantism—the modernists against the fundamentalists.¹⁷ By the 1920s, it was clear that modernists’ beliefs were ascendant.¹⁸ By the late 1950s,

¹⁴ Michael Lienesch, *Redeeming America: Piety and Politics in the New Christian Right* 107 (1993).

¹⁵ Phillip E. Hammond, *The Curious Path of Conservative Protestantism*, 480 *Annals of the Am. Acad. Of Political and Soc. Sci.* 53, 54 (1985).

¹⁶ *Id.* at 54-55.

¹⁷ Explaining the term “fundamentalist,” Professor Hunter recounts that:

[C]onservatives launched in 1910 a major effort...to regain a cognitive grasp over Protestantism with the publication of the *Fundamentals*....

Sponsored by two wealthy conservative Protestant businessmen, the twelve volumes...of the *Fundamentals* were designed to check the spread of the New Christianity. They systematically covered doctrinal issues relating to the inerrancy of the Scriptures (the doctrine of inspiration, archaeological confirmation of biblical stories, and

the overlap of liberal Protestantism with modern, liberal culture was nearly complete. Churches absorbed the New Deal ethic along with the belief that government agencies are the proper way to address social problems. Ecumenism was espoused, denominational loyalty becoming simply a matter of stylistic preference. Civil rights, world peace, redistributed wealth and control of nuclear arms became other planks in liberal Protestantism's agenda.¹⁹

Nevertheless, during the period between the 1920s and the 1970s the fundamentalists did not simply disappear and, by the 1970s, the confluence of a number of events led to their very public reemergence. First, technology allowed the fundamentalists to publicly air their message to large numbers of people. Second, the televangelists had the excesses of the 1960s to illustrate how things worked out when the liberals were in control. Third, the economic downturn during the 1970s necessitated cuts in public spending. Again, Phillip Hammond explained:

[W]hat made evangelical Protestantism an attractive response to the events in the 1970s? James Hunter, in his splendid analysis *American Evangelicals*, provides the single most important clue. It is true, he points out, that conservative Protestants lost the theological battle after 1920, but the moral viewpoint they shared at the time with most other American continued to be the dominant conventional viewpoint until the 1960s. It was one thing to lose control of the major denominations..., but quite another to see all of American culture threatening to deviate from the...conventionality inherited from the nineteenth century. * * *

the refutation of higher criticism), other Christian doctrines (the existence of God, the historicity of Christ, and the nature of the Christian life), commentary on the need for missions and evangelism, and finally, refutations of other religious systems (including Mormonism, Christian Science, spiritualism and Roman Catholicism). Though *The Fundamentals* was widely dispersed among church leaders, it was generally ignored by the academic and scholarly community. Its net accomplishment of its stated goals was dubious; at best, it provided a pause in the trend toward the decline of conservative power in the denominations.”

James Davison Hunter, *American Evangelicalism: Conservative Religion and the Quandary of Modernity* 32 (1983).

¹⁸ Hammond, *supra* note 15 at 55 (noting that “the Scopes trial of 1925...[was] the publicized scene of surrender.”)

¹⁹ *Id.* at 57.

[In addition to the counterculture of the 1960s, the women’s movement, affirmative action for minorities, gay rights, unwed mothers, and “court decisions declaring abortion to be right and school prayer wrong”], the 1970s saw a “halt to economic growth, the retracting of an economy that had been chiefly expanding for decades. This factor had impact throughout the social structure, of course; but if government programs to enhance life had to be curtailed, if civil rights—of criminals, for example—were going to be restricted, then a certain comfort might be derived from seeing these not as failure of an idealistic agenda but as ideologically demanded.”²⁰

In short, the Christian right has long been largely committed to a libertarian view of personal responsibility, contract rights, property rights and free market capitalism in addition to a very literal reading of the bible. More importantly, perhaps, their views on both economic and moral issues have been and still are widely shared. This is true whether the underlying issue is motivation in suing, e.g. charges of greed, or whether it is acceptance of personal responsibility, or whether it is the determination of the extent of an actor’s culpability and the appropriateness of the resulting consequences.

II. The Plaintiff’s Entitlement to Sue

A. The Background Context

By “right to sue,” I do not refer to an inalienable, fundamental legal claim of entitlement. In fact, the existence of such a “right,” in an absolute sense, has been denied by the federal courts in its entirety²¹ and by a majority of state courts as well. Only a

²⁰ *Id.* at 58-59. Explaining the post-1970s resurgence of evangelical Christianity as a response to the “changing social mores during the 1960s and 1970s[.]” see J. Christopher Soper, *Evangelical Christianity in the United States and Great Britain: Religious Beliefs, Political Choices* 105 (1994).

²¹ See e.g. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1977) (“Our cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’ The ‘Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,’ despite the fact that ‘otherwise settled expectations’ may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.”)(internal citations omitted).

handful of states have asserted the existence of such a right under state constitutional law and, even in those states, the right is not deemed to be a fundamental one and thus can be modified or even abrogated in its entirety by the legislature at least under some set of circumstances.²² Instead, I deal only with factors that influence broad public perception that one is or is not violating societal or group norms of behavior by seeking to assign the responsibility for one's misfortune to another.²³

The perception must be understood against the background of a generally recognized norm against litigation.²⁴ Public skepticism regarding claims of entitlement to demand money from others²⁵ has served to create something of a presumption against tort claimants. To overcome this presumption, a plaintiff needs to be viewed as relatively blameless. In a rough, imprecise sense, the situation is analogous to the equitable clean hands doctrine—that the courts (and society generally) should not be aiding those whose

²² See e.g. *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 999-1000 (Ala. 1982)(legislative alteration of common law rights subject to “stricter scrutiny.”); *Gentile v. Altermatt*, 363 A.2d 1, 12 (Conn. 1975)(common law right to sue for damages incorporated in state constitution, but can legislatively restricted or abolished provided “reasonable alternatives are created.”); *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980)(common law right to sue for injury not “fundamental,” but “important substantive right” and thus legislative restrictions subject to “more rigorous judicial scrutiny.”).

²³ See generally Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 Colum. L. Rev. 1253 (1999); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003 ((1995); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996).

²⁴ Shawn J. Bayern, *Comment, Explaining the American Norm Against Litigation*, 93 Calif. L. Rev. 1697 (2005); Ellickson, *supra* note 23 at 40-81.

²⁵ The objection to the idea of “entitlements” is particularly strong within the conservative Christian tradition. See Lienesch, *supra* note 14 at 129-34.

wrongdoing created the state of affairs from which they now seek redress.²⁶ Perhaps more importantly, one's decision to sue cannot be perceived as violating one or more of a whole series of social norms of behavior—the decision cannot make one appear to be acting dishonorably by reneging on a freely made prior agreement (actual or tacit). The decision cannot appear to be motivated by greed; it cannot be perceived to display ingratitude; it cannot be perceived as an abrogation of personal responsibility or an attempt to blame another for one's own shortcomings or failures. Finally, of course, the claim must sound objectively genuine.²⁷

1. Norms Against Litigation

a. In General

Although it is commonly asserted that Americans are excessively litigious, most of the empirical evidence and serious academic study of the subject lead one to conclude that, in truth, most tortiously inflicted injuries do not result in litigation.²⁸ This remains true even if one excludes injuries caused under circumstances where the existence of a

²⁶ At one time, such a rationale was used to explain the contributory negligence bar to recovery. Dean Prosser explained: “The ‘clean hands’ theory of contributory negligence, which induced a few early courts to deny recovery to a plaintiff whose conduct was unlawful in any way whatever, as in the case of one driving quite carefully in violation of a Sunday law, was soon found to be neither just nor workable [and]...has long since been discarded....” W. Page Keeton, Dan B. Dobbs, Robert E. Keeton and David G. Owen, *Prosser and Keeton on Torts*, § 65, at 457 (5th ed. 1984)(hereinafter cited as “Prosser & Keeton”).

Whether it has, in fact, “been discarded,” however, seems debatable.

²⁷ This category is distinct from the “greed” category in the sense that it tends to exclude those who appear to be overreacting to an event. In other words, greed is subjective, a judgment that one is overreacting is objective. Of course, in the world of politics, both appear to be lumped together under the heading of “frivolous lawsuits.”

²⁸ See generally, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4 (1983)(challenging the claim of American litigiousness); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1287-89 (concluding that only small percentage of accidental injuries result in claims and, even in those, claimants are often undercompensated). Also see Bayern, *supra* note 24 at 702.

cause of action is not recognized by the victim and/or where the decision not to pursue litigation is economically rational, i.e. where the injury is too small to justify the cost of litigation.

The most compelling explanation for this fact is the existence of a social norm against litigation that serves to deter individuals from filing suit to redress legally compensable harm.²⁹ Various rationales rooted in economics, sociology, psychology, and so on, have been suggested. Thus, it has been posited that declining to assert a legal claim might be a way to publicly announce one's wealth—signaling to others that “I don't need the money.”³⁰ Alternatively, if society perceives the negotiation of disputes as a value, one might decline to sue lest one be perceived as rejecting that value and creating disharmony within the group.³¹ It has also been suggested that, if people tend to be overly optimistic about their own chances for success in the face of uncertainty, an economically inefficient level of litigation might result. The norm against litigation, if asserted, might serve to counteract such a tendency toward inefficient behavior.³²

Though there appears to be little or no literature directly on point, one might also consider the possibility that many people are simply intimidated by the court system.

Lawsuits require one to enter a foreign land populated by frightening robed and suited

²⁹ See Bayern, *supra* note 24 at 1704 (noting “Ellickson's research of dispute resolution in Shasta County uncovered a norm of not litigating, not merely a practice of speaking out against litigation. Indeed, Ellickson's study documents a ‘norm against the invocation of formal legal rights’ that is ‘strongly established.’” (citing Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623, 681-82 (1986) and Ellickson, *supra* note 24).

³⁰ Bayern, *supra* note 24 at 1706-07 (citing Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. Legal Stud. 765, 768 (1998)

³¹ Bayern, *supra* note 24 at 1703 (citing Robert Cooter, *Normative Failure Theory of Law*, 82 Cornell L. Rev. 947, 954 (1997)).

³² Bayern, *supra* note 24 at 1709-11 (positing the possibility that “[t]he norm against litigation may...help...to correct the irrational judgment of individual people.”).

creatures speaking a language that is not quite English. Trial requires one to speak in public and subject oneself to public judgment. Although under the American rule, an unsuccessful litigant need not pay the other's attorney fees, it is not clear how widely this is known by the public and, in any event, the fear of expending large sums on other litigation costs may serve as a deterrent.³³ Additionally, by definition, lawsuits are confrontational. One must often challenge authority or powerful entities and the prospect of doing so may be daunting. If this is the case, many of the reasons given for refusing to sue—plaintiffs are greedy, I don't need the money, forgiveness is a virtue, etc., may simply represent rationalizations for declining to do something which one is secretly afraid to do.

b. The Religious Right

The post-1960s reemergence of evangelical Christianity as a significant, vocal political force in America added a new dimension, or at least a new level of power, to a view that initiating lawsuits is improper. The arguments advanced by the religious right fall into two general categories. First, when disputes arise that cannot be resolved directly between the parties to the dispute, the aggrieved party should take the dispute to the church, rather than the secular authorities. Ronald Rychlak explains:

For Christians, the picture of properly functioning social structures is described in part by the apostle Paul.... Paul raises several possibilities...within the context of church discipline, including especially the commendation of the ecclesial adjudication of disputes rather than

³³ Tort reform legislation that shifts the liability for attorneys' fees in "frivolous" lawsuits undoubtedly seeks to magnify that deterrent. See Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 Tex. L. Rev. 1863, 1866-67 (1998)(explaining that "[t]he 'tort reform' and 'competitiveness' movements of the 1980s and 1990s, particularly supported by business interests, mounted a new attack on the American rule, calling for state legislatures and Congress to replace it with the English 'loser pays' rule. Little headway was made, however, until the Republican 'Contract with America' burst upon the political scene with the GOP sweep of the congressional elections in 1994. One of the major planks of the Contract with America was the 'loser pays' rule.")

resorting to litigation in secular courts. He even praises the idea that it might be better for a Christian to forego legal action altogether rather than take his case to the civil courts. *** This is not to say that the civil courts are superfluous, but rather points to a greater principle: that community, forgiveness, and reconciliation ought to be higher priorities for Christians than material compensation.

* * *

And so Christians can be powerful *witnesses* to the word through living in a community of forgiveness. Consider the possibilities if it were a widespread practice among Christians to avoid at all costs the pursuit of tort litigation in lieu of a variety of other options. These alternative courses of redress include personal forgiveness and reconciliation, ecclesiastically facilitated mediation, private third-party conflict resolution, or even self-initiated restitution.³⁴

Rychlak goes on to point out the existence of and suggest the use of “Christian non-profit organizations that are dedicated to the private resolution of civil disputes.”³⁵ And, in fact, a number of such groups maintain websites on which they offer to provide training seminars and materials that can be used for dispute resolution wholly within the context of the religious community.³⁶

The second category of argument made by conservative Christian groups deals with why one should not bring suit, as distinct from the first which dictates who is to adjudicate disputes. Briefly, the claim is that the initiation of litigation demonstrates “emotions that are manifested as greed, enmity, unwillingness to forgive, retaliation, and envy...[which] alienate us not only from God but also from each other.”³⁷ Moreover, demanding that the wrongdoer pay compensation within the context of a system that is

³⁴ Ronald J. Rychlak, *Trial by Fury* 72-73 (2004).

³⁵ *Id.* at 73.

³⁶ See e.g. <http://www.icorvi.org/overview.php> maintained by Icorvi Ministries.

³⁷ Rychlak, *supra* note 34 at 70.

coercive strips the wrongdoer of the ability (and perhaps desire) to voluntarily elect to right the wrong that was committed, or at least feel the appropriate level of remorse.³⁸

B. Disqualifying Factors

Under some circumstances, there is a widespread perception that an injured person ought not to be able to bring suit despite the fact that the defendant's conduct is such that, under other circumstances, it would meet the applicable standard for the imposition of liability. In most of these cases, though not all, the circumstances are such that filing suit is amenable to an interpretation that the plaintiff is being greedy and/or is, in some sense, refusing to accept personal responsibility in attempting to cast blame on another, although other values may be implicated as well. As noted earlier, such a perception may be found: (1) where the plaintiff appears to be reneging on a freely made antecedent agreement; (2) where the plaintiff's decision to file suit appears to display a lack of gratitude; (3) where the plaintiff appears to be overreacting when judged under an objective standard, and (4) where the plaintiff's culpability seems disproportionately great relative to the defendant's culpability.

In this context, it is worth noting that the particular analytical convention employed by a court or legislature to preclude suit is often far less telling than the result. Thus, whether the plaintiff is barred by his or her own contributory or comparative negligence, or that same conduct is found to be a superseding cause, or barred by a no-duty rule, does not matter as long as the same social perception of forfeiture of rights or disqualification from suing is being expressed. In fact, it is not at all uncommon for the mode of judicial analysis to be tailored to make the result possible given other analytical

³⁸ *Id.* at 5. Also see Bayern, *supra* note 24 at 1714-16 (discussing explanations for the norm against litigation that are based on religious or moral grounds).

constraints. Thus, for example, if a legislature within a jurisdiction has adopted a rule of pure comparative negligence, the only way to deny recovery in its entirety might be to decide the case on the basis of “no-duty” or proximate cause.³⁹

1. Pre-Injury Agreement not to Sue

a. Consent – Express Agreement

If one who is about to engage in some activity expressly agrees in advance that he or she will not hold the defendant liable should things turn out badly, it is relatively easy to argue that reneging on the agreement evidences some type of greed, dishonesty or dishonorable behavior that should not be tolerated, let alone rewarded. Of course, the existence of such a perception may well depend on the perceived fairness of the agreement itself—whether it was entered into under circumstances where there was meaningful choice, whether the plaintiff understood the risks involved and whether the prevailing view at the time places a greater premium on the sanctity of private agreement or on rights that arise irrespective of agreement.

During the most of the late 19th and 20th Centuries, courts routinely refused to uphold such agreements where it was clear “that the effect of the contract [was]...to put [the plaintiff]...at the mercy of the other’s negligence.”⁴⁰ Thus, for example, in *Westlye*

³⁹ The judicial strategy of formulating doctrine that, in a purely formalistic sense, is not in conflict with other judicially formulated rules or legislative enactment is not confined to judges with any particular ideological agenda. For example, in *Spier v. Barker*, 363 N.Y.S.2d 916 (N.Y. Ct. App. 1974), the New York court dealt with plaintiff misconduct as a failure to mitigate damages and thereby avoided holding that no recovery was possible under the state’s rule of contributory negligence. Courts have also given the “ultimate outcome” instruction to juries under various circumstances to circumvent legislation that would have required a particular result. See Martin A. Kotler, *Reappraising the Jury’s Role as Finder of Fact*, 20 Ga. L. Rev. 123, 164-66 (1985)(criticizing the practice).

⁴⁰ Prosser & Keeton, *supra* note 26, § 68, at 482.

*v. Look Sports, Inc.*⁴¹ the court explained that an invalid release contained certain characteristics, namely:

“It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risks of carelessness by the seller or his agents.”⁴²

In other cases, however, where the activity in question was one in which the plaintiff desired to participate, but had no particular need for, typically some dangerous recreational activity, a release or covenant not to sue would be upheld.⁴³ Exculpatory agreements also were upheld in cases involving commercial actors based on the underlying assumption that they were free to allocate the risk of loss in commercial transactions however they saw fit.⁴⁴

⁴¹ 22 Cal. Rptr.2d 781 (Cal. App. 1993).

⁴² *Id.* at 790 (quoting *Tunkl v. Regents of University of California*, 32 Cal. Rptr. 33, 37 (Cal. 1962)).

⁴³ See e.g. *Kirashige v. Indian Dunes, Inc.*, 246 Cal. Rptr. 310, 315 (Cal. App. 1988)(dirt bike racing); *Curtis v. Hoosier Racing Tire Corp.*, 299 F.Supp.2d 777, 781 (N.D. Ohio 2004)(Ohio law)(stock car racing); *Johnson v. Paraplane Corp.*, 460 S.E.2d 398, 402 (S.C. App. 1995)(ultra light aircraft rental).

⁴⁴ See e.g. *Delta Airlines, Inc. v. McDonnell Douglas Corp.*, 503 F.2d 239, 244-45 (5th Cir. 1974)(Cal. law)(disclaimer between commercial parties upheld). Also see *Gym-N-I Playgrounds, Inc. v. Snider*, 158 S.W.3d 78, 85 (Tex. App. 2005)(holding that the enforceability of an “as is” cause in a commercial lease of realty depended upon “(1) the sophistication of the parties, (2) the terms of the “as is” agreement, (3) whether the “as is” agreement was freely negotiated, (4) whether the agreement was an arm’s length transaction, and (5) whether there was a knowing misrepresentation or concealment of a known fact.”).

Following the development of strict liability for defective products in the 1960s, however, courts displayed a reluctance to apply the same rules that were developed in negligence cases. Perhaps because strict liability in tort was largely developed to provide a basis of liability free from the contractual restrictions that had often precluded recovery under warranty law, courts were unwilling to recognize the validity of contractual releases even when the plaintiff freely and voluntarily entered the agreement.⁴⁵

The adoption of the Products Liability Restatement in 1998, however, may reflect the beginnings of a move to bring products cases into conformity with negligence law generally. It takes the position that such disclaimers are only presumptively invalid, recognizing the possibility that the presumption might be overcome.⁴⁶

Interestingly, the idea that prior agreement may preclude the assertion of a tort claim has been expanded by some courts to preclude suit—even in the absence of evidence of actual or apparent consent by the victim to bear the risk of harm arising out

⁴⁵ See *Westlye v. Look Sports, Inc.*, 22 Cal. Rptr.2d 781, 799-800 (Cal. App. 1993)(holding that it would violate public policy to honor disclaimers in products cases based on strict liability).

⁴⁶ Restatement (Third) of Torts: Products Liability, § 18, cmt. d (1998) states that:

The rule in this Section applies to cases in which commercial product sellers attempt unfairly to disclaim or otherwise limit their liability to the majority of users and consumers who are presumed to lack information and bargaining power adequate to protect their interests. This Section does not address whether consumers, especially when represented by informed and economically powerful consumer groups or intermediaries, with full information and sufficient bargaining power, may contract with product sellers to accept curtailment of liability in exchange for concomitant benefits, or whether such consumers might be allowed to agree to substitute alternative dispute resolution mechanisms in place of traditional adjudication. When such contracts are accompanied by alternative nontort remedies that serve as an adequate quid pro quo for reducing or eliminating rights to recover in tort, arguments may support giving effect to such agreements. Such contractual arrangements raise policy questions different from those raised by this Section and require careful consideration by the courts.

Also see McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp., 678 N.E.2d 1220, 1224 (Ind. 1997)(strict liability statute might be overcome “[i]f true negotiation of risk allocation occurs, and specific language is used, or proof of knowing assumption of risk is offered....”)(dictum).

of a given transaction—in those cases where there was only the theoretical opportunity to allocate the risk of harm prior to the occurrence. Thus, in the so-called “economic loss” cases, there is a body of authority that commercial actors who can be seen to have had a relatively equal bargaining position prior to the loss-causing event must allocate the risk contractually, rather than look to tort law for recovery.⁴⁷

While the rule seems intuitively defensible in transactions between commercial equals in cases involving economic loss, some courts, apparently intent on enacting tort reform from the bench,⁴⁸ have expanded its applicability to consumer transactions,⁴⁹ and claims involving foreseeable property damage in addition to pure economic loss.⁵⁰ Of course, whether these decisions will prove to be consistent with existing moral social intuition regarding the right to sue remains to be seen

b. Primary Voluntary Assumption of Risk

Traditionally, a plaintiff’s voluntary assumption of risk was established by showing that a plaintiff subjectively knew of and appreciated the nature and extent of risk created by the defendant’s conduct and, with such knowledge and appreciation, voluntarily elected to confront the risk. Though commonly designated a “defense,” with the burden of pleading and proof on the defendant, historically, it has been rather

⁴⁷ See e.g. *Chemitrol Adhesives, Inc. v. American Manufacturers Mut. Ins. Co.*, 537 N.W.2d 624, 631 (Ohio 1989).

⁴⁸ Discussing the issue of judicial tort reform, see generally, Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. Cin. L. Rev. 1189 (2006); Mark Geistfeld, *Constitutional Tort Reform*, 38 Loyola L.A. L. Rev. 1093 (2005).

⁴⁹ See e.g. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 673-74 (3rd Cir. 2002)(predicting PA law).

⁵⁰ See e.g. *Palmetto Linen Service, Inc. v. U.N.X., Inc.*, 205 F.3d 126, 129-30 (4th Cir. 2000)(S.C. law).

common either to treat it as a “duty” issue to be decided by the court as a matter of law,⁵¹ or decided by the court as a factual issue upon which reasonable people could not disagree.⁵²

Originally, the doctrine was clearly distinct from contributory negligence. Whereas the latter required the plaintiff to have behaved in an unreasonable manner, the former did not deal with reasonableness, but simple subjective consent to confront a known risk, whether such decision was objectively reasonable or not. The Second Restatement of Torts, however, initiated a major change to the traditional understanding of assumption of risk. Comment n to section 402A provides, in part, as follows:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defects in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in *voluntarily and unreasonably* proceeding to encounter a known danger, and commonly passes under the name of assumption of risk is a defense under this Section....⁵³

By adding the requirement that one “unreasonably” encounter the danger, the Restatement blurred the distinction between voluntary assumption of risk and contributory negligence and many courts followed suit. From the addition of a “reasonableness” element, it was only a short hop toward the elimination of assumption of risk as a distinct doctrine. Many courts reasoned that if one reasonably encountered a

⁵¹ See e.g. *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979)(explaining that “[t]he doctrine of primary assumption of the risk technically is not a defense, but rather a legal theory which relieves a defendant of the duty which he might otherwise owe to the plaintiff with respect to particular risks.”).

⁵² See e.g. *Benjamin v. Benjamin*, 439 N.W.2d 527, 529 (N.D. 1989)(concluding that the plaintiff “knew that protective eyewear was available and he should have been wearing it. Reasonable people cannot disagree that... [the plaintiff] was fully aware of the dangers involved in not using eye protection and, in failing to use such protection...assumed the risk of injury.”).

⁵³ Restatement (Second) of Torts, § 402A, cmt. n (1965)(emphasis added).

risk—running into a burning building to save a child, for example—such conduct should not preclude recovery.⁵⁴ On the other hand, if one unreasonably encountered a risk, such conduct would already be a defense under the rapidly emerging doctrine of comparative negligence. Therefore, courts proclaimed, there was no need to continue to recognize assumption of risk as a separate defense—it was simply subsumed by comparative negligence.⁵⁵

More recently, however, the doctrine has reemerged as a “no-duty” rule under the title of “primary assumption of risk.” Although sometimes the phrase is used to describe express (contractual) assumption of risk,⁵⁶ some courts have resurrected an implied version to bar recovery by persons who are injured in the course of confronting risks which are inherent in their chosen occupation or in particular activities in which they have elected to engage. Moreover, courts taking this position do so by finding, as a matter of law, no duty was owed to the plaintiff. Thus, no duty has been found to boxers injured in the course of a fight,⁵⁷ jockeys thrown from their mounts,⁵⁸ participants in non-

⁵⁴ See *Blackburn v. Dorta*, 348 So.2d 287, 291 (Fla. 1977).

⁵⁵ *Id.* at 292. Also see *Fell v. Zimath*, 575 A.2d 267, 268 (Del. Super. 1989); *Salinas v. Vierstra*, 695 P.2d 369, 374 (Idaho 1985); *Barrett v. Fritz*, 248 N.E.2d 111, 115 (Ill. 1969); *Rosenan v. City of Esterville*, 199 N.W.2d 125, 131 (Iowa 1972); *Parker v. Redden*, 421 S.W.2d 586, 592 (Ky. 1967); *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1125 (La. 1988); *Wilson v. Gordon*, 354 A.2d 398, 402 (Me. 1976); *Felguer v. Anderson*, 133 N.W.2d 136, 153 (Mich. 1965); *Boldac v. Crain*, 181 A.2d 641, 644 (N.H. 1962); *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 95-96 (N.J. 1959); *Williamson v. Smith*, 491 P.2d 1147, 1152 (N.M. 1971); *Wentz v. Deseth*, 221 N.W.2d 101, 104-05 (N.D. 1974); *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520 (Tex. 1978); *Sunday v. Stratton Corp.*, 390 A.2d 398, 402-03 (Vt. 1978); *Davis v. Globe Machine Mfg. Co.*, 684 P.2d 692, 697 (Wash. 1984).

⁵⁶ See *e.g.* *Mahoney v. USA Hockey, Inc.* 77 F.Supp.2d 859, 872 (N.D. Ohio 1999) (Ohio law) (contractual assumption of risk is a species of primary assumption of risk), *rev'd in part on other grounds*, 5 Fed. Appx. 450 (6th Cir. 2001).

⁵⁷ *Estate of Foronda v. Hawaii International Boxing Club*, 25 P.3d 826, 836 (Haw. App. 2001).

⁵⁸ *Turcotte v. Fell*, 474 N.Y.S.2d 893, 897 (N.Y. Sup. 1984).

contact or low-contact recreational activities,⁵⁹ veterinarian assistants bitten by dogs⁶⁰ and, of course, firefighters and other similar professional danger-confronters injured in the course of pursuing their professions.⁶¹

Assumption of risk as a matter of law has been resurrected in other contexts as well. For many years courts routinely applied the “patent danger rule” in cases where a negligently designed product caused injury to the user. Under the patent danger rule, product manufacturers were found only to have a duty to avoid designing a product that contained a hidden danger. As long as the dangerous quality of the product was open and obvious, the manufacturer was not negligent as a matter of law.⁶² Thus, there could be no suit if one was injured while using a machine that lacked a safety guard to shield blades or exposed moving parts, for example, since the danger of such a design was obvious to the user.

Primarily during the 1970s, the patent danger rule fell into judicial disfavor as courts recognized that, under a simple cost-benefit analysis, the addition of safety

⁵⁹ *Dilger v. Moyles*, 63 Cal.Rptr.2d 591, 593 (Cal. App. 1997)(holding that golf falls within the meaning of a sporting activity subject to primary assumption of risk because “[h]itting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. If every ball behaved as the golfer wished, there would be little ‘sport’ in the sport of golf.”); *Vecchione v. Middle Country Central School District*, 752 N.Y.S.2d 82, 84 (App. Div. 2002)(slip and fall during tennis practice was an assumed risk);

⁶⁰ *Nelson v. Hall*, 211 Cal. Rptr. 668, 672 (Cal. App. 1985).

⁶¹ Beyond police and firefighters, precisely who will be barred by the “firefighters’ rule” is a matter of some debate. *Compare* *Whiting v. Central Trux & Parts, Inc.*, 984 F.Supp. 1096, 1106 (E.D.Mich.1997) (holding that the fireman’s rule barred recovery by a customs inspector who was injured by a falling truck hood while inspecting a truck entering the country since “Whiting’s job is not distinguishable enough from that of a police officer to warrant the non-application of the rule.”) and *Lees v. Lobosco*, 625 A.2d 573, 576 (N.J.Super.Ct.App.Div. 1993)(holding “[f]ire fighters, police officers and paramedics all face very particular types of risk, directly related to the task of confronting emergencies and rescuing individuals, which are not present in the job of a building inspector.”).

⁶² *See e.g.* *Campo v. Scofield*, 95 N.E.2d 802, 803 (N.Y. 1950), *overruled by* *Micallef v. Miehle Co.*, 348 N.E.2d 571, 576 (N.Y. 1976).

features was frequently cost-justified in light of the “inevitable” injuries that would occur if such features were not provided. Thus, in negligence cases, all states now purport to reject the rule in its original form, with the sole exception of North Carolina.⁶³

This is not to say, however, that the issue has been put to rest. In failure-to-warn cases, courts routinely hold there is no duty to warn of obvious dangers apart from the question of whether the failure to warn was a causal factor in bringing about the plaintiff’s harm.⁶⁴ Furthermore, the patent danger rule has reappeared in design cases.⁶⁵

Section 402A of the Second Restatement of Torts provided for strict liability for commercial sellers of products which, when sold, were in a “defective condition unreasonably dangerous to the user or consumer....”⁶⁶ Both comments g (“Defective Condition”) and i (“Unreasonably Dangerous”) define those terms by using a consumer expectation test, i.e. whether the product was in a condition that presented a level of danger that would have been expected by an ordinary consumer.⁶⁷

⁶³ See *McCullum v. Grove Mfg. Co.*, 293 S.E.2d 632, 635 (N.C. App. 1982)(retaining the rule).

⁶⁴ See Restatement (Third) of Torts: Products Liability, § 2, cmt. j (1998)(stating “[i]n general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence.”); Also see *Burke v. Spartanics Ltd.*, 252 F.3d 131, 138-39 (2d Cir. 2001)(N.Y. law)(distinguishing the duty and causation issues raised by the obviousness of the danger).

⁶⁵ In addition to product design cases, similar principles may be applied in building design cases. Thus, for example, in *Pickens v. Tulsa Metropolitan Ministry*, 951 P.2d 1079 (Okla. 1997), the plaintiff, who had been sleeping on a retaining wall, sustained injuries when he fell off. His suit against the building owner and designing architect was dismissed on the basis that, even if he was an invitee, no duty was owed to him in light of the fact that the danger was open and obvious. *Id.* at 1064.

⁶⁶ Restatement (Second) of Torts, § 402A (1965).

⁶⁷ *Id.* Comment i provides, in part, that: “[t]he rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.” Comment g provides, in part, that: “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

Although many states have simply rejected the consumer expectation test in its entirety, some have retained it either as the sole test of “defectiveness” or, more commonly, as an alternative test to be used under some circumstances.⁶⁸ Some applications of the consumer expectation test, particularly if determined as a matter of law, are simply the patent danger rule under a new name.⁶⁹ Thus, for example, in *Todd v. Societe BIC, S.A.*,⁷⁰ the Seventh Circuit held that a disposable lighter that lacked a child-proof safety feature was not, as a matter of law, defective, regardless of whether the manufacturer could have added such a feature at a minimal cost. Predicting Illinois law, the court concluded: “the Illinois Supreme Court would not apply the risk-utility test to a simple but obviously dangerous product. An ordinary disposable lighter is such a product. Therefore, the district court was correct to determine that such a lighter is obviously dangerous, but not unreasonably dangerous, without reference to the risk-utility test.”⁷¹

Rather obviously, both the express and implied assumption of risk cases are amenable to a number of interpretations which are not, in the final analysis, in any sense

⁶⁸ See generally, Restatement (Third) of Torts: Products Liability, Reporters’ Notes to § 2 (1998)(collecting and discussing cases and articles).

⁶⁹ See Aaron D. Twersky, *In Defense of the Products Liability Restatement: Part I*, 8 Kan. J.L. & Pub. Pol’y 27, 32 (1998)(explaining that “the problem with the consumer expectations test is that it provides backdoor entry for the patent danger rule. The patent danger rule says that if a danger is open and obvious, that is, if consumers can expect the danger, the product is not defective. If you say that your test is a consumers’ expectations test, what’s sauce for the goose is sauce for the gander. If a product is defective because it doesn’t meet consumer expectations, then for the most part you have to expect the courts are going to say, it’s not defective if it meets consumer expectations. But that’s just a backdoor way of saying that the patent danger rule governs in product design cases. The patent danger rule is simply wrong. An industrial machine that is unguarded at the point of operation has dangers that are open and obvious. If it’s reasonable to put a safety guard there, that case ought not to be barred merely because the danger is obvious.”).

⁷⁰ 21 F.3d 1402 (7th Cir. 1994)(Ill. law), *cert. denied*, 513 U.S. 947.

⁷¹ *Id.* at 1412.

mutually exclusive of one another. Certainly, by deciding the plaintiff is not entitled to recover as a matter of law, the courts display distrust of the civil jury.⁷² Moreover, there is clearly a pro-defendant/pro-business flavor throughout the cases.⁷³ It is more important for our purposes, however, to recognize the power of the decisions lies in the very strong, though largely intuitive, appeal of the voluntary assumption of risk doctrine. The doctrine's appeal is rooted in the sense that the plaintiffs are asking for money even though, by word or by act, they previously represented that they would not. In renegeing on their promise, albeit implicit, they open themselves up to a charge of greed or dishonorable behavior in some sense. At the very least, the bringing of a lawsuit may be interpreted as a refusal to accept personal responsibility for the consequences of one's own decisions, and the insistence on the importance of personal responsibility is one of the defining features of conservative Christianity.⁷⁴ In order to conform tort doctrine to social moral intuition, some courts have reached back and seized upon doctrine that predated the liberalization of tort law in the 1960s and 1970s and breathed new life into it. This would not be found acceptable if the values underlying the doctrine's application were not widely held and if they had not remained constant over time.

⁷² See *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865-66 (7th Cir. 1999)(asserting that tort law lacks "screens against the vagaries of the jury.").

⁷³ See *e.g.* Werwinski, *supra* note 49 at 680-81 (expressing reluctance to adopt rules that would expose "manufacturers to substantially greater liability.").

⁷⁴ See Lienesch, *supra* note 14 at 98 ("According to [Amway Corp. President and director of the Christian Freedom Foundation, Richard] DeVos, accountability requires personal responsibility, 'the demand that each individual takes full responsibility for his choices and actions, the willingness to accept the rewards or punishments that follow as natural consequences of his behavior.'").

2. Lack of Gratitude

As I discussed at some length years ago, there is a rather clear connection between a defendant's economic motivation underlying an activity and the sense of the plaintiff's entitlement to sue if injured by negligence committed in the course of that profit-seeking activity.⁷⁵ Thus, traditional tort principles imposed a duty on common carriers, innkeepers, inviters and others whose conduct was profit-seeking.

The flip side of this traditional view was the creation of immunities favoring altruists or those perceived to be motivated by altruism. Sometimes the immunities were created by common-law judicial rulemaking and sometimes by legislative enactment. In either case, the immunities seemed to reflect a very real social consensus that there was something unseemly in the conduct of accepting a gift and then turning around to sue the donor.⁷⁶

Converting this view into tort doctrine, legislatures during the 1920s and 1930s enacted automobile guest passenger legislation precluding suit by the passenger who accepted a ride in cases where the driver's conduct was "merely" negligent.⁷⁷ Much

⁷⁵ Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 Vand. L. Rev. 63 (1988).

⁷⁶ This view tends to fit with the conservative Christian conception. See Liensch, *supra* note 14 at 129 (asserting that "[r]eligious conservatives see charity as a reciprocal relationship in which both giver and receiver have responsibilities to one another. In the case of recipients, they are expected not only to be grateful, but also to demonstrate their gratitude by associating with the church community, adopting its ways of living, and most important, becoming productive. * * * Assuming reciprocity, they do not hesitate to require responsibility from those they support. In fact, their expectations are high: 'Work is required.... Diligence is required.... Family participation is required...obedience is required. Submission to the standards of the Kingdom is required...responsibility must be enforced.'").

⁷⁷ Prosser & Keeton, *supra* note 26, § 34, 215-17.

along the same lines, Good Samaritan law protected physicians and other health care professionals who came to the victim's rescue.⁷⁸

The old charitable immunity doctrine, however, was perhaps the clearest illustration of the idea. Although there were numerous variations on the doctrine, in essence, it was a judicially created rule that immunized charitable hospitals and the like from suit by those to whom services were negligently provided. By the 1950s, however, the obvious unfairness of the rule—not to mention its blatant discriminatory impact on the economically disadvantaged—led to its judicial rejection in a majority of states.⁷⁹

Nevertheless, the desire to continue to provide protection for the altruist remains evident. The federal Volunteer Protection Act of 1997⁸⁰ immunizes volunteers at nonprofit organizations from personal tort liability.⁸¹ Under North Carolina law, those who donate food to nonprofits are immune from liability based on negligence,⁸² as are the nonprofits themselves.⁸³ A couple of states have enacted legislation capping the damages

⁷⁸ See generally, Eric A. Brandt, Note, *Good Samaritan Laws—The Legal Placebo: A Current Analysis*, 17 Akron L. Rev. 303 (1983)(reporting that “[s]ince 1959 every state, as well as the District of Columbia, has adopted some form of Good Samaritan legislation.”).

⁷⁹ See e.g. *Bing v. Thunig*, 163 N.Y.S.2d 3, 11 (1957)(concluding that “[t]he rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded.”); Also see Restatement (Second) of Torts, § 895E (1979)(rejecting the rule).

⁸⁰ 42 U.S.C.A. § 14501 et seq.

⁸¹ See Andrew F. Popper, *A One-Term Tort Reform Tale: Victimized the Vulnerable*, 35 Harv. J. on Legis. 123 (1998).

⁸² N.C. Gen. Stats. § 99B-10(a)(“...any person, including but not limited to a seller, farmer, processor, distributor, wholesaler, or retailer of food, who donates an item of food for use or distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food....”).

⁸³ N.C. Gen. Stats. § 99B-10(b).

available against nonprofits⁸⁴ and some states continue to recognize some variation of the old charitable immunity doctrine.⁸⁵

3. Claim Does Not Meet Objective Standard

Largely based on the belief that courts could not distinguish between fraudulent and genuine claims of emotional distress, there had long been a refusal to recognize a cause of action for negligent (or for that matter intentional) infliction of emotional distress in cases where the distress was not a consequence of physical injury. While eventually most jurisdictions eliminated their complete bar to such claims, various special rules were instituted to provide some assurance that the plaintiff was actually suffering from the distress alleged. Thus, as all first-year law students learn, special tort rules—the “impact rule,” “zone of danger rule,” and/or “physical manifestation” requirements—were developed in the so-called “direct infliction” cases, while, in the by-stander cases, the “zone of danger rule” or “three proximities test” was used.⁸⁶

In 1980, however, perhaps under the belief that the field of psychiatry had advanced to the point where fraudulent claims could be detected,⁸⁷ California rejected the

⁸⁴ Mass. Gen. L. Ann. 231 § 85k (1987)(\$20,000 cap); Tex. Health & Safety Code § 311.0456 (2005) and Tex. Civ. Pract. & Rem. Code § 101.023 (1997)(\$250,000 per person).

⁸⁵ *Low v. Insurance Co. of North America*, 2005 WL 343667 (Ark. 2006); *Harrell v. Louis Smith Memorial Hosp.*, 397 S.E.2d 746, 750 (Ga. App. 1990); *Abraham v. Reiss*, 638 A.2d 743, 748 (Md. 1994); N.C.G.S.A. § 1-539.10 (2005); N.J.S.A. § 2A:53A-7 (1995); *Coulombe v. Salvation Army*, 790 A.2d 593, 595-96 (Me. 2002); *Williams v. First United Church of Christ*, 309 N.E.2d 924, 926 (Ohio 1974); *Ola v. YMCA of South Hampton Roads, Inc.*, 621 S.E.2d 70, 72 (Va. 2005); Tex. Civ. Pract. & Rem. Code §§ 84.001-.008 (2003).

⁸⁶ *See generally*, Dan B. Dobbs, *The Law of Torts*, §§ 308-09, 835-41 (2000).

⁸⁷ *Molien v. Kaiser Foundation Hospitals*, 167 Cal. Rptr. 831, 835 (Cal. 1980)(asserting “that medical science and particularly the field of mental health have made much progress in the 20th century is manifest....”); *Also see generally*, Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. Kan. L. Rev. 115, 135-36 (1993)(citing the reluctance to permit emotional distress claims as “[a]nother reflection of tort law's coolness to psychiatry and psychology....”)

idea that special tort limitations were necessary in the direct infliction emotional distress cases and, in *Molien v. Kaiser Foundation Hospitals*, permitted recovery for negligently inflicted emotional distress in the absence of physical consequences and under circumstances where application of any of the other tests would have made no sense.⁸⁸

Only thirteen years later, in *Potter v. Firestone Tire & Rubber Co.*,⁸⁹ a very different California Supreme Court backed away from *Molien* and, in a case where four land owners who were exposed to carcinogens and other toxic substances that the defendant negligently permitted to contaminate their water, held that the plaintiffs' emotional distress based on the fear of contracting cancer in the future was not compensable unless they could show contracting the disease was more likely than not to occur.⁹⁰ Other states went further and simply held such claims were not actionable at all in the absence of physical harm.⁹¹ The fact that California and other states that followed its lead have now retreated from the apparent liberalization of tort law in this area has been cited as an illustration of how changing politics and new judicial appointments resulted in the in the conservative shift of legal doctrine.⁹²

Again, however, that explanation may oversimplify matters. To understand more fully what has occurred in this field some distinctions need to be made. In *Molien*, the plaintiff's wife was negligently diagnosed by Kaiser physicians; wrongly told she was

⁸⁸ *Molien*, *supra* note 87, 167 Cal. Rptr. at 838-39.

⁸⁹ 25 Cal. Rptr.2d 550 (Cal. 1993).

⁹⁰ *Id.* at 571.

⁹¹ *See e.g.* *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. App. 1987); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 194 (Ky. 1994); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996).

⁹² *See e.g.* *Schwartz*, *supra* note 3 at 676-77.

suffering from a sexually transmitted disease; and told to inform her husband. This led to mutual accusations of infidelity and, eventually, to divorce.⁹³ The plaintiff sought recovery for the expenses of marital counseling incurred before the break up and damages for his emotional distress, even though he displayed no physical manifestation of the distress.⁹⁴ In other words, given the facts surrounding the claim, there was neither any hint of subjective dishonesty on the plaintiff's part and, perhaps more importantly, under an objective test, it was clear that virtually anybody would have suffered mental anguish had they undergone a similar experience. Of course, those who place a high value on monogamous heterosexual marriage as an institution might be particularly sympathetic towards the plaintiff.

The exposure to toxic substance/cancerphobia cases are different. Even if the courts are satisfied with the subjective honesty of the plaintiffs' claims that that they are severely distressed by the fear of contracting cancer at some future date, there remains a serious question as to whether or not they are overreacting. In fact, that rather clearly appears to be the opinion of the court in *Potter* which stressed the obvious fact that everybody is at risk of contracting cancer in the future from numerous sources, known and unknown.⁹⁵ In other words, the denial of the plaintiffs' cause of action is similar to the way that idiosyncratic plaintiffs are treated in a variety of cases.

⁹³ 167 Cal. Rptr. at 832-33.

⁹⁴ *Id.* at 838.

⁹⁵ 24 Cal. Rptr.2d at 566 (asserting that “[a] carcinogenic or other toxic ingestion or exposure, without more, does not provide a basis for fearing future physical injury or illness which the law is prepared to recognize as reasonable. The fact that one is aware that he or she has ingested or been otherwise exposed to a carcinogen or other toxin, without any regard to the nature, magnitude and proportion of the exposure or its likely consequences, provides no meaningful basis upon which to evaluate the reasonableness of one's fear. For example, nearly everybody is exposed to carcinogens which appear naturally in all types of foods. Yet ordinary consumption of such foods is not substantially likely to result in cancer. (See Ames & Gold,

In the offensive battery cases, for example, the plaintiff who takes offense at being touched under circumstances in which most people would not is denied recovery, except possibly upon proof that the defendant knew of his or her idiosyncrasy and chose to exploit it.⁹⁶ While it may be possible to explain these cases in terms of implied consent (or “assumed consent”)—to say that one may be assumed to consent “to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life...,”⁹⁷—“consent” seems to add little to the understanding of these cases. Instead, it seems preferable to simply acknowledge that the genuineness of the plaintiff’s claim is judged under an objective test. When one can claim to be offended, or when one can claim to be distraught and entitled compensation because of it,⁹⁸ is judged by whether other reasonable persons would be similarly offended or distraught.

It is for this same reason that recovery for emotional distress has been permitted by most courts in the HIV exposure cases.⁹⁹ In those cases, the plaintiff, often a nurse or other healthcare provider, has been negligently exposed to blood that might be infected with HIV. Although medical advances have made HIV infection somewhat more

Too Many Rodent Carcinogens: Mitogenesis Increases Mutagenesis (1990) 249 Science 970, 971, fn. 10 [observing that apples, celery, coffee, carrots, cauliflower, grapes, honey, orange juice, potatoes and many other common foods naturally produce carcinogenic pesticides that have been found to induce tumors when administered to rodents in large doses.] Nor is the knowledge of such consumption likely to result in a reasonable fear of cancer.”).

⁹⁶ Prosser & Keeton, *supra* note 26, § 9 at 42.

⁹⁷ *Id.*

⁹⁸ The Supreme Court has suggested that damages in emotional distress cases, even if purporting to be compensatory, are actually punitive, or at least have a punitive quality. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).

⁹⁹ *See e.g.* *John & Jane Roes, 1-100 v. FHP, Inc.*, 985 P.2d 666, 668 n.9 (Hawaii 1999); *Hartwig v. Oregon Trail Eye Clinic*, 580 N.W.2d 86, 94 (Neb. 1998); *Madrid v. Lincoln County Medical Center*, 923 P.2d 1154, 1163 (N.M. 1996).

treatable and, therefore, less scary than it used be, at the time most of these cases were decided, HIV infection was widely regarded as a death sentence. It hardly seems surprising in those cases that there was no sense, expressed or felt, that the plaintiffs were overreacting.¹⁰⁰

To a somewhat lesser extent, the same sense that general damages for pain and suffering—so-called “noneconomic damages”—lack the requisite objective verifiability may provide at least a superficial justification for a legislatures’ determination to cap non-economic damages at a fixed amount.¹⁰¹ This argument, of course, is only defensible as an abstract proposition since an examination of the extent of intangible loss suffered in many catastrophic injury cases makes it immediately apparent that the caps frustrate any compensation or corrective justice goal. Nevertheless, if one starts with a prejudice against litigation generally and with a distrust of plaintiffs (and their attorneys), capping noneconomic compensatory damages can only be justified by pointing to the difficulty of justifying a specific amount.¹⁰² More importantly, public willingness to

¹⁰⁰ Importantly, however, recent cases express the insistence on objective verifiability by formulation of broad “no-duty” rules—precluding all suits in which the verifiability problem exists, rather than determine its existence on a case-by-case basis.

¹⁰¹ See Rustad, *supra* note 9 at 706-07 (“Tort reformers imply that pain and suffering damages are frivolous, granted for phantom or imaginary pain. The common law, however, has always recognized the compensability of mental or emotional distress. The common law did not place limitations on pain and suffering because such injuries could not be precisely measured. Noneconomic damages are only noneconomic in the sense that they ‘are not realized in pecuniary form.’ A loss that does not result in lost income is nevertheless a loss.”)

¹⁰² Of course, it is also possible, or even likely, that the damage cap reflects nothing more than greed implemented through the exercise of raw political power. See Rustad, *supra* note 9 at 718-19 (asserting “[t]he term ‘tort reform’ no longer connotes greater corporate accountability. Tort reform has become the rallying cry of powerful corporations who wish to shift costs back to the injured victim, the victim's family and the taxpayer. Their goal is to reduce their overall legal liability. Capping noneconomic damages means that wrongdoers do not bear the full economic costs of their actions.”).

tolerate (or endorse) such caps must be founded on the sense that the amount of noneconomic damages claimed is simply not subject to objective verification.¹⁰³

4. Plaintiff's Conduct Judged More Culpable than Defendant's

a. Degrees of Culpability

No one disputes that, depending on the specific circumstances, there is a broad range of judgments that can be rendered in assessing the “goodness” or “badness” of human conduct. At one extreme, someone’s conduct may so nearly approach the social ideal as to qualify the actor for public commendation. On the other hand, a person’s conduct may be so bad—culpable, egregious and/or evil—that there would be general agreement that it justly deserves condemnation. Of course, at both extremes and everything in between, the circumstances under which one acts and the criteria of the assessors must be taken into account. While such judgments may vary from place to place and change over time, assessments of injury-causing conduct seem to be relatively stable, changing only by degree. Thus, for example, while it is clear that drinking and driving is now judged more harshly than it was only a few decades ago,¹⁰⁴ it was never thought to be less than negligent unless the intoxication was involuntary.¹⁰⁵

¹⁰³ See Marshall S. Shapo, *Tort Law and Culture* 64-65 (2003) (“The caps legislation represents a compromise on the issue of whether pain and suffering is a compensable ‘injury,’ implicitly recognizing that it is but placing a limit on the degree of recognition. The statutory caps, which are themselves arbitrary constraints on what critics of pain and suffering damages deem an essentially arbitrary award, represent a rough and ready social judgment about justice. Against the background in ancient precedent for such awards, across many cultures and through many centuries, that pain and suffering as a compensable loss is embedded in the culture and that many people think that awards in the millions twist the symbolism, if not the reality, of pain too far for social comfort.”).

¹⁰⁴ See H. Laurence Ross, *Social Control through Deterrence: Drinking and Driving Laws*, 10 Ann. Rev. of Soc. 21, 24 (1984) (describing the earlier “view, prevalent in legal circles, that drunk driving is ‘routine and ordinary.’”); and Lewis P. Katz and Robert D. Sweeney, Jr., *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 Case W. Res. L. Rev. 239, 240 (1984) (asserting that “[t]he frequency of drunk driving creates a tendency to view this criminal behavior without the condemnation warranted by its...consequences. Until recently, the law’s treatment of drunk drivers has been shaped by

In any event, tort law expresses such judgments by decisions of whether to impose liability and to a lesser extent in the size of the judgment for which a culpable actor is responsible. Nevertheless, it is readily apparent that tort categories are, at best, crude and imprecise instruments for expressing such assessments. Sometimes, it is claimed, the categories are essentially meaningless. Thus, for example, whether a party's conduct was deemed "negligent" or "grossly negligent" has been said to carry no formal legal consequence¹⁰⁶—either was a sufficient basis for liability when used to characterize the defendant's conduct unless the plaintiff was also negligent or grossly negligent in which case the claim was barred under the doctrine of contributory negligence.¹⁰⁷ A formal determination of "recklessness," on the other hand, may be outcome-determinative even though distinguishing it from gross negligence involves some precision in definition that many courts have been unwilling or unable to articulate.¹⁰⁸

Leaving aside, for the moment, the doctrinal importance of the "recklessness" category, it is necessary to understand that an assessment of "negligent" conduct cannot be made, in a vacuum. It is necessarily judged not only in light of the circumstances

this tolerant attitude, and enforced and administered by police, prosecutors and judges affected by a 'there but for the grace of God go I' syndrome.").

¹⁰⁵ See Prosser & Keeton, *supra* note 26, § 32 at 178 n.40 ("Involuntary, non-negligent intoxication, as where the old lady who never has tasted whiskey is given a cup of 'tea,' is held to be treated like illness or physical disability.").

¹⁰⁶ *Id.* at § 34 at 211 (asserting "the difficulty of classification, because of the very real difficulty of drawing satisfactory lines of demarcation...justifies the rejection of the distinctions in most situations.").

¹⁰⁷ While it is undoubtedly true that the size of the award is informally influenced by the extent to which the judge or jury disapproves of the defendant's conduct, formal tort doctrine refuses to sanction this practice, insisting that compensatory damages correlate with the amount of the plaintiff's harm, rather than the culpability of conduct that gave rise to the plaintiff's need for compensation.

¹⁰⁸ Characterizing a party's conduct as "willful," "wanton," and/or "reckless" was commonly considered a basis for liability or a defense distinct from negligence. The issues presented by this characterization are taken up later. See notes 195-216 and accompanying text.

surrounding it,¹⁰⁹ but also relative to other actors' conduct. In other words, though often not recognized, or at least explicitly articulated as part of the formal doctrine, one of the circumstances that affect the assessment of the culpability of an actor's conduct is the other participants' contributing conduct.¹¹⁰ The result is that it is not unusual to find that liability will be imposed where the defendant's conduct is deemed substantially more culpable than the plaintiff's, but not where the plaintiff is deemed to have been the more culpable actor.

(1) Plaintiff's Relative Culpability as a Bar – Pre-1960s

Prior to the widespread adoption of principles of comparative fault, a failure to exercise sufficient care for one's own safety was treated more harshly than a failure to exercise care for another's safety, at least when both types of conduct contributed to the same loss. Although contributory negligence as a complete bar to recovery was undoubtedly tied up with proximate cause notions dealing with broken chains of causation,¹¹¹ it remained an absolute bar to recovery long after the notion of proximate cause as objectively determinable chains of causation had been discredited.¹¹²

¹⁰⁹ The so-called "emergency" doctrine, for example, reflects the recognition that conduct that would be deemed negligent under one set of circumstances would not be considered negligent (or "as negligent") under another.

¹¹⁰ The same relativity exists in judging criminal cases where the assessment of the defendant's culpability may turn, in whole or part, on the conduct of the victim. See Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 Buff. Crim. L. Rev. 385 (2005).

¹¹¹ See e.g. Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. Chi. L. Rev. 1175, 1191 (1986) (explaining that "[s]everal early doctrines worked to limit the temporal dimension. First, under the traditional narrow view of causation, the negligence of the plaintiff could sever the connection between the defendant's conduct and the loss, as it did under a 'last wrongdoer' rule. Second, and more generally, the theory that regarded contributory negligence as an absolute bar to recovery had the effect of reducing the length of the causal chains, for except in rare cases the plaintiff's negligence occurred at or persisted until the very instant of the accident.").

¹¹² See generally, Morton J. Horwitz, "The Doctrine of Objective Causation" in *The Politics of Law: A Progressive Critique* 361 (David Kairys, ed., 1990).

There is some old authority that barring recovery in cases where a plaintiff's misconduct was contributing was penal in nature.¹¹³ If this was the underlying justification for the doctrine, it would lend some support to a claim that a failure to protect oneself was deemed more egregious than a failure to protect another and the greater culpability acted to preclude recovery. In any event, since one is inevitably a foreseeable victim if one fails to exercise care for one's own safety, issues concerning the existence of a duty to oneself do not arise, though the inability to foresee harm to the plaintiff might be put forth as a basis for exculpating a defendant.¹¹⁴

Notwithstanding the widespread adoption of contributory negligence, there were both formal and informal mechanisms for permitting a negligent plaintiff to recover when his or her misconduct was viewed as relatively minor in comparison with that of the defendant. First, commentators have long maintained that, in cases where the trial court did not find contributory negligence as a matter of law, juries often ignored the formal legal doctrine of contributory negligence when the plaintiff's conduct was viewed as relatively less culpable.¹¹⁵ Second, under the doctrine of last clear chance, defendants were required to pay negligent plaintiffs who had put themselves or their property in a

¹¹³ See Prosser & Keeton, *supra* note 26, § 65 at 452 ("It has been said that it has a penal basis, and that the plaintiff is denied recovery to punish him for his own misconduct.") (citing *Wakelin v. London & S. W. R. Co.*, 12 A.C. 41, 45 (1886) (Lord Halsbury)).

¹¹⁴ See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928); Also see Ernest J. Weinrib, *Causation and Wrongdoing*, 63 Chi.-Kent L. Rev. 407 (1987) (providing what is arguably the best explanation of the duty principle developed by Judge Cardozo in *Palsgraf*).

¹¹⁵ The extent to which such informal mechanisms limited the effect of the contributory negligence doctrine is a matter of some disagreement. Compare Friedman, *supra* note 2 at 411-13 and Horwitz, *supra* note 2 at 94-97 (viewing the common law rules as treating plaintiffs harshly while favoring defendants) and Gary T. Schwartz, *The Character of Early American Tort Law*, 36 U.C.L.A. L. Rev. 641, 665 (1989) (examining 19th century tort cases and finding "judicial concern for the risks created by modern enterprise and a judicial willingness to deploy liability rules so as to control those risks [and]...judicial solicitude for the victims of enterprise-occasioned accidents and a judicial willingness to resolve uncertainties in the law liberally in favor of those victims' opportunity to secure recoveries.").

position of danger when the circumstances were such that the defendant still had the opportunity to avoid the accident.¹¹⁶ That this represents an assessment of the relative culpability of the parties is even more clear in those jurisdictions that distinguished between “conscious” and “unconscious” last clear chance. In cases where the defendant consciously discovered the negligent plaintiff’s plight and still failed to avoid hurting him or her, there was clearly a higher level of fault that justified the imposition of liability—overcoming, as it were, the normal judgment that a failure to protect oneself was more serious.

Under South Dakota law, the idea that contributory negligence is to be a complete bar except in cases where the plaintiff’s negligence is “slight” in comparison to the “gross” negligence of the defendant or defendants was formalized by statute.¹¹⁷ In cases presenting the need for decision under the “last clear chance” doctrine, the relative fault of the plaintiff will be assessed in light of whether the defendant knew of his peril and had the opportunity to avoid the harm. Thus, for example, in *Good Low v. United States*,¹¹⁸ a tribal police officer speeding through a field searching for a fleeing suspect was deemed negligent, but not grossly negligent in comparison to the plaintiff, since “there is no evidence that...[the officer] actually discovered that Good Low was in his

¹¹⁶ See generally, Prosser & Keeton, *supra* note 26, § 66 at 462-68 and G. Edward White, *Tort Law in America: An Intellectual History* 45-50, 83-87, 158-61, 166-67 (1980).

¹¹⁷ See S.D.C.L. § 20-9-2 (1998); *Woods v. City of Crooks*, 559 N.W.2d 558, 560 (1997)(explaining that “[u]nder this statute, the plaintiff’s negligence is compared with the negligence of the defendant, not with ‘the ordinarily prudent person.’”).

¹¹⁸ 428 F.3d 1126 (8th Cir. 2005)(S.D. law).

path...[until he] was only a few feet away from Good Low and could not stop his vehicle before striking him.”¹¹⁹

(2) Plaintiff’s Relative Culpability as a Bar—Post-1970s

In one sense, the judicial and legislative move away from contributory negligence in the 1960s and 1970s in favor of the formal adoption of comparative negligence served to formalize the informal practices which preceded it. Of course, given that many of the informal exceptions to the rule of contributory negligence required juries to ignore or defy the court’s instructions, the doctrinal change undoubtedly resulted in much greater consistency in the application of the rules.

Even after comparative negligence replaced contributory negligence in most places, a majority of those states that adopted comparative negligence continued to penalize the highly culpable plaintiff by instituting systems of modified comparative negligence that denied the plaintiff any recovery in cases where, depending on the particular scheme adopted, his or her fault was deemed to be either equal to or greater than that of the defendant. Only about a dozen states opted for a pure comparative negligence system under which a highly culpable plaintiff could demand payment from a less culpable defendant.¹²⁰

One might have thought that the adoption of comparative negligence signaled the beginning of an era in which comparative fault principles—that a defendant whose negligence in any degree would be liable to the plaintiff in some amount, albeit short of

¹¹⁹ *Id.* at 1130.

¹²⁰ Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Application to Negligence Actions Generally*, 78 A.L.R.3d 339 (1977)(providing a state-by-state breakdown).

full compensation—would become dominant in tort doctrine. This, however, has not occurred, at least to the extent one might have anticipated. In fact, much of the post-1970s tort reform efforts seem to be directed toward ensuring that the highly culpable plaintiff be barred from any recovery.

Thus, for example, the federal “Common Sense Product Liability Legal Reform Act of 1996,” a bill that was prevented from becoming law only by President Clinton’s veto, contains a provision making the plaintiff’s intoxication a complete defense provided that, as a result of the intoxication, the “claimant... was more than 50 percent responsible for such [harm causing] accident or other event.”¹²¹ The Conference Report explains:

Both H.R. 956 and the Senate amendment provide a complete defense to a product liability action in situations in which a claimant, under the influence of alcohol or drugs, is more than fifty percent responsible—as a result of such influence—for the accident or event resulting in the harm he or she sustains. A society that seeks to discourage alcohol and drug abuse should not allow individuals to collect damages when their disregard of such an important societal norm is the primary cause of accidents or events.¹²²

Some state tort reform legislation contains similar provisions.¹²³ The general attitude, neatly summed up in a Pennsylvania case, is that a demand for compensation for harm caused largely by the plaintiff’s own serious misconduct is a display of “unmitigated temerity.”¹²⁴

¹²¹ H.R. 956, § 104 (a)(1) and (2) and S. 565, § 104 (a)(1) and (2), 104th Cong., 1st Sess. (1995); modified and renamed “Common Sense Product Liability Reform Act of 1996, H.R. 956 Conference Report, House Rpt. 104-481, 104th Cong. 2nd Sess. (1996)(vetoed May 2, 1996).

¹²² Conference Report on HR 956, Common Sense Product Liability Legal Reform Act of 1996 (House of Representatives, March 14, 1996).

¹²³ See e.g. Fla. Stat. Ann. § 768.36 (2) (1999) and Wash. Rev. C. § 5.40.060 (1987).

¹²⁴ *Lewis v. Miller*, 543 A.2d 590, 593 (Pa. Super. 1988)(Popovich, J. concurring). Also see *Allen v. County of Westchester*, 492 N.Y.S.2d 772, 776 (1985)(“To allow recovery in favor of one who has voluntarily procured a quantity of liquor for his or her own consumption with full knowledge of its possible

The identical principles can be seen in cases involving bartenders. Though since modified by the legislature, at one time New Mexico law provided:

No person who was sold or served alcoholic beverages while intoxicated shall be entitled to collect any damages or obtain any other relief against the licensee who sold or served the alcoholic beverages unless the licensee is determined to have acted with gross negligence and reckless disregard for the safety of the person who purchased or was served the alcoholic beverages.¹²⁵

Cases, however, had interpreted legislation so as to allow a third party user of the highway who was injured by an intoxicated motorist to maintain an action against a bartender based on negligence in serving the intoxicated motorist to the point of impairment.¹²⁶ Explaining the rationale for this law, in *Sanchez v. San Juan Concrete Co.*,¹²⁷ the court stated:

What is the basis for the balance struck in the...[legislation]? Why is a third party injured by the patron's intoxication permitted to recover for the tavernkeeper's simple negligence whereas the patron cannot? The tavernkeeper is equally culpable in either circumstance—the same conduct, serving an intoxicated patron, is involved in each. The injury to the patron is no less foreseeable than injury to the third party: it is probably more foreseeable. The reason for the distinction between the patron and the third party is simply the reprehensibility of the patron's conduct.¹²⁸

While many of the cases of egregious misconduct involve drug or alcohol consumption, a finding that the plaintiff's conduct is sufficiently culpable to preclude

or probable results 'would savor too much of allowing...[such a] person to benefit by his or her own wrongful act.' (quoting *Buntin v. Hutton*, 1917 WL 2452 *3 (Ill. App. 1917)).

¹²⁵ N.M.S.A. 1978 § 41-11-1(B).

¹²⁶ *Lopez v. Maez*, 651 P.2d 1269, 1275 (N.M. 1982); *Trujillo v. Trujillo*, 721 P.2d 1310, 1311 (N.M. App. 1986).

¹²⁷ 943 P.2d 571 (N.M. App. 1997).

¹²⁸ *Id.* at 576 (also noting that "the statute finds it even more distasteful to forbid recovery when the tavern keeper is particularly culpable—having "acted with gross negligence and reckless disregard for the safety" of the patron.").

recovery is not so limited—almost any truly stupid behavior will do.¹²⁹ Thus, in cases where plaintiffs attempted to lower themselves by means of “old worn rope,”¹³⁰ dived into obviously shallow water,¹³¹ placed their hands into spinning lawn mower blades¹³² or used volatile chemicals in an attempt to clean up a mess created by the defendant,¹³³ courts have had little problem in concluding that the plaintiffs’ conduct was the sole proximate cause of the harm sustained.

III. The Right Not to be Sued

To this point, the discussion has focused on when it appears inappropriate for an injured plaintiff to assert a claim against another who would be legally responsible but for the conduct of the plaintiff leading up to the loss or based on common perceptions regarding his or her decision to sue. In other words, the legal responsibility of the defendant has been treated as a given. Additionally, while this Article’s primary focus is on how perceptions of individuals’ conduct affects doctrine, many other values are reflected in the doctrine as well. Thus, the importance of individual autonomy is seen in the principle of nonfeasance immunity and, to the extent that private property rights are viewed as an integral part of autonomy,¹³⁴ in the immunity of occupiers of land from suit

¹²⁹ One commentator coined the phrase “dumb as a matter of law,” which seems to aptly describe the standard. See Christopher Dove, *Note, Dumb as a Matter of Law: The Superseding Cause Modification of Comparative Negligence*, 79 Tex. L. Rev. 493, 495 (2000).

¹³⁰ Mack v. Altmans Stage Lighting Co., Inc., 470 N.Y.S.2d 664, 666 (App. Div. 1984).

¹³¹ Caraballo v. United States, 830 F.2d 19, 20, 22 (2nd Cir. 1987)(N.Y. law); Zieker v. Orchard Park, 538 N.Y.S.2d 671, 672 (App. Div. 1989), *rev’d* 551 N.Y.S.2d 898, 899 (N.Y. 1989).

¹³² Kuras v. International Harvester Co., 820 F.2d 15, 18 (1st Cir. 1987)(R.I. law).

¹³³ Falcone v. City of New York, 566 N.Y.S.2d 352, 353 (App. Div. 1989).

¹³⁴ See generally Richard A. Epstein, *Takings: Private Property and the Eminent Domain* (1985); and James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992).

by trespassers.¹³⁵ Against that background, however, judgments regarding conduct play a major role in the determination of liability rules.

The first set of conduct-related values, of course, is simply the flip side of the social values that bar the plaintiff in cases where his or her accident-causing conduct is viewed as highly culpable. The defendant's conduct must be perceived to be sufficiently culpable relative to the plaintiff's or other actor's conduct before he or she will be deemed to merit the sanction of tort liability. For the most part, this not only precludes the possibility of strict liability,¹³⁶ but also tends to preclude liability where the level of the defendant's culpability, relatively speaking, is low.

A. Background Context

1. No Liability without Fault

The debate over strict liability in America stretches back into the 19th Century. English common law had developed principles of liability without fault that were applied in a limited number of cases involving creators of private nuisances, keepers of harm-causing wild animals, trespassing cattle, and a few others. During the latter part of the 19th Century, led by such influential scholars and judges as Charles Doe, Lemuel Shaw and Oliver Wendell Holmes, strict liability was widely rejected and American tort law

¹³⁵ See Prosser & Keeton, *supra* note 26, § 58 at 395 (explaining that the basis for the immunity is “that, in a civilization based on private ownership, it is considered a socially desirable policy to allow a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right.”).

¹³⁶ Strict liability can still be found primarily in cases involving vicarious liability and under workers' compensation legislation. Why these forms of liability without fault have escaped the condemnation heaped upon other forms of strict liability is beyond the scope of this Article.

assumed its current form generally requiring, as it does, that liability be predicated on fault.¹³⁷

Nevertheless, there remained what have been commonly described as “pockets” of strict liability within a system which was predominantly fault-based. Sellers of substandard goods could be held liable for breach of warranty, even if the substandard nature of the goods was not detectable by the seller; those who interfered with other’s use and enjoyment of realty (private nuisance) or other’s right of exclusive possession of realty (trespass) could be held liable without fault; those who caused harm as a consequence of engaging in “ultra-hazardous” or “abnormally dangerous” activities¹³⁸ were strictly liable, and so on.

During the 1960s, breach of implied warranty was recrafted into strict liability for defective products¹³⁹ and, for a time, it appeared that liability without fault might become the new model of tort liability. As has been extensively chronicled elsewhere, however, there was a strong anti-strict liability reaction to this development. Although the language of strict liability is often retained,¹⁴⁰ a majority of states have now rejected strict liability in cases where it is alleged that a harm-causing product was defective by reason

¹³⁷ See White, *supra* note 116 at 12-16; Friedman, *supra* note 2 at 425-26; and Horwitz, *supra* note 2 at 97-99.

¹³⁸ Compare Restatement of Torts, § 520 (1938)(“ultrahazardous”) and Restatement (Second) of Torts, § 520 (1977)(“abnormally dangerous”).

¹³⁹ See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 800-05 (1966)(recounting the transition from warranty to strict liability).

¹⁴⁰ Shiela L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 599-600 (1980)(tracing the evolution); Richard L. Cupp, Jr., and Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. Rev. 874 (2002)(examining whether the choice of language matters); David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. Ill. L. Rev. 743 (discussing the decision to use the language of “strict liability”).

of its design or because it lacked any or adequate warnings of danger or instructions for safe usage. Although in theory strict products liability remained the rule in cases where a product was mismanufactured, in reality, this added little, if anything, to the old negligence doctrine of *res ipsa loquitur* which either permitted an inference of negligence or created a presumption of negligence in the manufacture of such products.¹⁴¹ The American Law Institute's adoption of the Products Liability Restatement in 1998 largely completed the return to negligence,¹⁴² though a handful of states remain holdouts.¹⁴³

The rejection of strict liability in tort for defective products went beyond merely reversing the trend in tort law that started with Roger Traynor's opinion in *Greenman v. Yuba Power Products*¹⁴⁴ in 1963 and the ALI's adoption of section 402A of the Second Restatement of Torts in 1964, but cut the heart out of its underpinnings as well. In

¹⁴¹ The products liability version of *res ipsa* is set forth in Restatement (Third) of Torts: Products Liability, § 3 (1998) which provides:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Id.

¹⁴² See Restatement (Third) of Torts: Products Liability, § 2 (b) and (c) (1998)(proposing a negligence test for determining the existence of design and warning/instruction defects.

¹⁴³ See e.g. *Soule v. General Motors Corp.*, 34 Cal. Rptr.2d 607, 617 (Cal. 1994)(allowing for the consumer expectation test to be used in some cases); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331-33 (Conn. 1997)(adopting the *Soule* test); *Halliday v. Sturm, Ruger & Co., Inc.*, 792 A.2d 1145, 1159 (Md. 2002)(retaining consumer expectation test); *Sternhagen v. Dow Co.*, 935 P.2d 1139 (Mont. 1997)(adopting a hindsight test); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003)(asserting that "negligence concepts [such as foreseeability] have no place in a case based on strict liability"); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 751-52 (Wis. 2001)(adopting consumer expectation test).

¹⁴⁴ Perhaps, somewhat more accurately, with Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

promulgating 402A, William Prosser, the Reporter to the Second Restatement, and his advisors, relied heavily upon the pre-existing warranty strict liability as it had developed. Recently, many courts, supported by the Products Liability Restatement, have taken the position that, at least in design and warning cases, warranty liability, like “strict liability” under the Restatement, is dependent upon a finding of negligence.¹⁴⁵

Although, in theory, strict liability for “ultra-hazardous activities,” or “abnormally dangerous” activities has been accepted in most states, the approach taken by the Second Restatement of Torts largely blurred the distinction between strict liability and negligence. While section 519 purports to provide for strict liability, section 520 defines “abnormally dangerous activity” by reference to a six factor balancing test that is similar (though not identical) to a traditional negligence test.¹⁴⁶ Even so, at least some courts have displayed reluctance to utilize even the limited type of “strict liability” identified in

¹⁴⁵ *But see* Denny v. Ford Motor Co., 639 N.Y.S.2d 250, 254-55 (N.Y. 1995)(distinguishing warranty liability from products/negligence liability).

¹⁴⁶ Restatement (Second) of Torts, § 520 (1977) provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

sections 519 and 520.¹⁴⁷ Private nuisance was recast as an intentional tort, at least in the sense that the tortfeasor continued the activity that interfered with another's interest after receiving notice that the interference was occurring.¹⁴⁸ In short, the views of those who saw fault or culpability as an essential precondition for the imposition of tort liability have clearly prevailed.¹⁴⁹

Those opposing strict liability have made three distinctly different types of arguments to support their position. The first is a political or public policy argument focusing on the alleged negative economic effects of liability without fault. Briefly stated, it is simply claimed that adopting strict liability means that defendants (commonly corporations) will have to pay for more injury costs than they would under a negligence regime. This serves to increase their cost of doing business either directly, by making them absorb the costs, or indirectly, by increasing the cost of liability insurance. Given global competition and given that other countries may not have adopted strict liability, American companies, it is claimed, are put at a competitive disadvantage.¹⁵⁰ If one

¹⁴⁷ See e.g. *E.S. Robbins Corp. v. Eastman Chemical Co.*, 912 F. Supp. 1476, 1489 (N.D. Ala. 1995)(Ala. law)(asserting that Alabama applied the doctrine only to blasting cases); *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1182-83 (7th Cir. 1990)(Ill. law)(holding that the shipping of hazardous chemical is a matter to be dealt with under negligence law—not strict liability); *U.S. v. Union Corp.*, 277 F. Supp.2d 478, 494 (E.D.Pa. 2003)(Pa. law)(asserting that Pennsylvania does not recognize strict liability for abnormally dangerous activities).

¹⁴⁸ Prosser & Keeton *supra* note 26, § 87, at 622-25.

¹⁴⁹ In fact, tort reform legislation in North Carolina rather clearly announces that “[t]here shall be no strict liability in tort in product liability actions.” N.C. Gen. Stats. §99-B-1.1.

¹⁵⁰ See e.g. Dan Quayle, President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (1991), reprinted at 60 U. Cin. L. Rev. 979 (1992), asserting:

Unrestrained litigation necessarily exacts a terrible toll on the U.S. economy. According to a recent report by a Professor of Finance at the University of Texas, it is estimated that the average lawyer takes \$1 million a year from the country's output of goods and services. These baleful effects are not limited to the domestic economy. According to a 1984 study commissioned by the U.S. Department of Commerce, foreign competitors often have products liability insurance costs that are 20 to 50 times lower than U.S.

accepts this claim, the tort system generally, and strict liability in particular, can be blamed for factory closures, lost jobs, trade deficits, refusals to market vaccines and other drugs, and so on.

The second argument focuses on the moral implications of the first. If a factory closes, either by going out of business or by moving its operations to another country, the greatest hardship will be felt by the now-unemployed workers who will find themselves without salaries, health benefits, pensions, etc. Even if the company is able to remain in business by raising the prices for the goods or services it produces, the poorest people will hardest hit by the higher prices.¹⁵¹ Thus, the strict liability system, at least partly intended to provide compensation for injury to those least able to afford it, is portrayed as a system harmful to the most vulnerable.¹⁵²

companies. In a survey of over 250 American companies, more than three-quarters of the executives said they believe that the United States will be increasingly disadvantaged in world markets unless modifications are made in the liability system.

Id. at 980.

¹⁵¹ See e.g. Rychlak, *supra* note 34 at 49 (arguing the tort system increases unemployment and poverty).

¹⁵² The form of argument is simply a variation of the one lampooned by the late Arthur Leff. He wrote:

There is this old widow, see, with six children. It is December and the weather is rotten. She defaults on the mortgage on her (and her babies') family home. The mortgagee, twirling his black moustache, takes the requisite legal steps to foreclose the mortgage and throw them all out into the cold. She pleads her total poverty to the judge. Rising behind the bench, the judge points her and her brood out into the swirling blizzard. "Go," he says. "Your plight moves me not." "How awful," you say?

"Nonsense," says the economic analyst. "If the old lady and kids slip out into the storm, they most likely won't die. *** Moreover, look at the other side of the (you should pardon the expression) coin. What would happen if the judge let the old lady stay on just because she was out of money? First of all, lenders would in the future be loathe to lend to old widows with children. I don't say that they wouldn't lend at all; they'd just be more careful about marginal cases, and raise the price of credit for the less marginal cases. The aggregate cost to the class of old ladies with homesteads would most likely rise much more than the cost imposed on this particular widow. That is, the aggregate value of all their homes...would fall, and they'd all be worse off.

* * *

The third argument appeals somewhat more directly to societal values and a particular conception of morality. It is an unfair and unjustified invasion of the defendant's property rights, it is claimed, to take money from one person to compensate another for the harm caused by the first, simply on the basis of causation. Fairness, individual autonomy and respect for property rights demand that the redistribution of wealth can only be justified by the culpability of the defendant coupled with the defendant having caused the harm.¹⁵³ In other words, the argument is based on a direct invocation of a corrective justice rationale for the tort system under which both culpability and causality are required and where the payment of damages by a wrongdoer to his victim is viewed as a means of "annulling" the wrong.¹⁵⁴

2. The Religious Right

A similar corrective justice underpinning for the obligation to compensate for unintended harm is asserted by the Christian right. Ronald Rychlak, discussing the concept of monetary damages paid by the wrongdoer to the victim to make him or her whole, explains:

More and more of them would be priced out of the money market until no widow could ever *decide for herself* to mortgage her house to get the capital necessary to start a seamstress business to pull herself (and her infants) out of poverty. What do you mean, 'awful'? What have you got against widows and orphans?"

Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 Va. L. Rev. 451, 460-61 (1974).

He also noted the importance of pointing out "the non-freeness of lunches." *Id.* at 461.

¹⁵³ Rychlak, *supra* note 34 at 24.

¹⁵⁴ See e.g. Weinrib, *supra* note 114 at 440 ("The plaintiff's right to be free of wrongful interferences with his person and property is correlative to the duty on the defendant to abstain from such interferences. The plaintiff's suffering of a wrongful loss is the foundation of his claim against the person who has inflicted that loss. The transference from the defendant to the plaintiff of a sum quantifying the loss is the procedure for annulling the effects of a wrong done by the former to the latter.")

This concept has an extensive history, going back as far as the Old Testament legal codes contained in the book of Exodus. For example, Exodus 21 and 22 contain parameters for the compensation of both individuals who have been injured and the violations of personal property. The *lex talionis*, or law of retribution, is famously contained in the phrases: “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe” (Exodus 21:23-25 NAB). The general principle behind this law is one of reciprocity, which holds that the punishment or restitution for the wrong is to be appropriate linked to the extent of the harm or damage.¹⁵⁵

Not only is corrective (“commutative”) justice critically important, but it is asserted to be more important than distributive justice. Again, as explained by Rychlak:

The reason why commutative justice is so important in Catholic doctrine is that it most clearly impacts individuals, not just the State. Commutative justice “requires safeguarding property rights, paying debts, and fulfilling obligations freely contracted.” Assurance that the State will enforce these rights helps shape the expectations and attitudes of the citizens in a way that lead to the proper functioning of the State. In this way, “Distributive justice is possible only upon the foundation of commutative justice.... [C]ommutative justice is not only fundamental, but is also prior to distributive justice.”¹⁵⁶

Thus, to the extent that liability without fault is based on principles of distributive justice, it follows that it must necessarily be subordinate to a system of fault-based liability.

B. No Liability without Sufficient Fault Relative to Others

Not only has strict liability been largely rejected as a basis for imposing an obligation on a defendant to pay for another’s injury, but low-level culpability has also been largely rejected. As previously noted, of course, often this is true in cases where a plaintiff’s culpability is deemed to be greater than the defendant’s. However, it is also

¹⁵⁵ Rychlak *supra* note 34 at 8-9.

¹⁵⁶ *Id.* at 14 (quoting the Catechism of the Catholic Church 2411 and Stephen J. Grabill, Kevin E. Schmiesing and Gloria L. Zuniga, *Doing Justice to Justice: Competing Frameworks of Interpretation in Christian Social Ethics*, vol. 4, *Christian Social Thought Series* 40-41 (2002)).

true where a defendant's culpability appears relatively minor when compared to that of some third party. It is the insistence on this outcome that explains the continued viability of old proximate cause analysis, notwithstanding modifications of other tort doctrine.¹⁵⁷

In the 1960s and 1970s, it appeared as though apportionment of responsibility principles would largely replace the all or nothing tort doctrine of earlier years. Contributory negligence was replaced by comparative negligence in all but a few states. Joint and several liability, under which each liable defendant, regardless of percentage of fault, could be held for the full amount of the judgment,¹⁵⁸ was abrogated in many states by the adoption of rules that a defendant was only liable for the percentage of the judgment equal to the percentage of responsibility assigned by the trier of fact.¹⁵⁹ Old implied indemnity rules, which allowed a "passively" negligent tortfeasor to shift the loss in its entirety to an "actively" negligent tortfeasor, were replaced by comparative contribution principles.¹⁶⁰

Nevertheless, neither courts nor legislatures have shown any particular inclination to reject old proximate cause rules that allow an admittedly negligent defendant to escape all liability because of the intervening culpable misconduct of the plaintiff or a third person. This is not to say that such a change has not been proposed. Commentators have

¹⁵⁷ See *supra* text at notes 129-133.

¹⁵⁸ See Restatement (Third) of Torts: Apportionment of Liability, § 7 (2000) ("When, under applicable law, some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person.").

¹⁵⁹ See *id.*, § 8 ("When, under applicable law, a person is severally liable to an injured person for an indivisible injury, the injured person may recover only the severally liable person's comparative-responsibility share of the injured person's damages.").

¹⁶⁰ See *id.*, §22, Reporters' Notes to Comment e (explaining "[t]hese doctrines were developed before comparative responsibility. They avoided the harsh effect of pro rata contribution when one of the tortfeasors was substantially more culpable than the other. They are inconsistent with the goals of comparative responsibility.").

noted the doctrine's anomalous presence notwithstanding the apparent doctrinal shift toward percentage apportionment.¹⁶¹ Yet, only Connecticut has abandoned superseding cause and, even there, retained the doctrine in cases of intervening criminal misbehavior.¹⁶²

The continued viability of proximate cause principles serve to preclude recovery in its entirety when the relative culpability of the actors is perceived to demand that outcome, even though the application of formal comparative fault doctrine would seem to require apportionment. Moreover, given that voluntary intoxication—particularly illicit drug use—increasingly has come to be regarded as truly egregious misbehavior, it is not surprising to find a series of decisions in a variety of contexts where the intoxicated misbehavior of either the plaintiff or a third party serves to exculpate a negligent defendant.

Consider, for example, the court's treatment of a manufacturer's liability in *Butz v. Lynch*.¹⁶³ In that case, the defendant Testor was the manufacturer of an aerosol airbrush that sprayed paint using a liquid propellant. Lynch intentionally inhaled the product to get high, lost control of his automobile and struck Butz, killing himself and injuring her.

Testor began distributing the product in 1990. The court explained:

Plaintiffs asserted that Testor was on notice that a secondary market for its product had developed among young people who intentionally inhaled the

¹⁶¹ See e.g. John G. Phillips, *The Sole Proximate Cause "Defense:" A Misfit in the World of Contribution and Comparative Negligence*, 22 S. Ill. U. L.J. 1 (1997); Terry Christlieb, *Note, Why Superseding Cause Analysis Should Be Abandoned*, 72 Tex. L. Rev. 161 (1993).

¹⁶² See *Barry v. Quality Steel Products, Inc.*, 829 A.2d 258, 268-69 (Conn. 2003)(noting "the doctrine was shaped in response to the harshness of contributory negligence and joint and several liability.").

¹⁶³ 762 So.2d 1214 (La.App. 2000).

product for the purpose of experiencing an intoxicating-like effect. They further alleged that Testor knew about an additive, oil of mustard, a chemical found in horseradish, which could have prevented or made it unlikely that anyone would have intentionally abused the product. However, plaintiffs claimed, Testor unreasonably waited until 1996 (the year after this accident occurred) to modify the product to add oil of mustard to deter the practice of “huffing” the product.¹⁶⁴

Notwithstanding the fact that the plaintiff might have made out a plausible negligence case against Testor based on evidence that the defendant had known for years that its product was being misused and could have remedied the problem inexpensively, the court granted defendant’s motion for summary judgment and the appellate court affirmed concluding that “Testor's knowledge of the potential and actual intentional abuse of its product does not create a question of fact on the question of reasonably anticipated use [under the Louisiana products liability statute].”¹⁶⁵

Under virtually identical facts, an Ohio appellate court upheld summary judgment in favor of an airbrush manufacturer finding, as a matter of law, that the manufacturer’s conduct was not a proximate cause of the harm to an innocent user of the highway in light of the intentional intoxication by another.¹⁶⁶ Interestingly, the court also dismissed the plaintiff’s claim against the owners of the home where the intoxicant was inhaled finding that social hosts owed no duty to users of the highway injured by intoxicated guests and an Ohio exception to the social host rule for minors inapplicable on the facts.¹⁶⁷

¹⁶⁴ *Id.* at 1216.

¹⁶⁵ *Id.* at 1218.

¹⁶⁶ *Horstman v. Farris*, 725 N.E.2d 698, 703 (Ohio App. 1999).

¹⁶⁷ *Id.* at 707.

The law dealing with social host liability also serves to illustrate the principle that liability will not be imposed on actors whose conduct is viewed as less culpable than that of another who participated in causing the harm. Moreover, the treatment of social host liability over a period of time tends to demonstrate the relative long-term stability of social conceptions of responsibility. For the better part of the 20th Century, the cases reflect that those who served alcohol to others were not considered responsible for injuries to consumers of the intoxicants in cases where they were injured or killed.¹⁶⁸ In *Fleckner v. Dione*,¹⁶⁹ the court stated: ““it has been uniformly held, in the absence of statute to the contrary, that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication.””¹⁷⁰ The same proximate cause rationale was used to deny recovery against the server to strangers injured by the intoxicated person.¹⁷¹

Although the enactment of Dram Shop laws in many states during the late 19th and early 20th Centuries often provided a basis for suit against commercial sellers, “[e]ven when an act's language was broad enough to include social hosts, courts confined liability to tavern owners.”¹⁷²

For a period of time, primarily during the 1970s and 1980s, judicial decisions in a number of states held, applying the traditional principle that a duty is owed to foreseeable

¹⁶⁸ See e.g. *Cole v. Rush*, 289 P.2d 450, 454 (Cal. 1955).

¹⁶⁹ 210 P.2d 530 (1949).

¹⁷⁰ *Id.* at 532 (quoting *Lammers v. Pacific Electric R. Co.*, 199 P. 523, 525 (Cal. 1921)).

¹⁷¹ See e.g. *Dwan v. Dixon*, 30 Cal. Rptr. 749, 751 (Cal. App. 1963).

¹⁷² John R. Ashmead, *Comment, Putting a Cork on Social Host Liability: New York Rejects a Trend*, 55 *Brooklyn L. Rev.* 995, 998 (1989).

victims of one's conduct, that a negligent social host might be held liable to strangers injured by intoxicated adult social guests.¹⁷³ Nevertheless, the judicial attempt to expand liability met with notable resistance. In California and New Jersey, decisions allowing social host liability were either abrogated or modified by the state legislatures¹⁷⁴ and a number of courts, sometimes praising the idea, ultimately chose to defer to the legislature.¹⁷⁵

Explaining these decisions, the drafters of the proposed Third Restatement of Torts assert:

In deciding whether to adopt a no-duty rule, courts often rely on general social norms of responsibility. For example, many courts have held that commercial establishments that serve alcoholic beverages have a duty to use reasonable care to avoid injury to others who might be injured by an intoxicated customer, but that social hosts do not have a similar duty to those who might be injured by their guests. Courts often justify this distinction by referring to commonly held social norms about responsibility. The rule stated in this Section does not endorse or reject this particular set of rules. It does support a court's deciding this issue as a categorical matter under the rubric of duty, and a court's articulating general social norms of responsibility as the basis for this determination.¹⁷⁶

In cases where the culpability of the defendant is greater however, the imposition of liability on the social host is common. Thus, in cases involving the provision of alcohol to minors who, thereafter, injure others, courts have little problem expressing the

¹⁷³ See *Coulter v. Superior Court*, 145 Cal. Rptr. 534 (Cal. 1978)(abrogated by statute, Cal. Civ. C. § 1714 (b)(1979)); *McGuiggan v New England Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986); *Kelly v Gwinnell*, 476 A.2d 1219 (N.J. 1984)(modified by statute, see N.J.S.A. 2A:15-5.6b); *Hart v. Ivey*, 420 S.E.2d 174, 178 (N.C. 1992); *Solberg v Johnson*, 760 P.2d 867, 871 (Or. 1988).

¹⁷⁴ See *supra* note 173.

¹⁷⁵ See e.g. *Bankston v. Brennan*, 507 So.2d 1385, 1387 (Fla. 1987); *Ganup Construction Co., Inc. v. Foster*, 519 N.E.2d 1224, 1228 (Ind. 1988); *Boutwell v. Sullivan*, 469 So.2d 526, 529 (Miss. 1985); *Manning v. Andy*, 310 A.2d 75, 76 (Pa. 1973); *Ferreira v. Strack*, 652 A.2d 965, 968 (R.I. 1995); *Burkhart v. Harrod*, 755 P.2d 759, 762 (Wash. 1988); *Olsen v. Copeland*, 280 N.W.2d 178, 182 (Wis. 1979).

¹⁷⁶ Restatement (Third) of Torts: Liab. Physical Harm § 7, cmt. c (P.F.D. No. 1, 2005).

social judgment of misconduct through the imposition of liability.¹⁷⁷ The same is true where the social host's conduct is otherwise particularly egregious.¹⁷⁸ Though precisely how such conduct should be characterized remains a problem.

C. Misconduct-Based Liability Rules

1. The Meaning of "Negligence"

Among legal scholars, there has long been a debate regarding the proper conception of "negligence." The law and economics scholars and many others who, to a greater or lesser extent, have been influenced by their work tend to conceptualize negligence in terms of the economic rationality of a cost-benefit or risk-utility test.¹⁷⁹ Such balancing tests are also widely employed by professional decisionmakers, both within private industry and within governmental regulatory agencies.¹⁸⁰ Nevertheless, as Richard Wright has pointed out, such tests are "infrequently mentioned by the courts, almost never included in jury instructions, rarely actually employed in judicial opinions, and almost never explain[] the actual results reached by the courts."¹⁸¹ Instead, juries are typically instructed, rather generally, in terms of "reasonableness"¹⁸² and, as all first year

¹⁷⁷ See e.g. *Rangel v. Parkhurst*, 779 A.2d 1277, 1284 (Conn. App. 2001); *Fullmer v. Tague*, 500 N.W.2d 432, 434 (Iowa 1993); *Linn v. Rand*, 356 A.2d 15, 19 (N.J. Super. A.D. 1976); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 485 P.2d 18, 23 (Or. 1971); *Martin v. Marciano*, 871 A.2d 911, 915 (R.I. 2005); *Marcum v. Bowden*, 2005 WL 2129176 *5 (S.C. 2005).

¹⁷⁸ *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986)(dictum); *Hickingbotham v. Burke*, 662 A.2d 297, 300-01 (N.H. 1995).

¹⁷⁹ See Richard Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 32-34 (1972).

¹⁸⁰ Discussing the judicial role in assessing regulatory agency's cost-benefit, see generally Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 Mich L. Rev. 1708 (2002).

¹⁸¹ Richard W. Wright, *Negligence in the Law: Hand, Posner and the Myth of the "Hand Formula,"* 4 Theoretical Inquiries in Law 145, 148 (2003).

¹⁸² Thus, for example, Delaware Civ. Jury Instruction § 5.1 states: "This case involves claims of negligence. Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide. If a

law students learn, “reasonableness” is defined by reference to the conduct of the (somewhat idealized) norms of behavior of ordinary persons within the relevant community. Whether that is actually the commonly held understanding of the term, at least outside of the legal community, however, may be open to doubt. In fact, the more common lay understanding of “negligence” would appear to require either “rule breaking” or some other type of misconduct that lawyers and academics might be inclined to characterize as something other than “mere” negligence.

a. Rule-Breaking Misconduct

Perhaps the most common lay understanding of “negligence” focuses on conduct where a party has broken a published rule regarding behavior. While this includes the non-compliance with published industry standards and administrative rules and regulations, most commonly people are exposed to the situation where the conduct alleged to be tortious violated a criminal statute or similar positive enactment. This is not particularly surprising. After all, motor vehicle accidents are probably the most common basis for tort suits¹⁸³ and those cases very commonly involve negligence per se

person’s conduct in a given circumstance doesn’t measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person’s conduct does measure up to the conduct of a reasonably prudent and careful person, the person wasn’t negligent.”

Also see, e.g. Cal. BAJI 3.10 (2006)(“Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.”).

¹⁸³ *See e.g.* Thomas A. Eaton and Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 Ga. L. Rev. 627, 651 (1996)(concluding “[t]he mix of claim types found in these [five] Georgia counties is in keeping with national data. The BJS Tort Cases in Large Counties study found that the composite urban tort docket is dominated by automobile accident cases (60.1% of all tort claims), followed by premises liability (17.3%), medical malpractice (4.9%) and products liability (3.4%). While the four-county Georgia data reveal a comparatively greater dominance of automobile accident claims than does the BJS study, the relative ranking of claim types is the same.”); Thomas A. Eaton, Susette M. Talarico and Richard E. Dunn, *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1070-71 (2000)(in a follow-up to the earlier study, the authors

based on the violation of some criminal law regulating the use of the highways—right of way at an intersection, safe distances between cars, speed and, of course, prohibitions on drunk driving among others.

Although lawyers understand the idea that judges are adopting legislatively determined standards of behavior and applying those standards in a civil case to which they do not directly apply,¹⁸⁴ it is certainly understandable that non-lawyers would simply view the rule breaking or illegality of the behavior as the critical issue.

Trial judges, of course, necessarily recognize that jurors—who are undoubtedly pretty representative of the public as a whole in this regard—will conflate rule breaking or criminality with negligence. Thus, in cases where a statute or other law has been violated, but the court concludes that the statutory standard is not an appropriate one for use in a civil case, judges often will exclude evidence of a party’s violation of statute, since allowing the jury to hear of it would almost inevitably lead to confusion and be unduly prejudicial to the violator,¹⁸⁵ even if the evidence might be probative on some other issue.¹⁸⁶

concluded that “[h]igh stakes products liability and medical malpractice suits receive more media and academic attention, but the everyday world of tort litigation is dominated by the automobile accident. We found this to be true in our 1996 study, and it remains true today.”).

¹⁸⁴ See *Clinkscales v. Carver*, 136 P.2d 777, 778 (Cal. 1948)(explaining “[t]he decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them.”) (Traynor, J.).

¹⁸⁵ See *e.g.* *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26, 30 (6th Cir. 1981)(improper admission of OSHA standards in a products liability cases was prejudicial); *Trimarco v. Klein*, 451 N.Y.S.2d 52, 57 (N.Y. 1982)(finding that the statute in question was not binding on the defendant, the court asserted that although it was relevant to the custom of using safety glass for bath enclosures, “defendants’ objection to

The popular tendency to equate negligence and the violation of criminal statutes and administrative regulations, i.e. negligence and negligence per se, is important for two reasons. First, it makes it quite easy to accept the converse, i.e. due care per se. Even though traditional tort doctrine has long held that compliance with a statutory or regulatory requirement is not dispositive on the issue of negligence¹⁸⁷ (though it is admissible to prove non-negligence), it is not difficult to understand why those who already believe there is no negligence without the violation of a rule readily accept that proof of no violation equals proof of no negligence. And, in fact, the so-called “statutory compliance” defense has not been a hard sell for the tort reformers.¹⁸⁸

the statutes themselves should have been sustained. Without belaboring the point, it cannot be said that the statutes, once injected into the adversarial conflict, did not prejudice the defendants.”).

¹⁸⁶ Evidence of a statutory requirement, for example, might tend to prove community custom even if the violation of the statute is not negligence per se. *See e.g.* *Trimarco v. Klein*, *supra* note 185.

¹⁸⁷ *See e.g.* *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 733-34 (Minn. 1980)(compliance with flammability standards set forth in federal legislation did not preclude liability for compensatory or punitive damages); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1325 (Or. 1978)(noting that “[w]e have found no cases holding that compliance is a complete defense.”); *But see* Judge Linde’s concurring opinion in *Wilson* explaining:

It is true that compliance with government safety standards will generally not be held to negate a claim of “dangerously defective” design, but it would equally be an oversimplification to say that it can never do so. The role of such compliance should logically depend on whether the goal to be achieved by the particular government standards, the balance struck between safety and its costs, has been set higher or lower than that set by the rules governing the producer’s civil liability. It may well be that when government intervenes in the product market to set safety standards, it often confines itself to demanding only minimum safeguards against the most flagrant hazards, well below the contemporary standards for civil liability. But that was not necessarily the case when the first safety standards were legislated, and it is not necessarily so for all products today.

Id. at 1333 (Linde, J. concurring).

¹⁸⁸ *See e.g.* Colo. Rev. Stat. Ann. § 13-21-403(1)(b); Ind. Code § 34-20-5-1(2); Kan. Stat. Ann. § 60-3304(a); Mich. Comp. L. Ann. § 600-2946(4); N.J. Stat. Ann. § 2A:58C-4; Tenn. Code Ann. § 29-28-104; Utah Stat. § 78-15-6(3).

Interestingly, the creation of a presumption that a complying product or presumption of non-negligence seems to add nothing to traditional doctrine since the plaintiff already has the burden of proof on these issues—though it will ensure that evidence of compliance is admissible.

Second, the mistaken idea that negligence necessarily, or at least often, involves criminal behavior may lead to the additional unwarranted conclusion that some level of immorality must be associated with the conduct before liability will be imposed, and this view is not limited to traffic accidents. A number of empirical studies, for example, appear to indicate that there is a widely held sense among physicians that negligence involves an element of willfulness that distinguishes it from other accidentally caused injuries.¹⁸⁹ Malpractice attorney and Professor Darrell Keith explains:

Many physicians believe medical “negligence” means “gross malpractice,” solely a breach of “medical customary practices,” departures from medical practices of “most,” “an average of,” other,” or a “consensus” of physicians, or “guilt” or “sinfulness.” Still other doctors like to think “to err is human,” thereby considering almost all medical errors to “honest mistakes in judgment,” “a legitimate mistake,” or “natural mistake,” or “understandable errors,” or “unavoidable error. In the minds of some medical professionals, all of medicine involves “medical judgment” because it is purportedly an inexact science with too many variables.¹⁹⁰

If, in fact, many physicians—and by extension, many people—distinguish between inadvertent error caused by momentary lapse of attention and some type of conduct involving morally deficient misconduct, believing the latter is required to establish liability for negligence or professional negligence, it would go a long way toward explaining not only the outraged response of physicians to malpractice allegations,¹⁹¹ the fact that roughly three out of four jury verdicts in medical malpractice

¹⁸⁹ See e.g. Bryan A. Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 Cornell J.L. & Pub. Pol’y 121, 128 (1997).

¹⁹⁰ Darrell L. Keith, *Medical Expert Testimony in Texas Medical Malpractice Cases*, 43 Baylor L. Rev. 1, 36 (1991).

¹⁹¹ See e.g. Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* at 9-67 (Report of the Harvard Medical Practice Study to the State of New York 1990)(reporting that “most physicians perceive their suits as arising from

cases favor the physician,¹⁹² but also the common judicial and legislative tendency to require something more than “mere” negligence as the basis of liability in a number of different types of cases.¹⁹³ This tendency might simply be a conscious or unconscious attempt to bring formal doctrine into line with common understanding.

2. Aggravated Misconduct

While it may well be true that, as Anthony Sebok has stated, “recklessness has... become an increasingly important means of expressing society’s outrage at a certain form of antisocial conduct[,]”¹⁹⁴ the formal judicial or legislative adoption of an aggravated misconduct standard as the basis of liability is nothing new. In many types of cases where immunities have been created to protect underlying autonomy, to reflect some social intuition regarding responsibility, or to preclude plaintiffs from recovering because of their conduct, it has not been uncommon for courts and legislatures to carve out an exception to the applicable immunity or no-duty rule applicable upon a showing that the defendant’s conduct was something more than merely negligent. As the drafters of the proposed Restatement explain:

[I]n physical-harm cases the defendant's negligence generally serves as a sufficient basis for liability. Yet there are particular situations in which courts and legislatures have concluded that the negligence standard would

circumstances beyond their control. Many physicians report that they are being unfairly and unjustly punished....”), quoted in W. John Thomas, *The Medical Malpractice “Crisis”: A Critical Reexamination of a Public Debate*, 65 Temp. L. Rev. 459, 501 n.295 (1992); William M. Sage, *Principles, Pragmatism, and Medical Injury*, 286 J.A.M.A. 226 (2001)(reporting that physicians attached “moral opprobrium” to allegations of malpractice).

¹⁹² See William P. Gunnar, *Is There An Acceptable Answer to Rising Malpractice Premiums?*, 13 Annals Health L. 465, 479 (2004)(jury verdicts favor plaintiffs in 28% of cases tried to verdict); Frank A. Sloan and Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 Law & Soc’y Rev. 997, 1007 (1990)(22-44% of verdicts for plaintiffs).

¹⁹³ See *infra* text at notes 198-216.

¹⁹⁴ Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 Vand. L. Rev. 1165, 1185 (2001).

operate too harshly on defendants or would entail inappropriate social results. When courts or legislatures do reach such a conclusion, they frequently establish recklessness as the appropriate standard of liability.¹⁹⁵

Although, to some extent, the meaning of this legislative or judicial approach is dependent on the definition of “recklessness,” a matter about which there is considerable disagreement,¹⁹⁶ the truth of the essential point is indisputable. A determination that the

¹⁹⁵ Restatement (Third) of Torts: Liability for Physical Harm, § 2 cmt. b (P.F.D. No. 1, 2005)(internal cross reference omitted).

¹⁹⁶ The Second Restatement of Torts, § 500 (1965), defines “reckless disregard of safety” as follows:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

The proposed Third Restatement, § 2 on the other hand, states:

A person acts recklessly in engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Explaining the change, comment c states, in part, as follows:

Section 2 both acknowledges appropriate differences between criminal recklessness and tort recklessness and also sets forth a standard for recklessness that is somewhat more restrictive than that included in the previous § 500. Under the latter, an actor can be found reckless whose only fault consists of the failure to draw an inference that a reasonable person would have drawn. Yet that fault is too limited and too ordinary to justify a finding of recklessness. This Section accordingly requires that the person either have knowledge of the danger or have knowledge of facts that would make the danger obvious to anyone in the actor's situation.

Rather than formally adopting either a “very negligent” approach or a “knowledge” approach, many courts attempt to rely on various verbal formulations seeking to express the actor’s culpability either in quantitative or qualitative terms. Descriptions such as “gross negligence,” “willful,” and/or “wanton,” in addition to or in place of “recklessness” are common. *See* Restatement (Third) of Torts: Liability for Physical Harm, § 2 cmt. a. (P.F.D. No. 1, 2005). *Also see* Sebok, *supra* note 194 (critically discussing the Third Restatement’s approach).

defendant's conduct was "morally deficient"¹⁹⁷ will provide a basis for imposing liability notwithstanding the existence of many of those circumstances, described earlier, which have otherwise led courts or legislatures to formulate rules which either preclude the plaintiff from suing based on perceptions regarding his or her conduct or which protect a defendant based on insufficient relative culpability.

Thus, for example, in the express assumption of risk cases,¹⁹⁸ while it is often possible to agree in advance not to hold a defendant liable for negligence, courts have been unwilling to honor advance agreements to exculpate another for reckless or intentional misconduct. In such cases, courts either hold that such agreements violate public policy¹⁹⁹ or, as a factual matter, that the agreements themselves do not encompass reckless or intentional misconduct.²⁰⁰ In the primary assumption of risk cases, recklessness is considered outside of the scope of the risk that a plaintiff has tacitly agreed to encounter as evidenced by participation in the risky activity.²⁰¹

¹⁹⁷ Restatement (Third) of Torts: Liability for Physical Harm, § 2 cmt. c. (P.F.D. No. 1, 2005).

¹⁹⁸ See *supra* text at notes 40-50.

¹⁹⁹ See *supra* text at notes 40-42.

²⁰⁰ See e.g. *Barber v. Eastern Karting Co.*, 673 A.2d 744, 753 (Md. App. 1996)(W.Va. law)(explaining "a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability from any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention. Similarly, a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances.").

²⁰¹ See *Knight v. Jewett*, 11 Cal. Rptr.2d 2, 16 (Cal. 1992)(explaining that "[t]he overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant liability in such a sport, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport—for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game—and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.").

In the “gratitude” cases,²⁰² courts and legislators apparently sense that the disqualification from suing only goes so far. For example, the old “guest passenger” statutes precluded suit by a non-paying automobile passenger against a negligent driver, but permitted suit if the conduct rose to the level of some form of aggravated misconduct—willful, wanton misconduct, gross negligence, recklessness or the like.²⁰³ Similarly, “Good Samaritan” legislation precludes suit against volunteering health care professionals only in the absence of a showing of some type of misconduct that was more than simply negligent.²⁰⁴ Modern versions of similar legislation follow the same pattern. Thus, North Carolina’s food donor immunity contains an exception for injuries “caused by the gross negligence, recklessness, or intentional misconduct of the donor”²⁰⁵ and the immunity of the nonprofit itself is limited in the same way.²⁰⁶ Similarly, the Volunteer Protection Act of 1997, which immunizes volunteers from negligence-based liability under many circumstances, abrogates the immunity where the harm is caused by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant

²⁰² See *supra* text at notes 76-85..

²⁰³ Restatement (Third) of Torts: Liability for Physical Harm, § 2 cmt. b (P.F.D. No. 1, 2005) (“[A]utomobile guest statutes and common-law guest doctrines, although no longer common, still exist in some some form in certain jurisdictions. They require the social guest in the defendant’s car to establish something more than negligence in order to justify liability.”)

²⁰⁴ *Id.* (“Under statutes in effect in almost every jurisdiction, such a physician [who provides emergency services] is free of liability for ordinary negligence; to justify liability, the plaintiff must show (depending on the jurisdiction) that the physician was guilty of gross negligence or recklessness, or willful and wanton misconduct, or that the physician failed to act in good faith.”).

²⁰⁵ N.C. Gen. Stats. § 99-10(a).

²⁰⁶ N.C. Gen. Stats. § 99-10(b).

indifference to the rights or safety of the individual harmed by the volunteer[.]”²⁰⁷

Moreover, the Act specifically allows for liability for misconduct that:

- (A) constitutes a crime of violence...or act of international terrorism...for which the defendant has been convicted in any court;
- (B) constitutes a hate crime...;
- (C) involves a sexual offense...for which the defendant has been convicted in any court;
- (D) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or
- (E) where the defendant was under the influence...of intoxicating alcohol or any drug at the time of the misconduct.²⁰⁸

Particularly in cases where the right to sue or the right not to be sued hinges on the relative culpability of the parties, the characterization of an actor’s conduct may prove important. An otherwise negligent defendant may successfully defend on the basis of proximate cause where the plaintiff’s or a third party’s conduct is extreme to the point where courts are inclined to label it “unforeseeable,”²⁰⁹ though it is rare that it need be formally characterized as “reckless.”²¹⁰

Similarly, in many of the cases where no-duty rules based on social value norms—protection of individual autonomy, for example—would otherwise preclude suit, extreme misbehavior has emerged as the standard of liability. These cases include, but are not limited to, those where the no-duty rule is based on the longstanding judicial

²⁰⁷ 42 U.S.C.A. § 14503 (a)(3).

²⁰⁸ 42 U.S.C.A. § 14503 (f)(1)(internal cross references defining terms omitted).

²⁰⁹ See *supra* text at notes 129-133 and notes 166-171.

²¹⁰ See e.g. *Yun v. Ford Motor Co.*, 647 A.2d 841, 848 (N.J. Super. A.D. 1994)(“[Victim’s] flagrant disregard for personal safety by crossing Parkway late at night...constitute[s] intervening superseding cause[.]”), *rev’d* 669 A.2d 1378 (N.J. 1996).

insistence on the “protection of property rights.”²¹¹ Thus, the rule of no duty to trespassers, based on the importance accorded to real property and the value of rights of exclusive possession, not only allows landowners to be held liable for intentionally or recklessly injuring trespassers,²¹² but also recognizes a duty to trespassing children,²¹³ discovered trespassers²¹⁴ and, in some states, frequent adult trespassers.²¹⁵ In the latter cases, the occupier’s culpable misconduct will not necessarily be characterized as “reckless” under either the Second or proposed Third Restatement definitions.²¹⁶

²¹¹ See Wells, *supra* note 11 at 740-41 (identifying this as one of the aspects of traditional tort law explainable by reference to broadly held social values).

²¹² Prosser and Keeton, *supra* note 26, § 58 at 397 (explaining “[a] trespasser, while he may be a wrongdoer, is not an outlaw, and an intentional, unprivileged battery upon him was too much to be tolerated even by the great veneration of the English courts for rights in land. The defendant was not permitted to set traps for the trespasser, or to use unreasonable force to expel him from the premises. Nor, in later cases, was he allowed to injure him negligently by an act specifically directed toward him, or recklessly by conduct in conscious disregard of his peril.”).

²¹³ *Id.*, § 59 at 399-410.

²¹⁴ *Id.*, § 58, at 396-97.

²¹⁵ *Id.*, at 395-96.

²¹⁶ See e.g. *Alexander v. Medical Associates Clinic*, 646 N.W.2d 74, 79-80 (Iowa 2002)(finding duty of reasonable care to discovered trespassers); *Nelson v. Illinois Regional Commuter R.R. Corp.*, 845 N.E.2d 884, 889 (Ill. App. 2006)(holding “where the landowner is aware of the presence of frequent trespassers and a corresponding risk of danger to them, the frequent trespass doctrine imposes a duty of care on him to prevent harm.”).

On the other hand, in some cases courts have required conduct that seems to satisfy the proposed Third Restatement definition of recklessness as a condition of imposing liability, but have not formally announced a “recklessness” standard. For example, many jurisdictions immunize pharmacists from liability when a patient is injured by drugs prescribed by a physician. This no-duty rule is often justified by the claim that the imposition of a duty would have the potential to interfere with the relationship between the prescribing physician and the his or her patient. Nevertheless, even where immunity is recognized, an exception is carved out in cases where the pharmacist either had knowledge of a particular risk or almost certainly should have had such knowledge. Thus, where the pharmacist knew the customer was an alcoholic and that the drug prescribed was dangerous when mixed with alcohol, a duty was found. Similarly, where multiple drugs are prescribed and it is well-known among pharmacists that it is dangerous to take them in combination, the pharmacist cannot simply stick his head in the sand and still avoid liability. In other words, regardless of the court’s characterization of the pharmacist’s behavior under such circumstances, it is a recklessness standard that is being applied. Immunity may exist where there was even an unreasonable failure or refusal to investigate, however, the pharmacist is not free to ignore the facts in front of his or her eyes.

Cases that involve the voluntary consumption of intoxicants—drugs or alcohol—may represent a special, distinctive type of morally deficient egregious misconduct that, while not falling neatly within the negligence-recklessness doctrinal distinction,²¹⁷ is commonly treated as reckless with corresponding legal consequences. Although for a brief period of time during the 1950s and 1960s the idea of alcoholism as a disease led to at least some changes in criminal law,²¹⁸ similar changes in tort law are not readily apparent. In any event, by the 1970s, public attitudes toward drinking and driving had hardened with the result that courts were not only willing to preclude recovery by intoxicated plaintiffs, cut off the liability of negligent defendants when intoxicated third persons played a causal role in bringing about harm, but to impose punitive damages on intoxicated defendants as well.²¹⁹

What is important to note, for purposes of this Article, however, is that none of these cases represent any particular change in doctrine. Apparently, the moral intuition of the community both before and after the brief liberation of tort law during the 1960s and 1970s, has been to insist on the assumption of sole personal responsibility by those whose conduct is exceptionally culpable.

²¹⁷ There are, of course, many reasons why bad conduct following voluntary intoxication will not fit into attempts to define “recklessness” (or, for that matter “negligence”). Given the well-known addictive potential of various intoxicants, whether or to what extent consumption should even be viewed as “voluntary” is open to debate. Even if we assume that the intoxication is sufficiently voluntary, intoxication itself is not a tort. It is not until the intoxicated person chooses to drive, operate machinery, or the like, that the conduct becomes even potentially relevant in a tort case. To that, one must also consider the tort requirement that the combination of intoxication and the activity need to be casually linked to the harm.

²¹⁸ The American Psychiatric Association classified alcoholism as a disease in 1952. See American Psychiatric Association Comm. On Nomenclature and Statistics, *Diagnostic and Statistical Manual—Mental Disorders*, at vi, 88 (1952). Also see generally, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Calif. L. Rev. 943, 955-58 (1999).

²¹⁹ Generally see Danny R. Veilleux, *Annot.*, *Intoxication of Automobile Driver as Basis for Awarding Punitive Damages*, 33 A.L.R.5th 303 (1995).

IV. The Translation of Moral Social Intuition Into Tort Doctrine

The idea that widespread public intuition is—or at least can be—the substance from which tort doctrine is formulated is hardly novel. The insight that tort law mirrors our culture is one that Marshall Shapo has explained and explored in books and journal articles dating back at least to the early 1990s.²²⁰ In his most recent work on the subject,²²¹ he explains the judicial implementation of instrumentalist strict products liability doctrine of the 1960s and 1970s as a part of that ongoing process. “[I]t is reasonable to conclude,” he argues, “that the idea that there should be liability without fault for injuries caused by dangerously defective products was responsive to an underlying set of economic and social realities, reflecting the culture that derived its identity from those realities.”²²²

Yet, there is another explanation that appears better to fit the historical record. Throughout much—maybe most—of the 20th Century, tort law undoubtedly did reflect mainstream American culture. Something happened, however, during the 1960s and 1970s which interrupted the process—either momentarily halting it in its tracks or, at the very least, distorting the mirror’s image.

There are two aspects to the obvious explanation, one more significant than the other. First, as Shapo and others have recognized and acknowledged over the years, the filtering of the culture through the lens of a judiciary, that is not particularly

²²⁰ See Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 Nw. U. L. Rev. 1567 (1995); Marshall S. Shapo, *Products Liability and the Search for Justice* (1993).

²²¹ Shapo, *Tort Law and Culture*, *supra* note 103.

²²² *Id.* at 283.

representative of society as a whole, has, at the very least, the potential to distort the reflection.²²³ Second, and more importantly, what if the development of tort law during the 1960s and 1970s was characterized by a judicial tendency not to even attempt to reflect popular culture, but was based on a set of values that was largely out of touch with the mainstream?

In 1992, Michael Wells, explicating and applying earlier work by Bruce Ackerman, challenged what had become the conventional approach of tort theorists toward assessing where tort law was and where it was going.²²⁴ He explained:

My argument will make heavy use of a distinction, introduced by Professor Bruce Ackerman, between two styles of reasoning in addressing legal issues. One is the perspective of the “Ordinary Observer,” who begins his analysis by looking at the common practices of laymen and makes legal rules based on the expectations of a well-socialized member of society, without regard to whether the resulting body of law fits into any coherent pattern. Ackerman contrasts this method with that of the “Scientific Policymaker,” who begins from the premise that the law should serve some goal or small group of goals and who views adjudication as an exercise in crafting rules that will help to realize those goals. I maintain that traditional tort law better fits the model of the Ordinary Observer, while the new regime in torts is largely the product of Scientific Policymaking.²²⁵

²²³ It is for this reason that I argued elsewhere that judicial rule-making power should be reduced, leaving the decisions in most tort cases to the civil jury. See Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. Kan. L. Rev. 65 (2000).

Nevertheless, while Shapo acknowledges that, “judges experiences and their decisions in socially controversial cases will often tend to reflect those backgrounds and experiences[,]” recognizes that judicial decisions may embody “a set of biases associated with its creation by a predominantly male, white, affluent class of decisionmakers” and the possibility that “judges seeking to move up on the judicial career track will likely write opinions with an eye to how their decisions may be regarded by those in a position to advance them—who often will share the bias just described[,]” he insists not only that judges “try to hold their political predilections in check” but also “as a group tend generally to reflect the perspectives of the broader society....” Shapo, *Tort Law and Culture*, *supra* note 103 at 289-90.

²²⁴ Wells, *supra* note 11 (basing his argument on the distinction made in Bruce A. Ackerman, *Private Property and the Constitution* 10-20 (1977)).

²²⁵ *Id.* at 727-28.

Under the general heading of “Scientific Policymaking” (in a torts context) fall all of the major theoretical constructs that drove the development of torts in the 1960s and 1970s. It included all forms of the instrumentalism—regardless of whether the goals were social welfare, economic efficiency (wealth maximization), utility maximization, accident cost reduction, individual autonomy, or something else. Academic tort theory dictated judicial decisionmaking as much as (if not more) than before or since. The entire strict liability experiment arose out of it; it was not a product of the moral social intuition of the time and that, by itself, condemned it to eventual rejection together with a host of other legal doctrines that failed to resonate with the general public. While judges may have formally served as lawmakers, all too often they were acting as surrogates for academicians. As G. Edward White explained:

This study has suggested...that doctrinal changes in tort law have to an important extent been created by academicians. The influence of academics on tort law has ranged from direct and immediate examples (appellate court use of the Restatement of Torts, a treatise or a law review article as the source of a standard or test of liability) to a more indirect and long-range ones (the evolution of an extracted “principle” of tort law to prominent doctrinal status in the courts). But academic influence has been regular and profound, shaping basic conceptions of civil liability. To say that academic who propound theories, create doctrines, or extract principles of tort law are not functioning as lawmakers is to equate lawmaking solely with the status of officials charged with that task.²²⁶

V. Conclusion

Once one accepts that tort law was and is widely regarded as essentially punitive, the rejection of much of the doctrine that was developed during the 1960s and 1970s is not only not surprising, but was almost inevitable. While the values tort law has reflected traditionally were certainly not universally held, they are apparently very widely held and

²²⁶ White, *supra* note 116 at 241-42.

have been for a long time. The mere fact that they may be based on a lack of understanding of what many of us accept as basic legal principles does not really matter; the underlying beliefs are held firmly nonetheless. That liability without fault or without sufficient fault relative to others is perceived to be unfair to defendants; that highly culpable plaintiffs should be barred from recovery as should those who are otherwise deemed to have forfeited any claim to call upon society for redress is simply a reflection of those values.

The campaign to roll back the tort law of the 1960s and 1970s, as many have noted, is deliberately orchestrated and lavishly funded by those who have the most to gain by its success.²²⁷ This, of course, should come as no surprise to anybody. Like all political campaigns, it is at times wildly misleading—rife with half-truths and some out-and-out lies. Nevertheless, it is an elitist mistake to view the attractiveness of tort reform solely in terms of a cynical manipulation of a gullible public. Much of it is consistent with the widespread public rejection of the idea that accidents are inevitable. Rightly or wrongly, many believe not only can they be avoided, but also, if they are not, it may well be a matter of the victim's personal responsibility. Many reject the idea that accident costs should be spread, and insist that the imposition of liability can be nothing other than a public determination of significant moral deficiency. Moreover, conduct evidencing greed, ingratitude and overreaction or exaggeration of one's injury should serve to close the courthouse doors.

The post-1970s reemergence of conservative Christians as a political force championing free enterprise, sanctity of contract, property rights, personal responsibility

²²⁷ See Feinman *supra* note 6 and Attack on Trial Lawyers, *supra* note 5.

and some kinds of personal freedom may well have been a significant factor in the rollback of the liberalization of tort law, but most of the values they endorse (at least those relevant to the tort reform debate) have been widely shared for most of the 20th Century. In that sense, the developments of the 1960s and 1970s were the aberration.