Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault

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I. INTRODUCTION

All or nothing. For years this idea of absolutes has been a hallmark of tort law despite the inequities it has caused. Plaintiffs must either win a total victory or suffer total defeat. In recent years courts and legislatures have begun to recognize the injustice of the all-or-nothing approach and to replace it with rules that permit partial recoveries that

are more equitably tailored to the particular facts of each case.[1] The most dramatic example of this more equitable approach is the nearly universal rejection of contributory negligence in favor of comparative fault in negligence cases.[2] Almost all jurisdictions, however, still refuse to use comparative fault when defendant is alleged to have committed an intentional tort;[3] in that case, the all-or-nothing approach still prevails.

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1. Although comparative fault, which is discussed in the text, is the most obvious example of this new approach, there are others. For example, market share liability has enabled injured plaintiffs to obtain some compensation for their injuries even though they were unable to prove which of many negligent parties injured them. See, for example, *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), rev'd on other grounds, 681 F.2d 334 (5th Cir. 1982); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37 (1984). Similarly, a plaintiff who cannot prove that defendant's carelessness probably caused her injuries sometimes is permitted to recover for the value of her lost chance to avoid those injuries. See, for example, *Scafidi v. Seiler*, 119 N.J. 93, 574 A.2d 398 (1990). Under this approach, if, for example, defendant's negligence caused someone to lose a 25% chance of being cured of a fatal illness, a proper plaintiff could recover the value of that lost chance even though she had not proven that defendant, more likely than not, had caused the decedent's death.

2. Some form of comparative fault is presently used in 46 states. Alaska (Alaska Stat. § 09.17.060 (Supp. 1991); *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975)); Arizona (Ariz. Rev. Stat. Ann. §§ 12-2505, 12-2509 (West Supp. 1991)); Arkansas (Ark. Stat. Ann. § 16-64-122 (Supp. 1991)); California (*Li v. Yellow Cab Co. of Cal.*, 13 Cal. 3d 804, 532 P.2d 1226 (1975)); Colorado (1989 Colo. Rev. Stat. § 13-21-111); Connecticut (Conn. Gen. Stat. Ann. § 52-572 (West 1977)); Delaware (10 Del. Code Ann. § 8132 (Supp. 1990)); Florida (Fla. Stat. Ann. § 768.81 (West Supp. 1992); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973)); Georgia (Ga. Code Ann. §§ 51-11-7, 51-12-33 (Michie 1982 and Supp. 1992)); Hawaii (Hawaii Rev. Stat. § 663-31 (1988)); Idaho (Idaho Code §§ 6-801 to 6-806 (1990)); Illinois ((Ill. Ann. Stat. ch. 110, §§ 2-1107.1, 2-1116, 2-1117 (Smith-Hurd Supp. 1992)); Indiana (Ind. Code Ann. §§ 34-4-33-3 to 34-4-33-13 (Supp. 1992)); Iowa (Iowa Code Ann. § 668.1-668.3 (West 1987)); Kansas (Kan. Stat. Ann. §§ 60-258a, 60-258b (Supp. 1991)); Kentucky (Ky. Rev. Stat. Ann. § 411.182 (1992)); Louisiana (La. Civ. Code Ann. § 2323 (West Supp. 1992)); Maine (14 Me. Rev. Stat. Ann. § 156 (1980)); Massachusetts (Mass. Gen. Laws Ann. ch. 231, § 85 (West 1985)); Michigan ()*Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979)]; Minnesota (Minn. Stat. Ann. § 604.01 (West Supp. 1992)]; Mississippi (Miss. Code Ann. § 11-7-15 (1972)]; Missouri (Mo. Ann. Stat. § 537.765 (Vernon 1988); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983)); Montana (Mont. Code Ann. § 27-1-702 (1991)); Nebraska (Neb. Rev. Stat. § 25-21, 185 (1989)); Nevada (Nev. Rev. Stat. § 41.141 (Supp. 1991)); New Hampshire (N.H. Rev. Stat. Ann. §§ 507:7-d, 507:7-e (Equity Supp. 1991)); New Jersey (N.J. Stat. Ann. § 2A:15-5.1 to 2A:15-5.3 (West 1987 and Supp. 1992)); New Mexico (*Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981)); New York (N.Y. Civ. Prac. Law §§ 1411-1413 (McKinney 1976)); North Dakota (N.D. Cent. Code §§ 32-03.2-01 to 32.03.2-03 (Supp. 1991)); Ohio (Ohio Rev. Code Ann. §§ 2315.19, 2315.20 (Baldwin 1990)); Oklahoma (23 Okla. Stat. Ann. § 13 (West 1987)); Oregon (Or. Rev. Stat. §§ 18.470 to 18.490 (1988)); Pennsylvania (42 Pa. Cons. Stat. Ann. § 7102 (Purdon 1983 and Supp. 1992)); Rhode Island (R.I. Gen. Laws § 9-20-4 (1985)); South Carolina (*Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E. 2d 783 (1991)); South Dakota (S.D. Cod. Laws § 20-9-2 (1987)); Tennessee (*McIntyre v. Balentine*, 833 S.W. 2d 52 (1992)); Texas (Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001 to 33.013 (Vernon 1986)); Utah (Utah Code Ann. §§ 78-27-37 to 78-27-43 (1992)); Vermont (12 Vt. Stat. Ann. § 1036 (Equity Supp. 1992)); Washington (Wash. Rev. Code Ann. §§ 4.22.005, 4.22.015, 4.22.070 (West 1988)); West Virginia (*Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979)); Wisconsin (Wis. Stat. Ann. § 895.045 (West 1983)); Wyoming (Wyo. Stat. § 1-1-109 (1991)).

3. Victor E. Schwartz, *Comparative Negligence* § 5.2 at 97 (Allen Smith, 2d ed. 1986); Henry Woods, *Comparative Fault* § 7.1 at 165 (Lawyers, 2d ed. 1987).

Admittedly, the perpetrators of certain intentional torts should not benefit from comparative fault rules: why, for example, should a thief be able to avoid paying the full value of the items he stole by proving that the victim was careless in leaving her possessions unguarded? On the other hand, it takes little imagination to conceive of intentional tort situations in which resort to comparative fault is quite appealing. To use an example familiar to many law students, a defendant who, while legally hunting wolves, shoots at, hits, and kills plaintiff's dog, which looks exactly like a wolf, has committed an intentional tort.[4] The dog's owner may recover the full value of the dog even though defendant reasonably believed he was shooting a wolf. But what if the dog owner was negligent in releasing his wolf-like dog during wolf-hunting season?[5] Why should this negligence be ignored in determining the extent of defendant's liability? Had defendant been negligent (suppose, for example, he aimed at a wolf but carelessly hit plaintiff's dog), plaintiff's fault in releasing the dog would have been used either to reduce defendant's liability or to bar plaintiff from all recovery.[6] Although the equities

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New Jersey recently decided that comparative fault should be used in intentional tort cases, *Blazovic v. Andrich*, 124 N.J. 90, 590 A.2d 222 (1991), and New York has compared fault in many intentional tort cases for some time. See, for example, *Comeau v. Lucas*, 90 A.D.2d 674, 455 N.Y.S.2d 871 (N.Y. App. Div. 1982). But see *City of New York v. Corwen*, 164 A.D.2d 212, 565 N.Y.S.2d 457 (N.Y. App. Div. 1990). Louisiana appellate courts have held that comparative fault should be used in battery cases in which plaintiff provoked the battery. See, for example, *Baugh v. Redmond*, 565 So. 2d 953, 959 (La. Ct. App. 1990); *Jones v. Thomas*, 557 So. 2d 1015, 1017 (La. App. 1990); *Kennedy v. Parrino*, 555 So. 2d 990, 994 (La. Ct. App. 1990).

4. See *Ranson v. Kitner*, 31 Ill. App. 241 (1888). Many authorities find the idea that liability should be imposed on a morally innocent person, simply because the physical result that he intended turns out not to be permitted by the law, hard to justify. Holmes stated that it was "arguable" that defendants should not be held liable "unless, judged by average standards, [they are] also to blame for what [they did]." Oliver W. Holmes, Jr., *The Common Law*, 163 (Little, Brown, 1881). Many intentional tort defendants would not be held liable under such a standard.

Prosser, as well as Harper, James, and Gray, contends that holding the morally innocent defendant liable "can be justified only upon the basis of a policy which makes the defendant responsible for the physical result which he intended, and, as between two parties equally free from moral blame, places the loss upon the one who made the mistake." W. Page Keeton, et al., *Prosser and Keeton on Torts* § 17 at 110 (West, 5th ed. 1984). See also Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 1 *The Law of Torts* § 2.8 at 158 (Little, Brown, 2d ed. 1986). This may explain some cases, but it does not justify the result in the hypothetical discussed in the text in which the party who is free of moral blame is required to pay the blameworthy party. This Article does not explore the reasons for imposing liability in cases like *Ranson*. Instead, it assumes that liability is proper in that type case, but argues that plaintiff's fault should be considered in determining the amount of her recovery.

5. Little doubt exists that the dog's owner would have a negligence cause of action against someone to whom she had entrusted the dog who released it under these circumstances. Accordingly, the release of the dog seems to be negligent.

6. This bar would occur in contributory negligence jurisdictions and in modified comparative fault jurisdictions if the jury found that plaintiff's share of the fault exceeded the stated threshold, thus triggering the use of contributory negligence.

favor the morally innocent intentional tort defendant over both this negligent defendant and the negligent plaintiff, the law presently insists that the intentional tort defendant pay the negligent plaintiff in full but allows the negligent defendant either to escape without any liability or to pay for only part of the damage.

Many other, less familiar, fact patterns also indicate that comparative fault should be used in certain intentional tort cases. For example, in some cases an intentional tort will exist only if defendant negligently assessed the situation in which he acted.[7] In *McCummings v. New York City Transit Authority*,[8] plaintiff was shot by the police and seriously wounded while trying to escape from the scene of a crime in which he had beaten and choked a seventy-two-year-old man. Plaintiff sued, and the jury concluded that, because defendant's use of force had been excessive, plaintiff was entitled to damages, which were assessed at $4,343,721.24. Defendant's fault was carelessly misassessing the situation and therefore using more force than was permitted. Should not the jury be allowed to conclude that plaintiff's conduct in beating the man and running away when the police sought to arrest him was both blameworthy and a proximate cause of his injury? If it was, why should that fault be ignored in establishing damages?

Intentional tort cases in which defendant erroneously thought he had plaintiff's consent may also present situations in which comparative fault should be used. Suppose, for example, that defendant injured plaintiff during an Indian wrestling match.[9] At the time they agreed to the match, both plaintiff and defendant were drunk. Plaintiff claimed that she was so intoxicated that her consent to the match was invalid. Defendant did not think that plaintiff was too drunk to consent. If plaintiff was too drunk to consent, defendant's conduct may constitute a battery. Nevertheless, should not plaintiff's fault be considered? It would be incongruous to hold defendant fully liable while completely excusing plaintiff's nearly identical faulty conduct, which also contributed to her injury.

In other intentional tort cases, defendants are held liable even though they were not morally at fault. Thus, good faith purchasers of stolen goods are converters, and in some jurisdictions private persons who arrest others under the mistaken belief that those arrested have committed a crime are liable for false arrest no matter how reasonable their belief that the arrestee committed the crime.[10] If in such a case

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7. For a more complete discussion of this type of case, see text accompanying note 121.

8. 177 A.D.2d 24, 580 N.Y.S.2d 931 (N.Y. App. Div. 1992).

9. This example is similar to *Hollerud v. Malamis*, 20 Mich. App. 748, 174 N.W.2d 626 (1970).

10. See, for example, *Lindquist v. Friedman's, Inc.*, 366 Ill. 232, 8 N.E.2d 625 (1937).

plaintiff's fault contributed to her injury, why should that fault be ignored? It was proper for the court in *Lindquist v. Friedman's, Inc.*[11] to hold that defendant had falsely imprisoned plaintiffs when he detained them after they had used a counterfeit bill to pay for merchandise in defendant's store; the crime for which plaintiffs were detained required that they know that the bill was counterfeit, and they allegedly did not. If plaintiffs should have known that the bill was counterfeit, however, why not permit the jury to conclude that the plaintiffs' ignorance was negligence that should be considered in deciding damages? Similarly, if plaintiff's diamond ring, which plaintiff had carelessly left in a place where it was likely to be stolen, was stolen and later purchased by defendant, a good faith purchaser, should not plaintiff's fault in carelessly encouraging the theft be considered in determining the amount of money the good faith purchaser should have to pay to plaintiff?

Cases in which defendant did not intend the injury of which plaintiff complains but is nevertheless held liable under the liberal damage rules associated with intentional torts also call for the use of comparative fault. For example, in *Rogers v. Board of Road Comm'rs for Kent County*,[12] decedent was injured when his mowing machine hit a post that defendant had failed to remove from decedent's land. If the post was visible and should have been seen by decedent had he been paying proper attention, why should the decedent's carelessness be ignored simply because defendant had committed the intentional tort of trespass by failing (apparently carelessly) to remove the post?

Finally, cases arise in which plaintiff's provocation of defendant clearly should be reflected in any damage award. For example, in *Jones v. Thomas*[13] plaintiff objected when defendant told him it was time to take a break from work. An argument developed. When a supervisor told them to stop arguing, defendant walked away, but plaintiff continued to direct "rank profanity and threats of physical violence"[14] toward defendant. After about ten minutes of this verbal assault, plaintiff called defendant a "black motherfucker,"[15] threatened to kick his "black ass,"[16] and threatened to kill defendant's mother and burn down his house.[17] At this point, defendant finally lost control and punched plaintiff. Even though defendant committed an intentional tort, plain-

11. Id. For a more recent case involving somewhat similar considerations, see *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 285 N.E.2d 871 (1972).

12. 319 Mich. 661, 30 N.W.2d 358 (1948).

13. 557 So. 2d 1015 (La. Ct. App. 1990).

14. Id. at 1016.

15. Id. at 1017 n.2.

16. Id.

17. Id.

tiff's provocation clearly should be considered in determining damages.[18]

The thesis of this Article is that comparative fault[19] ought to govern the liability of my hypothetical wolf hunter, as well as the liability of the other defendants mentioned above and other similarly situated intentional tortfeasors. The reasons for using comparative fault in many intentional tort cases are discussed in Part II. Part III considers the justifications that have been offered to support the refusal to use comparative fault in these cases and finds them wanting. A system for determining when the use of comparative fault is appropriate in intentional tort cases is explained in Part IV. Part V explores the administrative costs that might be associated with the use of comparative fault in these cases.

II. Reasons for Using Comparative Fault in Intentional Tort Cases

The primary reason for using comparative fault in most types of intentional tort cases[20] is simple: it is fair to do so. Fairness undoubtedly is a major objective of the law, and "the keystone to fairness is proportionate responsibility for fault . . . [with] [e]ach party's recovery . . . [being] reduced in proportion to that party's responsibility . . . [so that] no one is unjustly enriched."[21] Although this

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18. Althougb this Louisiana court concluded that comparative fault should be used, most courts, unfortunately, would disagree.

19. Professor McNichols has suggested that the term "comparative responsibility" should replace "comparative fault." William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts*, 37 Okla. L. Rev. 641 (1984). "Comparative responsibility" certainly better expresses what is done when, for example, a jury in a strict liability case is asked to determine how plaintiff's fault compares to tbe total amount of fault of all the parties. Nevertheless, I have decided to use the term "comparative fault" because it is the more familiar term and because, for the most part, my discussion is limited to cases in whicb both parties were at fault so tbat "comparative fault" accurately describes the situation.

Furthermore, the adoption of comparative responsibility would raise additional issues that are beyond the scope of this Article. For example, some of the all-or-nothing aspects of the privilege rules probably should be replaced by some type of comparative responsibility that is not based on the parties' fault. Under the approach presently used, a defendant who reasonably but incorrectly believes he must defend himself is privileged to use reasonable force for that purpose. If in doing so be injures a totally innocent plaintiff, defendant pays nothing. Comparative responsibility might provide a way to divide the damages between such a plaintiff and defendant, and given plaintiff's innocence and defendant's error, protecting this defendant from full liability may be sufficient protection of his interests. Such possibilities raise issues that have little to do with comparative fault and thus will not be fully discussed.

20. In certain instances, defendant's conduct may disable him from asserting that plaintiff's fault should be considered. These instances are discussed in the first full paragraph following the text accompanying note 129 and in notes 136-47. In addition, the remedy provided in conversion cases makes the use of comparative fault undesirable in some of these cases. See note 118.

21. *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982). Tbose scholars who cbampioned

statement supports the conclusion that allocating damages according to fault advances fairness, it fails to tell us why this is true. Two reasons appear to exist. First, fairness requires that courts treat plaintiffs and defendants consistently; when defendant is held liable because he was at fault in causing an injury, it is inconsistent to relieve plaintiff, who was also at fault in causing the injury, of all responsibility. Second, ignoring plaintiff's faulty conduct contradicts our fundamental belief that people should bear some responsibility for injuries caused by their substandard conduct.

The inconsistent treatment of plaintiffs and defendants, both of whose carelessness contributed to plaintiff's injury, was most patent in negligence cases in which the contributory negligence rule required courts to absolve defendants of liability and impose the entire loss on plaintiffs. The inconsistency of imposing the full loss on one person because she had been negligent, while excusing the other despite his negligence, was dramatic. Once courts and legislatures realized that this inequitable treatment was not necessary because losses could be divided, most jurisdictions replaced contributory negligence with comparative fault.

There is more to the lure of comparative fault, however, than correcting the disparate treatment accorded to plaintiffs and defendants. Although that inconsistency may explain the dominance of comparative fault in negligence cases, it cannot explain why most courts faced with the issue have held that comparative fault should be used in strict liability cases.[22] In those cases, the traditional rule was to ignore plaintiff's fault.[23] Ignoring plaintiff's fault, however, was not inconsistent with the treatment accorded defendant whose fault—or lack of it—also was irrelevant. Thus, the reason for using comparative fault in strict liability cases cannot lie in a reluctance to treat the parties differently.

It might be argued that the attraction of comparative fault in strict liability cases arises from the inconsistency of treating strict liability defendants, who have not been shown to have been at fault, more sternly than negligence defendants, who clearly were at fault. Making faultless people pay more than careless people is anomalous, but that anomaly always existed. In fact, under a contributory negligence regime, the anomaly is greater, for then the careless plaintiff's full recov-

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the use of comparative fault in negligence cases also relied on the injustice of visiting the entire loss on one of two faulty parties. See, for example, William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 (1953); Ernest A. Turk, *Comparative Negligence on the March*, 28 Chi. Kent L. Rev. 189 (1950).

22. Keeton, et al., *Torts* § 65 at 478 (cited in note 4); Woods, *Comparative Fault* §§ 14.42-14.48 at 363-74 (cited in note 3).

23. Restatement (Second) of Torts §§ 515, 524 (1976).

ery in strict liability must be compared to no recovery in negligence. The use of comparative fault in negligence cases ameliorates this anomaly and thus should decrease the pressure to change the traditional rule that plaintiffs' carelessness is irrelevant in strict liability cases. Nevertbeless, the availability of comparative fault has had the opposite effect: instead of strengthening the position that plaintiffs' negligence is irrelevant in strict liability cases, it has caused many courts to conclude that plaintiffs' fault should be considered. One reason for this effect may be that comparative fault provides a way to avoid the anomaly of treating strict liability defendants more harshly than negligence defendants without imposing unduly harsh results on plaintiffs.

There is a more fundamental reason, however, for using comparative fault in these cases; it is our strongly held belief "tbat persons are responsible for their acts to the extent their fault contributes to an injurious result."[24] When plaintiffs' faults were causes of their injuries, we think those faults should be considered in assessing damages even though defendants are being held liable for reasons that have little to do with fault. This belief in responsibility for injuries caused by faulty actions is reflected in the law's initial decision to hold defendants liable because they were at fault, supports the use of comparative fault in negligence cases, and is a major reason why, once comparative fault was available, many courts changed the law to consider plaintiffs' fault in strict liability cases.

Both of these reasons for concluding that comparative fault should be used in negligence and strict liability cases also apply in intentional tort cases. First, although the conflict between the treatment accorded to plaintiffs and defendants often is not as direct[25] in intentional tort cases as it is in negligence suits, it exists. The law's refusal to consider plaintiffs' fault in intentional tort cases is inconsistent with its decision to hold defendants liable because they were at fault[26] in causing the

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24. Friedrich K. Juenger, *Brief For Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae,* Parsons v. Construction Equipment Company, 18 Wayne L. Rev. 3, 50 (1972).

The same conclusion was reached by the Supreme Court of California, which could discern no policy reason why that share of plaintiff's damages that flows from her own fault should be borne by others. "Such a result would directly contravene the principle . . . that loss should be assessed equitably in proportion to fault." *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169 (1978).

25. In negligence cases both parties were careless. In intentional tort cases, one may have acted negligently and the other intentionally. These differences are merely differences in degree, which supply no reason for refusing to compare one type of fault with the other. See the discussion of the differences between negligence and intent in the text accompanying notes 50-79.

When both parties' fault was intentional, the inconsistent treatment of the parties is just as stark in intentional tort suits as it is in negligence cases.

26. For example, a defendant who injures someone in an unavoidable accident is not liable,

harm. If engaging in faulty conduct that is a proximate cause of an injury results in liability for defendant, consistency requires that it have the same consequence for plaintiff. Second, the desire to hold plaintiffs responsible for losses caused by their fault should arise in intentional tort cases as it does in negligence and strict liability suits. Because plaintiffs' faulty conduct often would be the same in all of these cases, identical reasons to hold them accountable exist.

If these goals of imposing responsibility for losses caused by faulty conduct and according consistent treatment to all parties are never sufficient to justify the use of comparative fault in intentional tort cases, as the present blanket refusal to do so indicates, the reason must be that the use of comparative fault in these cases would undermine some more important goal of intentional tort law. This, however, does not appear to be true.

For the most part, the goals of intentional tort liability are the same as those of negligence liability: indicating that society finds certain behavior undesirable, deterring and perhaps punishing that undesirable behavior, and compensating some people who have suffered injury. One goal of negligence liability—loss spreading—is not an objective of intentional tort liability because generally it cannot be achieved by imposing liability on intentional tortfeasors.[27] However, although one goal of negligence liability is absent in intentional tort cases, the remaining goals are similar. Given this similarity of objectives, it is difficult to conclude that the goals of intentional tort liability and negligence liability differ enough to require that plaintiffs' fault be ignored in intentional tort cases even though it properly is considered in negligence cases. Consequently, comparative fault should be used in both types of cases.

This conclusion, based on the similarity between the goals of intentional tort liability and negligence liability, is buttressed by the fact that the use of comparative fault in intentional tort cases would not prevent the courts from achieving their deterrence[28] and punishment[29] objectives. In addition the fact that defendant still would be required to compensate plaintiff somewhat would send a message that society finds defendant's behavior objectionable. The goal of compensating the in-

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save in those few instances covered by strict liability. Keeton, et al., *Torts* § 29 at 162 (cited in note 4).

27. See text accompanying notes 31-32.

28. See text accompanying notes 106-09. It could be argued that the use of comparative fault actually would advance deterrence by deterring plaintiffs from engaging in improper conduct. This seems unlikely, however, as discussed with respect to defendants in the text accompanying notes 106-09.

29. See text accompanying notes 97-100.

jured would not be fully achieved because the careless plaintiff would not recover for all her damages. As discussed more fully below,[30] however, compensating plaintiffs may not be the real goal. It makes little sense to compensate one victim for her loss by imposing a greater loss on someone else, thereby creating a more needy victim.

The appeal of the compensation goal lies in the fact that the defendant in negligence and strict liability cases usually can spread the loss more easily. In such cases defendants typically are covered by insurance, and when the losses are associated with the sale of an item or even a service, they often can be passed along through price increases. In one way or another, the loss is dispersed by imposing it on defendant. In intentional tort cases, however, it is unlikely that defendants are better able than plaintiffs to spread losses. Because few intentional torts arise in sales situations, intentional tort defendants seem to be no better able than plaintiffs to pass along losses by increasing prices. In addition, these defendants' insurance may not provide a way to distribute losses because liability insurance does not cover many intentional torts.[31] In fact, intentional tort defendants as a group probably are less able than plaintiffs to distribute losses because plaintiffs often have first party insurance to cover much of their loss.[32] As a result, the courts' refusal to use comparative fault in intentional tort cases often causes the loss to be imposed on the person least able to spread it. Moreover, by imposing the entire loss on one party instead of dividing it between plaintiff and defendant, the anti-comparative-fault rule further concentrates losses.

Thus, the use of comparative fault in intentional tort cases might advance loss spreading, would not undermine deterrence or punishment, and would not counteract the message presently sent that society disapproves of the behavior of intentional tortfeasors. Once again, it seems that comparative fault should be used.

Finally, it should be noted that considering plaintiff's fault in intentional tort cases is nothing new.[33] Despite the courts' recognition of the importance of plaintiff's fault in these cases, their all-or-nothing approach prevented them from reaching decisions that reflected both parties' fault. When plaintiff's fault was sufficiently egregious to justify

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30. See text accompanying notes 110-13.

31. Robert E. Keeton and Alan I. Widiss, *Insurance Law, a Guide to the Fundamental Principles, Legal Doctrines, and Commercial Practices*, 493-94 (West, student ed. 1988).

32. Over 80% of accident victims have health and accident insurance. Victor E. Schwartz, *Comparative Negligence* 210 (Allen Smith, 2d ed. 1986).

33. For example, defendant presently is protected by a privilege if plaintiff "intentionally or negligently" caused defendant to believe that certain facts existed. Restatement (Second) of Torts § 77 (1963). See also id. §§ 88, 101, 119.

imposing the full loss on her, the courts did so by finding the defendant privileged. When plaintiff's fault was less significant, courts ignored it and imposed the full loss on the defendant. In this limited way, the courts, burdened by their all-or-nothing mindset, did as much as they could to recognize the relevance of plaintiff's fault in intentional tort cases. Comparative fault provides a method, unavailable when losses are held to be indivisible, to take account of both parties' fault, thereby enhancing the courts' ability to consider what has always been an important facet of each case. Thus, comparative fault should be a welcomed refinement to the present system of assigning liability in intentional tort cases.

In sum, the use of comparative fault in some intentional tort cases would promote fairness by allocating losses equitably. It would eliminate the inconsistent treatment presently accorded to plaintiffs and defendants in these suits and, unlike the existing rule, would honor our strong belief that people should bear some responsibility for losses caused by their faulty conduct. Furthermore, the use of comparative fault in intentional tort cases would advance the goal of loss spreading, and might even prevent some losses by deterring plaintiffs from endangering themselves. Moreover, this could be achieved through the use of comparative fault without foregoing the deterrence or punishment of defendant. In view of these potential benefits of using comparative fault in intentional tort cases, why has it not been done?

III. Justifications Offered to Support the Blanket Prohibition on the Use of Comparative Fault in Intentional Tort Cases

Although courts rarely give any policy reasons why plaintiff's fault should be irrelevant in an intentional tort case,[34] a few have attempted to justify that conclusion. The following justifications have been offered.

A. Plaintiff's Fault Must Be Ignored to Circumvent the Harsh Results Imposed by Contributory Negligence

Before the advent of comparative fault, a major reason for the courts' refusal to consider plaintiffs' contributory fault in intentional tort cases was their dissatisfaction with the harsh effect of the contribu-

34. See, for example, *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *Munoz v. Olin*, 76 Cal. App. 3d 85 (1977), vacated on other grounds, 24 Cal. 3d 629, 596 P.2d 1143 (1979); *Finnigan v. Sandoval*, 43 Colo. App. 219, 600 P.2d 123 (1979); *Dep't of Corrections v. Hill*, 490 So. 2d 118 (Fla. Dist. Ct. App. 1986), aff'd in part, rev'd in part, 513 So. 2d 129 (Fla. 1987); *Terrell v. Hester*, 182 Ga. App. 160, 355 S.E.2d 97 (1987); *Fitzgerald v. Young*, 105 Idaho 539, 670 P.2d 1324 (Ct. App. 1983); *Cruz v. Montoya*, 660 P.2d 723 (Utah 1983); *Stephan v. Lynch*, 136 Vt. 226, 388 A.2d 376, 379 (1978); *Schulze v. Kleeber*, 10 Wis. 2d 540, 103 N.W.2d 560 (1960).

tory negligence doctrine.[35] That doctrine precluded a negligent plaintiff from recovering anything from the defendant who had negligently injured her. A court that was uncomfortable with a rule which barred a careless plaintiff from recovering from a negligent defendant naturally would be reluctant to extend that rule to other cases, especially intentional tort cases in which the rule usually would place the entire loss on the less culpable party.[36] However, the availability of comparative fault—be it pure comparative fault or modified comparative fault—should ameliorate this concern.

Under a pure comparative fault regime,[37] a court need not worry about the harshness of the contributory negligence rule because the negligent plaintiff is no longer barred from recovering; her recovery simply is reduced to reflect her share of the fault. Thus, the undue harshness rationale for refusing to compare plaintiff's negligence with defendant's intentional fault disappears.

On the other hand, harsh results could occur if modified comparative fault were used in intentional tort cases; nevertheless, such results are consistent with the philosophy of modified comparative fault and are preferable to the results imposed by the present system. Under modified comparative negligence, plaintiff's recovery is reduced as in pure comparative negligence, but only until her fault reaches some threshold amount, usually around fifty percent of the total fault.[38] Once plaintiff's fault reaches that threshold, her claim is barred. If this same approach were used in intentional tort cases, a plaintiff whose fault was under the threshold amount would obtain a reduced recovery, but a plaintiff whose fault exceeded the threshold would be barred from recovery.[39] Barring a plaintiff from all recovery even though she has

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35. Jake Dear and Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 Santa Clara L. Rev. 1, 9 (1984); See *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 176 (1982); *Danculovich v. Brown*, 593 P.2d 187, 194 (Wyo. 1979).

36. Generally, a defendant who has committed an intentional tort intended an injury similar to the one that he caused and thus usually is more at fault morally than his victim, at least if the victim's fault was mere carelessness.

37. Under pure comparative fault, plaintiff's recovery is reduced by the same proportion that her fault bears to the total fault.

38. Schwartz, *Comparative Negligence* § 3.5 at 67 (cited in note 32). In two states, plaintiffs are barred from recovery if their negligence is more than "slight." See Neb. Rev. Stat. § 25-21,185 (1989); S.D. Cod. Laws Ann. § 20-9-2 (1987).

39. It is possible that a different type of modified comparative fault would be applied in intentional tort cases. In jurisdictions in which modified comparative negligence is merely a step toward adoption of pure comparative negligence, a different version of modified comparative fault would be needed for intentional tort cases because in intentional tort cases the courts are going from full recovery to partial recovery, instead of from no recovery to partial recovery. To reflect that difference, the modified comparative fault system for intentional torts could permit the present full recovery in all cases in which plaintiff's fault was below the threshold but allow only a proportionate recovery when plaintiff's fault exceeded the threshold. Such a system would not

shown that defendant committed an intentional tort is manifestly inequitable. Furthermore, in the intentional tort context (unlike in negligence) disallowing recovery completely is so radical a departure from the present system, which permits the negligent plaintiff to recover fully, that the appearance of inequity is exacerbated. This treatment of plaintiffs whose fault exceeds the threshold, however, comports with one of the justifications most often offered for modified comparative negligence—that a plaintiff should not recover from a person whose fault is less than (or in some places, equal to) hers. In addition, when plaintiff's fault exceeds defendant's, a rule that prevents plaintiff from recovering from defendant is more equitable than the present approach, which requires the less faulty defendant to pay fully the more faulty plaintiff. Consequently, even though the use of modified comparative fault in appropriate intentional tort cases would lead to harsh results when plaintiff's fault is above the threshold, such results are in keeping with the philosophy behind modified comparative fault and invariably would be less inequitable than the present system of requiring defendant to pay in full.

Thus, the courts' fear that recognizing plaintiffs' fault in intentional tort cases would lead to unduly harsh results may be valid in those few states that continue to insist that contributory negligence is a complete defense. Courts in jurisdictions that bar plaintiffs from recovery if their fault is more than slight also have reason to be reluctant to use that version of modified comparative fault in intentional tort cases because it could cause unduly harsh results in many cases while correcting injustice in only a few. In all other jurisdictions, the use of comparative fault in intentional tort cases will not lead to unduly harsh results; in fact, the results will be more equitable than those presently reached.

B. Comparative Negligence Statutes Prohibit the Use of Comparative Fault in Intentional Tort Cases

Because the field of contributory negligence was clearly governed by common law,[40] its rules could be judicially modified. Many jurisdic-

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change the results of intentional tort suits as significantly as would the usual modified system and would avoid the harsh (in so far as plaintiff is concerned) results discussed in the text. It contradicts, however, one of the theoretical justifications for modified comparative fault: that plaintiffs whose fault is above the threshold are entitled to no recovery. Furthermore, it addresses the inequities of the present system only in those cases in which plaintiff's fault is above the threshold. It seems unlikely that any jurisdiction would devise a comparative fault rule that undermines the jurisdiction's rationale for using modified comparative negligence. The possibility that any court would create such a system knowing that it would only partially correct the existing inequities is even more remote.

40. *See Li* 532 P.2d at 1232.

tions that have replaced contributory negligence, however, have adopted comparative fault legislatively, and some of these statutes speak in terms of comparative negligence.[41] A court might conclude that the legislature, by enacting a comparative negligence statute, has indicated that the comparison of fault is appropriate only in negligence cases and that the court, consequently, does not have the power to extend the comparative fault doctrine to intentional tort cases.[42] This conclusion, however, is not required because the courts can judicially create a comparative fault rule to be used in intentional tort cases. In New Jersey, which has a comparative negligence statute,[43] the courts have created such a rule.[44] Similarly, a number of courts have decided that the existence of a comparative negligence statute does not prevent them from using a variation of comparative fault in strict liability cases.[45] Even the Uniform Comparative Fault Act indicates that it is proper for courts to apply comparative fault to situations such as intentional torts, which are not specifically covered by the Act.[46] Accordingly, the existence of a comparative negligence statute does not preclude the courts from using comparative fault in intentional tort cases.

C. *Intent and Negligence Are Different in Kind and Thus Cannot Be Compared*

One of the more popular reasons offered to explain the prohibition against using comparative fault in intentional tort cases is that defendant's intent and plaintiff's negligence cannot be compared[47] because they are different in kind.[48] This argument fails for two reasons. First,

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41. See, for example, 42 Pa. Cons. Stat. Ann. § 7102 (Purdon 1983 and Supp. 1992); 12 Vt. Stat. Ann. § 1036 (Equity Supp. 1992).

42. Some statutes, by specifying that they do not apply to actions based on intentional torts, come closer to prohibiting the courts from extending their provisions to cover such torts. See, for example, Fla. Stat. Ann. § 768.81 (West Supp. 1992). Even these statutes, however, do not prevent the courts from applying comparative fault to intentional tort cases because they do not contain provisions prohibiting courts from adopting comparative fault.

43. N.J. Stat. Ann. § 2A:15-5.1 to 2A:15-5.3 (West 1987 and Supp. 1992).

44. *Blazovic v. Andrich*, 124 N.J. 90, 590 A.2d 222 (1991).

45. See, for example, *Hao v. Owens-Illinois, Inc.*, 738 P.2d 416 (Haw. 1987); *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985). The *Bell* court noted that the statute does not prohibit it "from applying comparative negligence to a claim previously insusceptible to the har of contributory negligence." Id. at 170.

46. Although the Uniform Comparative Fault Act does not authorize the use of comparative fault in intentional tort cases, the comments state that it does not prohibit the use of the doctrine in those cases. Unif. Comp. Fault Act § 1, cmt. 12, reprinted in Schwartz, *Comparative Negligence* 364-65 (cited in note 32).

47. *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986).

48. See, for example, *Bell v. Mickelsen*, 710 F.2d 611, 617 (10th Cir. 1983); *Herbert v. First Guaranty Bank*, 493 So. 2d 150, 155 (La. Ct. App. 1986); *Florenzano*, 387 N.W.2d at 176 (Minn.

although the conclusion that intent and negligence are different in kind sounds appealing, significant doubt exists that they are.[49] Second, even if they are different in kind, that is not a sufficient reason to require that one of two faulty people bear the entire loss.

1. Do Negligence and Intent Differ in Kind?

Although some courts, in refusing to consider plaintiffs' fault in intentional tort cases, rely on the assertion that negligence and intent are "different in kind," they rarely explain what makes the difference one "in kind" rather than one "in degree"[50] or state what differences between negligence and intent render those concepts different in kind.[51] In fact, the basic premise of this justification for refusing to use comparative fault is undermined by the Second Restatement of Torts, which implies that differences in degree may be differences in kind.[52] Furthermore, assuming that two distinct types of differences exist, the courts' conclusion that intent and negligence differ in kind rather than in degree is rendered suspect by the fact that the courts sometimes conclude, when the issue arises in a different context, that these two concepts differ only in degree.[53] Some legal scholars seem to be confused as

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1986); *Danculovich v. Brown*, 593 P.2d 187, 193 (Wyo. 1979). See also *Cage v. New York Central R.R.*, 276 F. Supp. 778, 790 (W.D. Pa. 1967).

49. See text accompanying notes 50-79. As one eminent jurist, Circuit Judge Posner, has said, "The spectrum is continuous between involuntary conduct at the one end and deliberate action on full information at the otber. There are no clean breaks marked 'involuntary,' 'unavoidable,' 'negligent,' 'grossly negligent,' 'reckless,' 'deliberate.' " *Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1042 (7tb Cir. 1990). Nevertheless, the court concluded tbat contributory negligence was not a defense to an intentional tort.

50. See, for example, cases cited in note 48.

51. The few courts that give any explanation for their "different in kind" conclusion often exhibit some confusion about the state of mind required for an intentional tort. A Louisiana court spoke of an intentional tortfeasor as one who "intended to inflict harm," *Hebert*, 493 So.2d at 155; and a Kansas court described an intentional tortfeasor as one who "affirmatively wishes to injure"; *Atchison, T. & S.F. Ry. Co. v. Baker*, 98 P.2d 804, 807 (1908). But many intentional tortfeasors intend no harm or injury. Similarly, the Supreme Court of Iowa stated that its rule against contribution between intentional tortfeasors was based "upon moral turpitude and actual intent to injure," neither of which is required for an intentional tort. *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23, 28 (1956).

52. Restatement (Second) of Torts § 500 cmt. g (1963) states that the difference between negligence and recklessness "is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."

The Restatement's implication that no significant distinction can be drawn between differences in kind and differences in degree receives some support from Edward H. Levi who states that often "matters of kind vanish into matters of degree." Edward H. Levi, *An Introduction to Legal Reasoning* 9 (Univ. of Chicago, 1949).

53. See, for example, *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524-525 (10th Cir. 1979); *Spivey v. Battaglia*, 258 So. 2d 815, 817 (Fla. 1972).

The difficulty courts exhibit in distinguishing between intent and negligence is in itself some indication that these concepts are not different in kind, for to amount to a difference in kind, the

well. For example, *Prosser and Keeton on Torts* opines inconsistently that in some cases the "distinction between intent and negligence obviously is a matter of degree"[54] and that the "aggravated form of negligence, approaching intent . . . differs from negligence not only in degree but in kind. . . ."[55] Given these contrary conclusions and the paucity of reasoning behind them, it is irresponsible to rely on the "different in kind" rationale to deny important rights without fully exploring first what is meant by differences in kind and degree and then the distinctions between negligence and intent that supposedly render them different in kind.

In one of the few opinions containing any discussion of differences in kind and degree, Justice Holmes stated that most differences are in degree, not kind.[56] He cited night and day as examples of things that are different in degree; although night and day differ dramatically, they are opposite poles of an "admitted antithesis" and thus differ in degree, not in kind.[57] Pursuant to that approach, things that can be measured along a continuum differ in degree, while things that have no common characteristic differ in kind.

In what respects do negligence and intent differ? According to generally accepted definitions, intent arises when the actor "desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it."[58] Negligent conduct "falls below the standard established by law for the protection of others against unreasonable risk of harm."[59] Thus, intentionally tortious and

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difference, at a minimum, must be detectable. No court that has concluded that the same conduct can amount to both an intentional tort and negligence, see, for example, *Mazzilli v. Doud*, 485 So. 2d 477 (Fla. Ct. App. 1986); *Ghassemieh v. Schafer*, 52 Md. App. 31, 447 A.2d 84 (Md. Ct. Spec. App. 1982); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979); or that has held that gross negligence "may supply the element of intent," *Lopez v. Surchia*, 112 Cal. App. 2d 314, 317, 246 P.2d 111, 113 (1952), quoting 6 C.J.S. Assault & Battery § 10(3) (1975); that intent and recklessness are "not necessarily opposed one to the other," *Hackbart*, 601 F.2d at 524; or that wantonness "finds its equivalent, in point of responsibility, to willful or intentional wrong," *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232, 243, 33 So. 875, 878 (1903), can convincingly claim that intent and negligence are so distinct as to be different in kind.

54. Keeton, et al., *Torts* § 8 at 36 (cited in note 4).

55. Id. § 65 at 462.

56. *Haddock v. Haddock*, 201 U.S. 562, 631 (1906) (Holmes dissenting), overruled by *Williams v. North Carolina*, 317 U.S. 287, 304 (1942).

57. *Haddock*, 201 U.S. at 632.

58. Restatement (Second) of Torts § 8A (1963).

59. Id. § 282. Somewhere between intention and negligence is recklessness, which involves an intentional act or omission that the actor does or fails 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." Id. § 500. Depending upon the jurisdiction, recklessness is either an aggravated form of negligence or an intermediary type of conduct, supposedly different in kind from both negligence and intent. Compare, for example, *Sorensen v. Allred*,

negligent conduct apparently differ on two bases. First, whereas the intentional tortfeasor was at least "substantially certain" that particular consequences would follow,[60] the negligent tortfeasor merely created an unreasonable risk.[61] Second, whereas the intentional tortfeasor subjectively[62] "intended" some consequences, the negligent tortfeasor failed to meet an objective standard.[63]

No one doubts that differences, indeed meaningful differences, may often exist between conduct that is substantially certain to cause a result and that which merely involves an unreasonable risk of the result. The fact that these differences are meaningful, however, does not render them differences in kind. The concepts of substantial certainty and unreasonable risk describe the degree of certainty that the conduct will cause a result. Thus, they exist on a continuum that stretches from conduct creating no foreseeable risk of harm (usually nontortious conduct) through that creating an unreasonable risk of harm (negligent conduct) and that creating a strong probability of harm (recklessness) to that creating either a substantial certainty of harm or a desired harm (intent). These constructs all measure the same concept—certainty of harm—and thus shade into each other. To draw a line anywhere on this continuum and declare that conduct on one side of the line differs in kind from conduct on the other side of the line would be arbitrary and is not supported by, much less required by, the differences between these types of behavior.

Nor is the second supposed distinction between intentional torts and negligence—the subjective, plaintiff-specific requirement of intent versus the supposedly objective, reasonable person test of negligence—sufficiently clear or significant to render the two concepts differ-

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112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980) and *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), with *Krivijanski v. Union: R.R.*, 357 Pa. Super. 196, 515 A.2d 933 (1986) and *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).

60. Restatement (Second) of Torts § 8A (1963).

61. Id. §§ 291, 500 (1963).

62. Some authorities contend that under tbe Second Restatement objective "intent" is sufficient. David J. Jung and David I. Levine, *Whence Knowledge Intent? Whither Knowledge Intent?*, 20 U.C. Davis L. Rev. 551, 559-65 (1987). See also Leon Green, *The Thrust of Tort Law*, 64 W. Va. L. Rev. 59, 63-4 (1961). To the extent that an objective test of intent is used, the linchpin of the "different in kind" argument has been demolished.

Because most authorities contend that the test is subjective, this Article accepts that conclusion and attempts to show that the difference between negligence and intent, as a practical matter, is one of degree even under a subjective test of defendant's intent.

63. The authorities disagree as to whether an objective or subjective standard is used to determine recklessness. Compare, for example, *Roberts v. Brown*, 384 So. 2d 1047 (Ala. 1980) and Restatement (Second) of Torts § 500 (1963), with *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) and *Wolters v. Venhaus*, 350 Ill. App. 322, 112 N.E.2d 747 (1953). Compare by analogy *Smith v. Wade*, 461 U.S. 30, 61-64 (1983) (Rehnquist dissenting).

ent in kind.[64] First, in examining whether a negligent defendant's state of mind differs in kind from that of an intentional tortfeasor, the focus should be on defendant's actual state of mind, not on whether the law requires plaintiff to prove that defendant acted with a particular state of mind. When that focus is brought to bear, the subjective-objective distinction between intent and negligence largely disappears because, even though the law does not require plaintiff in a negligence case to prove that defendant subjectively realized that his conduct was unreasonably dangerous, many negligence defendants knew that they were creating unreasonable risks.[65] In these cases no subjective-objective distinction exists between negligence defendants and intentional tort defendants; both were subjectively aware of the risks created by their conduct.

Second, an examination of cases shows that the requirement of subjective intent is not distinct completely from the objective negligence approach.[66] Subjective intent can exist only in the mind of the actor, yet no jury is required to accept the actor's self-serving testimony as to his intent. Courts using the subjective standard of intentional torts therefore permit the jury to "infer that the actor's state of mind was the same as a reasonable person's state of mind would have been."[67] Some states go even further, creating a presumption that the actor "intend[ed] the ordinary consequences of his voluntary act."[68] In practice, the subjective standard of intentional torts thus approaches the objective standard of negligence. Admittedly, a difference could exist in a particular case—the defendant could convince the jury that he did not realize what a reasonable person would have realized and thus avoid liability for an intentional tort—but that would be a highly unusual case. Typically the jury will find intent, despite defendant's

64. Interestingly, the Second Restatement does not focus on this distinction in the comments that discuss the differences between intent, recklessness, and negligence. Restatement (Second) of Torts § 282 cmts. d and e, and § 500 cmts. f and g (1963).

65. The entire deterrence rationale for imposing liability on negligent defendants is based on the conclusion that potential defendants can and will decide what actions are unreasonably dangerous. Some basis for concluding that this is possible clearly exists. For example, some studies show that over half of the drivers who caused fatal automobile accidents "had blood alcohol level concentrations far greater than those likely to be reached hy most social drinkers." Harper, James, and Gray, 3 *Law of Torts* at 91 (cited in note 4). Many of these drivers must have known that, by drinking excessively and driving, they were creating unreasonable risks. Other defendants were specifically warned of the risks they were creating. In *Vaughn v. Menlove*, 3 Bing (N.C.) 467, 132 Eng. Rep. 490 (Ct. Common Pleas 1837), defendant repeatedly was told that his hayrick was a fire hazard, but said "he would chance it." Again it seems likely that defendant understood the danger, but decided to continue his endangering conduct.

66. See *Smith v. Wade*, 461 U.S. at 63-64 (Rehnquist dissenting).

67. Keeton, et al., *Torts* § 8 at 36 (cited in note 4).

68. Cal. Evidence Code § 665 (West 1966). Accord, *Casualty Reciprocal Exchange v. Thomas*, 7 Kan. App. 2d 718, 647 P.2d 1361 (1982).

protestations of ignorance, whenever a reasonable person would have realized that his conduct would cause the proscribed invasion. Thus, as a practical matter, the requirement that plaintiff prove that defendant subjectively knew he would cause a result is not strictly enforced.

The supposed subjective-objective distinction between intent and negligence is further eroded by the subjectivity that has crept into the supposedly objective reasonable person test of negligence law. The conduct of a child is judged by that of a reasonable child of defendant's age, intelligence, experience, skill, and understanding[69]—a somewhat subjective standard. Although the conduct of an adult defendant is judged by the reasonable person standard, the reasonable person takes on the physical characteristics,[70] superior knowledge, superior skill,[71] and superior intelligence[72] of the defendant. In a few jurisdictions defendant's sudden, unforeseeable, severe insanity also is considered in deciding if his conduct met the required standard.[73] In such a case defendant apparently is negligent only if he failed to act as a reasonable person with defendant's insanity—obviously a rather subjective approach. Thus, in many instances the negligence standard is not completely objective.

Considering the subjectivity that has infiltrated the negligence analysis and the extent to which the objective standard is used in intentional tort cases, it is doubtful that the subjective-objective distinction can support the conclusion that these torts always differ in kind. When that blending of the subjective and the objective is considered in conjunction with the fact that many negligence defendants knowingly created unreasonable risks and thus would be liable even if a completely subjective standard were used, it becomes clear that this insubstantial subjective-objective distinction cannot sustain the conclusion that intentional torts invariably differ in kind from negligence.[74]

There are other indications that negligence and intent are not different in kind. For example, with rare exceptions, a tort does not arise

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69. Keeton, et al., *Torts* § 32 at 179-80 (cited in note 4).

70. Harper, James, and Gray, *3 Law of Torts* at 421-23 (cited in note 4); Keeton, et al., *Torts* § 32 at 175 (cited in note 4).

71. Harper, James, and Gray, *3 Law of Torts* at 420-21 (cited in note 4); Keeton, et al., *Torts* § 32 at 185 (cited in note 4).

72. Keeton, et al., *Torts* § 32 at 185 (cited in note 4).

73. See *Breunig v. American Family Life Ins. Co.*, 45 Wis. 2d 536, 173 N.W.2d 619 (1970).

74. Evidence that some courts have implicitly recognized that this subjective-objective distinction is not the reason for their refusal to use comparative fault in intentional tort cases is their refusal to compare plaintiff's negligence with defendant's willful or wanton conduct, even though in these cases both parties' conduct is judged under an objective standard. See, for example, *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (no comparative fault when defendant's conduct was willful or wanton; conduct is willful or wanton if the actor "knows, or should know" that his intentional act "will very probably cause harm"); *Danculovich v. Brown*, 593 P.2d at 193-94.

if the plaintiff consented to defendant's conduct[75] or if defendant reasonably believed that plaintiff's conduct indicated consent.[76] Hence, in some cases in which consent is the issue, an intentional tort will exist only if defendant was negligent in deciding that plaintiff's conduct evinced consent. Similarly, some privileges depend on what a reasonable person in defendant's position would have believed.[77] Thus, a defendant who asserts one of these privileges has committed an intentional tort[78] only if he fails to meet the objective reasonable person standard. Once again, the existence of an intentional tort depends on whether defendant's perceptions were those of a reasonable person.[79] It is hard to conclude that such a defendant's fault differs in kind (or even in degree) from negligence.

2. Do Differences in Kind Mandate Different Results?

Even if intent and negligence do differ in kind, it is far from clear that such a difference should prevent courts from using comparative fault. Although that would be the case if it were impossible[80] to compare the faulty conduct of plaintiff with that of defendant, in reality it is no more difficult to compare negligent conduct to intentional conduct than it is to compare two types of negligent conduct.[81] Furthermore, in strict liability cases, many courts and legislatures have decided that the

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75. Harper, James, and Gray, 4 *Law of Torts* at 298 (cited in note 4); Keeton, et al., *Torts* § 18 at 112-13 (cited in note 4).

76. *O'Brien v. Cunard S.S. Co.*, 154 Mass 272, 28 N.E. 266 (1891); Restatement (Second) of Torts § 892 (1977).

77. See, for example, Restatement (Second) of Torts §§ 88, 101, 119, 125 (1963).

78. Although there is some disagreement about whether the existence of a privilege negates the tort or simply excuses it, the difference is of little significance here. I have used the Second Restatement's conclusion that the existence of a privilege "prevents [defendant's] conduct from being tortious. . . ." Id. Ch. 3, Scope Note (1963).

79. See, for example, id. § 892 comment b (1977).

80. Of course, policy reasons may justify the refusal to compare fault. However, that is not the point being discussed here. Here the issue is whether the difference in kind between the two concepts in and of itself requires that the parties' fault not be compared. Other supposed justifications for the refusal to use comparative fault are discussed in other subsections of Part III of this Article.

81. In many negligence cases it is undeniably difficult to compare the faults of plaintiff and defendant. Suppose a case in which plaintiff was injured in an automobile accident caused by the combined negligence of the car manufacturer's negligent production of a defective car and plaintiff's substandard driving. Given the different types of conduct involved, jurors may have difficulty determining how to divide the parties' fault.

It should be no more difficult to determine how to apportion fault in many intentional tort cases. For example, suppose an intoxicated plaintiff attacked a similarly intoxicated defendant who unreasonably misjudged the situation and used excessive force to repel plaintiff's attack. Defendant's use of excessive force amounts to an intentional tort, but it seems easier to compare the fault of this plaintiff and defendant than to compare the negligence of the car driver and the manufacturer discussed in the prior paragraph.

benefits of comparative fault outweigh any conceptual difficulty in comparing the conduct of plaintiff and defendant.[82] Any jurisdiction that, in strict liability cases, requires juries to compare plaintiff's fault with defendant's nonfault cannot contend seriously that any perceived difficulty in comparing one type of fault (negligence) with another (intent) justifies depriving the intentional tort defendant of the benefits of comparative fault.

One final indication that the "difference in kind" rationale may not be the real basis for refusing to consider plaintiff's negligence in an intentional tort situation is that courts in intentional tort cases often refuse to consider plaintiff's intentional tortious conduct that was a cause of her injury. Thus, a defendant whose spring gun shot a thief who was trespassing on defendant's land is fully liable even though the thief's intentionally tortious conduct was a substantial factor in causing her injury.[83] Similarly, a defendant who unreasonably used too much force in defending himself from a battery is fully liable for the injury caused by the excessive force,[84] and somewhat analogously, most jurisdictions hold intentional tort defendants liable for full compensatory damages even though plaintiff provoked defendant.[85] Obviously, the reason for refusing to consider plaintiff's fault in these types of cases cannot be the alleged difference in kind between negligence and intent because all of these parties acted intentionally.

Thus, the distinctions between negligent conduct and intentional conduct do not render the two different in kind, and even if they did, that difference would not justify denying intentional tort defendants the benefits of comparative fault. Furthermore, the courts' refusal to compare parties' intentionally tortious conduct indicates that their reason for refusing to compare fault in intentional tort cases is not based on the "different in kind" rationale.

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82. See, for example, Alaska Stat. §§ 09.17.060, 09.17.900 (Supp. 1991); Ark. Stat. Ann. § 16-64-122 (Supp. 1991); *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983) (admiralty); *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339 (9th Cir. 1981) (Nevada law); *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) (Virgin Island law); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (admiralty); *Daly v. Gen. Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Armstrong v. Cione*, 69 Haw. 176, 738 P.2d 79 (1987); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Sandford v. Chevrolet Div. of Gen. Motors*, 292 Or. 590, 642 P.2d 624 (1982); *Fiske v. MacGregor*, 464 A.2d 719 (R.I. 1983); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982).

83. See, for example, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

84. Keeton, et al., *Torts* § 19 at 126 (cited in note 4).

85. Id.

D. *Plaintiff Is Entitled to Full Compensation*

A variation on the different in kind argument, which has recently been advanced, is that comparative fault should not be used in intentional tort cases because intentional tort liability is not based on fault at all, but on plaintiff's right to be compensated for certain intentional invasions.[86] While the latter part of this statement correctly states the conclusion reached in cases in which liability is imposed, the argument is based on the assumption that plaintiffs who presently would receive full compensation invariably are entitled to full compensation. That position clearly begs the question.

E. *Plaintiff Has No Duty to Act Reasonably to Avoid Harm*

Some say that plaintiff's fault is irrelevant when defendant's tort was intentional because plaintiff has no duty to act reasonably to avoid being harmed by an intentional tort.[87] Because a duty exists if the court says it does,[88] the question becomes: should there be a duty? This question can be answered only by analyzing the reasons for and against imposing a duty through the use of comparative fault, an analysis with which Parts II, III, IV, and V of this Article are concerned. Suffice it to

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86. Michael B. Gallub, *Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing "Culpable Conduct" Under New York's CPLR 1411*, 37 Syracuse L. Rev. 1079, 1112 (1987).

87. Charles Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence* § 65 at 104 (Baker, Voorhis , 3d ed. 1899). Because Beach's statement is based on the conclusion that a negligent plaintiff should not be "deprived" of redress, the author might have reached a different conclusion had comparative fault been available. Accord, *Steinmetz v. Kelly*, 72 Ind. 442 (1880). Compare *Melendres v. Soales*, 105 Mich. App. 73, 81-82, 306 N.W.2d 399, 403 (1981) (stating that plaintiff's duty when the injury is caused "by design is insignificant, if existent at all"). A later Michigan case concluded that a plaintiff has a significant duty not to permit himself willfully to be injured by defendant's intentional tort. *Dinger v. Dep't of Natural Resources*, 147 Mich. App. 164, 383 N.W.2d 606 (1985).

Interestingly, the law already imposes on potential plaintiffs a duty of care to avoid being the victims of intentional torts in a limited number of situations. For example, if plaintiff acted in a way that reasonably caused defendant to conclude that plaintiff consented to defendant's conduct, plaintiff impliedly consented, and no tort was committed. In this way, the law imposes on plaintiff a duty to use reasonable care not to appear to consent to conduct to which she does not want to consent. Plaintiff's failure to use reasonable care in this respect deprives her of a cause of action. Similarly, the Restatement permits one private person to arrest another for a criminal offense if the arrestee "knowingly causes the actor to believe that facts exist which would create in him a privilege to arrest." Restatement (Second) of Torts § 119(e) (1963). For other similar privileges, see id. §§ 88, 101. Plaintiff "knowingly" caused defendant's belief if she acted in a way that "a reasonable man should realize [would create] a substantial probability of inducing the other . . . to believe" in the existence of facts that create the privilege to arrest her. Id. § 119 cmt. r. In such a situation, the arrestee's extreme negligence can create a privilege to engage in conduct that would otherwise constitute an intentional tort. Thus, the law has imposed on the arrestee a duty to use some care to avoid being the victim of defendant's intentional tort. Plaintiff's extreme negligence also appears to render invalid her claims based on deceit. See discussion in note 136.

88. Keeton, et al., *Torts* § 53 at 357-58 (cited in note 4).

mention here that the problem of defining the plaintiff's duty to avoid harm occurs in all cases involving contributory fault on the part of plaintiff[89] and has not prevented the courts from finding plaintiffs to be contributorily negligent and denying or reducing their recovery in negligence cases. Furthermore, given the desirability of avoiding injuries that can be avoided by the exercise of due care and the near certainty that rules against comparative fault will not deter potential intentional tortfeasors,[90] there is at least an argument that a duty to use due care to avoid injury should be placed on both plaintiffs and defendants in the hope that imposing that duty will deter carelessness and thereby avoid injuries.

F. Plaintiff's Fault Cannot Be a Proximate Cause of Her Injury

Some have argued that plaintiff's fault is irrelevant when defendant has committed an intentional tort because plaintiff's negligence "can in no just sense be said to contribute to [her] injury."[91] In many cases, however, this is not true. For example, plaintiff's negligence may have precipitated defendant's intentional tort—and foreseeably so. Reverting again to the example of the dog that was shot in the reasonable belief that it was a wolf: if the dog had been released carelessly by a third party, not its owner, little doubt exists that the owner could recover from the third party for the death of the dog despite the intervening intentional tort of the shooter.[92] One of the risks that made it unreasonable to release the dog was that it might be mistaken for a wolf and shot. When one of the reasons why defendant's conduct is negligent is the possibility that an intentional tort will be committed, the defend-

89. Keeton says that "[c]ontributory negligence involves no duty," id. § 65 at 453, while others say that the plaintiff's duty is to use reasonable care to protect herself. See, for example, *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981); *Bartlett v. MacRae*, 54 Or. App. 516, 635 P.2d 666 (1981); *Glenn v. Brown*, 28 Wash. App. 86, 622 P.2d 1279 (1980). Under neither of these theories would the duty issue present a problem in an intentional tort situation. If no duty is required, we need not worry about where to find one. If the required duty is merely to use reasonable care to protect oneself from harm, then it exists and is breached anytime the plaintiff is injured in part through her own carelessness. If the courts intend to confine plaintiff's duty to use care to protect herself to cases in which the injury is caused negligently, they must offer some reason for this limitation. Simply declaring that no duty exists is insufficient.

90. See text accompanying notes 106-09.

91. Beach, *Contributory Negligence* § 65 at 104 (cited in note 87). See generally A. M. Honoré, *Causation and Remoteness of Damage*, in André Tunc, XI/1 *International Encyclopedia of Comparative Law* § 161 at 7110 (J.C.B. Mohr, 1983).

92. The proximate cause cases go much further than this hypothetical in that they permit negligent defendants to be held liable for injuries that are purposefully inflicted, at least when it is foreseeable that those injuries might be inflicted. Thus, the person who carelessly released the dog might be liable even if the shooter killed the dog knowing it to be plaintiff's dog, as long as the possibility that the dog would be so shot was a risk that a reasonable person would have foreseen. See Restatement (Second) of Torts § 448 (1963). See also id. §§ 302B cmts. e and f, § 449 (1963).

ant's negligence is a proximate cause of the injury even though the injury is directly caused by the foreseeable intentional tort of another person.[93]

One person's negligence can be a proximate cause of an injury that is directly caused by another person's intentional tort. The fact that the negligent person is a plaintiff, rather than some third person, does not break the causal connection or render the negligence any less proximate.[94]

G. The Need to Punish Defendant Precludes the Use of Comparative Fault

One policy reason offered to support the refusal to reduce plaintiff's damages because of her contributory fault in intentional tort cases is the need to punish the defendant.[95] The argument is that the intentional tortfeasor deserves to be punished for his wrong and thus should not benefit from plaintiff's fault. This argument has several problems. First, it is not clear that punishment is a particularly appropriate function for tort law; perhaps that function is more proper for criminal law with its procedural safeguards.[96] Second, assuming that punishment is

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93. *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921); Restatement (Second) of Torts § 449 (1963).

94. Honoré, *Causation* in Tunc, *International Encyclopedia* § 161 at 7110 (cited in note 91).

95. See, for example, Harper, James, and Gray, *4 Law of Torts* § 22.5 at 294 (cited in note 4); Dear and Zipperstein, 24 Santa Clara L. Rev. at 18-19 (cited in note 35). Compare *Davies v. Butler*, 95 Nev. 763, 764-73, 602 P.2d 605, 611 (1979); *Draney v. Bachman*, 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (1976).

The tendency of some courts to find ways to require liability insurers to pay for damages caused by intentional torts is some indication that they do not find this rationale to be particularly important. See, for example, *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 503 P.2d 962 (1972) (defendant's liability insurance covered plaintiff's claim when defendant, in an attempt to escape from a robbery he had just perpetrated, shot in plaintiff's direction to scare him, but without intent to injure him; the bullet hit plaintiff, causing serious damage); *Smith v. Moran*, 61 Ill. App. 2d 157, 209 N.E.2d 18 (1965) (homeowner's insurance covers gunshot injuries inflicted on plaintiff by the insured when the insured shot at a third person and the bullet hit plaintiff).

96. See, for example, *Fay v. Parker*, 53 N.H. 342, 382 (1873) ("Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies?"); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 53, 25 P. 1072, 1074 (1891) ("Surely the public can have no interest in exacting the pound of flesh"). Justice Brennan has said that punitive damages in defamation cases are " 'wholly irrelevant' to furtherance of *any* valid state interest." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 794 (1985) (Brennan dissenting) (emphasis added), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Further doubt about the propriety of punishment as an objective of tort law is demonstrated by the fact that some states that permit punitive damages specify that punishment is not a proper function of these damages. See, for example, *Foss v. Maine Turnpike Auth.*, 309 A.2d 339, 345 (Me. 1973); *Birkenshaw v. City of Detroit*, 110 Mich. App. 500, 511, 313 N.W.2d 334, 339 (1981).

For a discussion of the reasons against punishing in civil cases, see Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in *The Case Against Punitive Damages* (1969). See also

sometimes a desirable objective for a tort action, it is inappropriate in many intentional tort cases,[97] making this rationale overbroad at best. Third, plaintiffs in some intentional tort cases seem quite deserving of punishment,[98] yet the prohibition against comparative fault assures them full compensation. As a result, such plaintiffs not only go unpunished, but also are absolved of all responsibility for their reprehensible behavior.[99] Can society's need to punish all intentional tort defendants be so great that it justifies adopting a rule that permits plaintiffs to act reprehensibly with impunity? Fourth, it cannot be assumed that paying a proportionate share of the damages is never sufficient punishment for an intentional tortfeasor, yet the punishment rationale for prohibiting comparative fault is based on that assumption. Fifth, and probably most important, when punishment is appropriate, it usually can be achieved through the imposition of punitive damages.[100] Consequently, those jurisdictions that want to punish certain intentional tortfeasors in a civil proceeding can do so through punitive damage awards; no need exists for them to distort proper compensatory damage awards to obtain punishment.

H. The Need to Deter Substandard Conduct Makes Comparative Fault Undesirable

Closely related to the punishment rationale is the argument that refusing to use comparative fault deters intentional tortfeasors,[101] which, the argument continues, is a sufficient goal to justify imposing inequitable damage awards. Certainly deterrence of potential intentional tortfeasors is an accepted goal of tort law, although the number of cases permitting insurance to cover losses inflicted by intentional

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A.B.A. Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, 4-171 to 4-175 (1984). But see *Symposium: Punitive Damages*, 40 Ala. L. Rev. 687 (1989).

97. There is simply no reason to punish many intentional tortfeasors including, for example, those defendants like the hunter in *Ranson* who merely made reasonable mistakes.

98. Imagine, for example, the plaintiff who knowingly taunts the retarded or insane defendant until that person slaps plaintiff.

99. Plaintiff's conduct may result in a denial of punitive damages, but in most jurisdictions it is irrelevant to her recovery of compensatory damages. Restatement (Second) of Torts § 921 (1977).

100. All states except Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington allow some punitive damages. James D. Ghiardi and John J. Kircher, 1 *Punitive Damages Law and Practice* §§ 4.02 - 4.12 (Callaghan, 1991). Michigan and Connecticut seem to limit punitives to damages needed to compensate, thus severely limiting their punitive nature. Id. All these states have determined that punishment is not a proper function for tort law, and thus they should not cite punishment as a justification for prohibiting comparative fault.

101. Glanville L. Williams, *Joint Torts and Contributory Negligence* § 55 at 198 (Stevens & Sons, 1951). See, for example, *Draney v. Bachman*, 138 N.J. Super. 503, 514, 351 A.2d 409, 415 (1976). See generally, McNichols, 37 Okla. L. Rev. at 679-80 (cited in note 19).

tortfeasors[102] indicates that many courts view the deterrence function as either relatively unimportant or unattainable through the imposition of damage awards. I assume that deterrence remains an important aim of the law of intentional torts. This does not mean, however, that the deterrence goal justifies the refusal to use comparative fault.

First, it may be unfair to try to deter future intentional tortfeasors by excessively punishing those intentional tortfeasors who are sued. In the criminal context, "[t]here is a limit to which a criminal can be used to benefit society at large."[103] A similar limit may exist when defendant's conduct is merely tortious,[104] and a court that assesses damages without considering plaintiff's fault may exceed that limit.[105]

Second, there is serious reason to doubt that the use of comparative fault would undermine any deterrence achieved by the present damage rules. Some question exists about the effectiveness of legal penalties as deterrents. Some researchers have found that punishment probably is not an effective deterrent of criminal behavior,[106] and others have concluded that the perceived severity of the punishment has little deterrent effect.[107] For example, one study of 145 convicted murderers

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102. See, for example, *Vanguard Ins. Co. v. Cantrell*, 118 Ariz. App. 486, 503 P.2d 962 (1972) (homeowner's insurance covers injuries inflicted by thief who intentionally shot in plaintiff's direction, hoping to cause plaintiff to duck, but not intending to injure him); *Sabri v. State Farm Fire & Casualty Co.*, 488 So.2d 362 (La. Ct. App. 1986) (insured's insurance covers injuries sustained by plaintiff who was shot by the insured because he thought she was a criminal breaking into his home; plaintiff was insured's daughter, and had he realized that, he would not have shot); *Putman v. Zeluff*, 372 Mich. 553, 127 N.W.2d 374 (1964) (insured's insurance covered injuries inflicted by insured when he shot and killed a dog that he thought might attack and kill him); *Lumbermens Mutual Ins. Co. v. Blackburn*, 477 P.2d 62 (Okla. 1970) (homeowner's insurance covers injuries inflicted when insured threw debris at plaintiff without intending to injure him); *Spengler v. State Farm Fire and Casualty Co.*, 568 So. 2d 1293 (Fla. Dist. Ct. App. 1990) (when insured shot plaintiff in erroneous belief that she was a burglar, homeowner's insurance covered plaintiff's injuries).

103. Ezzat Ahdel Fattah, *Deterrence: A Review of the Literature*, in Law Reform Commission of Canada, *Fear of Punishment* 1, 15 (William S. Hein & Co., 1975). See Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat to Criminal Control* 35-42 (Chicago, 1973). For example, even if it could be shown that chopping off the hands of thieves would decrease dramatically the number of thefts, it is unlikely that our society would endorse such treatment. The same might be said of less drastic punishments, for example, imposing long prison terms for parking violations.

104. See Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854-55 (1989).

105. "In any society committed in the least to principles of freedom, to the dignity of its individual citizens, and to 'due' process of the law, the community cannot be allowed to punish a citizen solely to promote the public good." David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 725 (1989).

106. Eysenck, *Crime and Personality* 147-48 (1964), quoted in Zimring and Hawkins, *Deterrence* at 98 (cited in note 103); Hart, *Punishment and Responsibility* 1 (1968), quoted in Zimring and Hawkins, *Deterrence* at 76 (cited in note 103); Wolf Middendorff, *The Effectiveness of Punishment* 53-67 (Rothman, 1968).

107. Raymond Paternoster, et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 Law and Soc'y Rev. 457 (1983). Accord, Fattah, *Deterrence*, in *Fear of Punishment* at

showed that not one of them thought of the possibility of being sentenced to death before committing the crime.[108] While studies of criminal behavior patterns may not always apply to merely tortious behavior, they at least cast some doubt upon the efficacy of legal penalties in deterring antisocial behavior.

Further, even assuming that legal penalties, such as a prohibition against the use of comparative fault, can deter people from engaging in intentionally tortious behavior, two conditions must be met before these penalties could possibly have that effect: the potential tortfeasor must be aware of the penalty, and he must guide his conduct in apprehension of it. It is unlikely that many potential tortfeasors know about the legal rules governing the use of comparative fault. Studies indicate that most people know very little about what penalties can be imposed for different crimes.[109] Criminal penalty rules receive some publicity, particularly among those who have been convicted, yet even members of that group are, to a large extent, unaware of them. Given this lack of knowledge of criminal law penalties even by those most likely to be affected by them, the conclusion is inescapable that comparative fault rules, which receive virtually no publicity, are seldom known by potential tortfeasors.

Further, even assuming that many potential intentional tortfeasors know the rule governing comparative fault in the appropriate jurisdiction, common sense indicates that they would seldom change their conduct because of that rule. The rule against the use of comparative fault could deter only those who find the specter of paying the full amount of damages unacceptable but nevertheless would accept the risk of paying less than full damages. Given the uncertainty that a jury will find plaintiff at fault and the possibility that, if it does, the reduction in damages might be insignificant, it is difficult to imagine that a defendant, who is cautious and calculating enough to be deterred by the possibility of having to pay full damages, will alter his behavior because of these speculative possibilities. This is particularly true in the vast majority of torts in which it is impossible for the tortfeasor to know either what injury he will cause or, even if he could know that, what monetary value a jury would attach to that particular harm. It is hard to believe that

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43 (cited in note 103). See also Zimring and Hawkins, *Deterrence* at 200 (cited in note 103).

108. David C. Leven, *Vengeance Remains Sole Reason to Support the Death Penalty*, N.Y. Times A18 (July 3, 1991).

109. Fattah, *Deterrence*, in *Fear of Punishment* at 43, 83 (cited in note 103); Zimring and Hawkins, *Deterrence* at 145-46 (cited in note 103). For example, one study showed the following: Only 17% of the general public and 50% of adult prisoners could select the correct potential penalties for forgery; 35% of the general public and 59% of the adult prisoners could choose the potential penalties for assault; and 8% of the general public and 85% of the adult prisoners could choose the right penalties for first-degree robbery. Zimring and Hawkins, *Deterrence* at 145-46.

anyone who would be deterred by the possibility of liability for an uncertain amount of damages would find the risk of liability acceptable because of a chance that this uncertain amount might be decreased by some other even more uncertain amount.

Finally, even assuming that comparative fault rules do deter potential intentional tortfeasors, that cannot end the deterrence inquiry, for the same rules also may affect plaintiffs' behavior. The unavailability of comparative fault might encourage a plaintiff to act in a faulty manner, confident that she will recover fully despite her fault. If plaintiff's behavior is faulty, which is the only situation in which comparative fault would be used, there is good reason to want to deter it. Consequently, even if potential intentional tort defendants can be deterred by holding them fully liable, the value of that deterrence must be decreased by the value of the deterrence of careless plaintiffs that is lost by that rule. Thus, in view of the extreme improbability that the rule against the use of comparative fault will be a deciding factor in a defendant's decision to engage in intentionally tortious behavior and the possibility that this rule may encourage plaintiffs to engage in faulty behavior, deterrence is not a rational reason for the rule prohibiting the use of comparative fault in intentional tort cases.

I. Victim Compensation Militates Against the Use of Comparative Fault

Victim compensation is said to be an appropriate goal of the tort system,[110] and prohibiting the use of comparative fault in intentional tort cases could be viewed as a way to further that goal: intentional tort plaintiffs receive full compensation for their injuries regardless of their fault.

First, it should be noted that this argument has not carried the day in the area of negligence where plaintiffs are rarely permitted full recovery if they were at fault in causing their injury. In most jurisdictions, the same is true of strict liability plaintiffs. No reason exists to suppose that intentional tort plaintiffs are more in need of compensation than are negligence or strict liability plaintiffs.

Second, this argument overlooks a significant problem: the tort system cannot eliminate plaintiff's loss; at most the system can reallocate the loss by requiring defendant to pay plaintiff. Plaintiff is thereby compensated, but only by imposing a larger loss[111] on defendant. It

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110. See John G. Fleming, *Is There a Future for Tort?*, 44 La. L. Rev. 1193, 1203 (1984); McNichols, 37 Okla. L. Rev. at 684-85 (cited in note 19).

111. When the costs of litigation are considered, it seems that the loss imposed on defendant is likely to be significantly more than that originally imposed on plaintiff because the defendant, in

makes no sense to try to compensate one victim[112] by creating another victim whose loss exceeds that initially imposed. The attraction of holding defendant liable is not so much compensation as loss spreading. Although loss spreading is achieved by imposing liability on negligence and strict liability defendants, as previously discussed,[113] that is not true in intentional tort cases. On the contrary, in these cases comparative fault, by dividing the loss, may well serve the loss spreading goal better than the present approach.

Once it is acknowledged that courts cannot eradicate the loss caused by a tort, but at most reallocate it, the appeal of victim compensation as a justification for imposing liability dissipates. To the extent that the real goal of victim compensation is loss spreading, that goal is better served in intentional tort cases by using comparative fault.

IV. When Comparative Fault Should Be Used in Intentional Tort Cases

Given the broad appeal of comparative fault and the weakness of the reasons offered for refusing to use it in intentional tort cases, one is tempted to conclude that the present rule should be replaced by the rule used in most other tort cases: plaintiff's recovery should be decreased by the same proportion that plaintiff's fault bears to the total fault.[114] The chance that such a rule would cause meaningful injustice to the parties is slight because in cases of real malfeasance jurors undoubtedly would be unimpressed with claims by nefarious defendants that plaintiffs should have done more to prevent defendants from causing them injury. Nevertheless, it is worthwhile to decide if there are intentional tort cases in which comparative fault should not be used. An overly broad mandate to compare fault might lead some juries to reach unwarranted results, a consequence that obviously should be avoided if at all possible. Furthermore, the use of comparative fault will inject new issues into some trials, perhaps hindering a prompt resolution of those and other cases,[115] another untoward result. Finally, despite the weakness of the arguments offered against the use of comparative fault, the mind rebels against its use in some intentional tort cases. Picture, for example, a claim by a thief that his liability for stolen items should be

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addition to paying for plaintiff's injury, has incurred legal expenses.

112. In actuality, plaintiff probably has not been fully compensated because she too must pay her lawyer.

113. See text accompanying notes 31-32.

114. New Jersey recently adopted a similar approach. *Blazovic v. Andrich*, 129 N.J. 90, 590 A.2d 222 (1991).

115. The administrative burdens likely to accompany the use of comparative fault in intentional tort cases are more fully discussed in the text accompanying notes 163-89.

reduced because his victim's carelessness made it easy for him to steal. We instinctively know that the law should not recognize such a claim. The thief's conduct should prevent him from asserting that his liability should be reduced to reflect plaintiff's fault,[116] but why? Unless a method is devised to distinguish this type of claim from somewhat similar claims by other intentional tort defendants, the entire argument for using comparative fault seems suspect.

In examining which intentional tort defendants should be prevented from using plaintiff's fault to mitigate damages, it is helpful to categorize defendants according to their conduct. Defendants who are liable for intentional torts can be divided into the following four categories: (1) Defendants who did not intend to inflict the injury of which plaintiffs complain or any other harm that, under the facts as defendants believed them to be, would have been prohibited (e.g., defendant shot a wolf-like dog, believing it to be a wolf); (2) Defendants who intended to inflict the harm of which plaintiffs complain but who believed that facts existed which rendered the conduct nontortious (e.g., defendant shot the dog, knowing it was a dog but believing that he had to shoot it to defend himself); (3) Defendants who did not intend to inflict the harm complained of but who did intend to inflict a different type of harm, aware of facts under which they had no right to do so (e.g., defendant intentionally shot at a dog, realizing it was a nonthreatening dog, but the bullet struck plaintiff); (4) Defendants who intended the harms of which plaintiffs complain, aware of facts depriving them of any privilege to inflict those harms (e.g., defendant shot plaintiff's dog for fun). These situations will be considered in order.

A. Defendant Did Not Intend to Inflict the Injury of Which Plaintiff Complains or Any Other Harm That, Under the Facts as Defendant Believed Them to Be, Would Have Been Prohibited

1. When Defendant's Belief Was Reasonable (E.g., Defendant Shot a Wolf-Like Dog Reasonably Believing It to Be a Wolf)

Cases in the first subcategory are similar in some respects to strict liability cases: defendant is held liable even though he was not morally at fault in causing plaintiff's harm and did not violate even the objective standard of negligence. A defendant in this type of case made a reasonable mistake, and the justification for holding him liable is that "as between two parties equally free from moral blame, [the loss should

116. A similar explanation supports the avoidable consequences rule: plaintiff who fails to use reasonable means to avoid or minimize the damages caused by a tort is "under a 'disability' to recover for [the] avoidable loss." Charles T. McCormick, *Handbook on the Law of Damages* § 33 at 128 (West, 1935).

be on] the one who made the mistake."[117] Given the justification, plaintiff's carelessness obviously should not be ignored, for if plaintiff was careless, the court is not faced with "two parties equally free from moral blame." A strong argument can be made that in such a case, plaintiff, the only blameworthy party, should bear the entire loss. Assuming that defendant is to be held liable, there is no reason why this morally innocent defendant should be treated more harshly than a negligent defendant. Clearly the reason for holding defendant liable would not be undermined by holding plaintiff partially responsible. The person who made a reasonable mistake (the shooter who reasonably believed he was shooting a wolf, for example) may have committed an intentional tort, but as discussed in Parts II and III of this Article, that in itself is no reason to ignore plaintiff's fault in causing the damage. Nothing about such a defendant's conduct should disable him from using plaintiff's fault to decrease the amount of plaintiff's judgment.[118] Comparative fault[119] should be used in these cases.

2. When Defendant's Belief Was Unreasonable (*E.g.*, Defendant Shot a Dog Believing It to Be a Wolf, but a Reasonable Person Would Have Realized It Was a Dog)

The position of defendants in this category closely resembles that of negligence defendants—both have been careless, and that carelessness has led to an unintended harm. The difference is that the intentional tort defendant intended the physical result of his conduct, but because of his carelessness, did not apprehend that the result would be objectionable, while the negligence defendant did not intend the result at all, although he may well have realized that the result was both likely

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117. Keeton, et al., *Torts* § 17 at 110 (cited in note 4).

118. In one special situation, the unusual remedy provided for the tort makes it desirable to ignore plaintiff's fault. When plaintiff successfully sues for conversion, defendant obtains good title to the converted item. Consequently, a defendant permitted to use comparative fault could obtain good title even though the judgment in the conversion suit was for less than the value of the converted item. This raises the possibility that defendant could profit from his tort, a result that should not be permitted. If, however, in addition to paying the judgment in the conversion suit, defendant previously had paid for the item so that his total payments equal or exceed the value of the item, he would not profit from the tort even if comparative fault were used. For example, a defendant who, in good faith, paid $90 for a stolen item that was worth $100, would not make any profit from the tort as long as the judgment in the conversion suit required him to pay at least $10. Consequently, he should be permitted to use comparative fault as long as he is held liahle for at least $10. On the other hand, a defendant who took plaintiff's goods reasonably believing they were his own, should not be allowed to use plaintiff's fault to reduce his liability if doing so would permit him to profit from the conversion.

119. The judge in these cases should not instruct the jury to allocate the loss hased on the relative fault of the parties, which might result in the imposition of the entire loss on plaintiff. Instead the judge should instruct the jury to allocate the loss equitably. Such instructions might well mirror those given when comparative fault is used in strict liability cases.

and highly objectionable. In terms of moral fault, the negligent defendant often will be considerably more blameworthy than this intentional tort defendant. Nothing about this intentional tort defendant's behavior makes it undesirable to hold the plaintiff partially responsible for the injury caused in part by her negligence. Because the essence of both parties' fault is carelessness, it is equitable to consider the carelessness of both in apportioning the loss.

B. Defendant Intended the Harm of Which Plaintiff Complains, but Believed that Facts Existed Which Rendered the Conduct Non-Tortious (E.g., Defendant Shot a Dog Knowing It Was a Dog, but Believing He Had to Shoot It to Defend Himself)

Defendants in this category of cases at first appear to be on substantially different ground than defendants in the first category, for the second type of defendant actually intended the harm for which plaintiff seeks recompense. Nevertheless, these defendants claim that they should be treated with some compassion because they thought facts existed that justified their acts. At present, a defendant in this position claims a privilege and either is relieved of all liability or is held fully accountable. In instances in which defendant is held liable[120] and plaintiff's carelessness contributed to the injury, why should that carelessness be ignored?

The strongest case for ignoring plaintiff's fault arises when defendant was morally at fault in deciding that facts existed which gave him a right to act as he did. *Munoz v. Olin*[121] is such a case. In *Munoz*, arson investigators intentionally shot a person suspected of being a fleeing arsonist. The investigators claimed a privilege, but the jury determined that the investigators had not acted reasonably in shooting and thus were not privileged. The jury also concluded that the suspect had been

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120. Arguments similar to those discussed in the text might be made by plaintiffs in cases in which defendants are not held liable even though they acted under a mistake. For example, a person who reasonably believes he is being attacked has a privilege to defend himself regardless of the truth of his belief. Restatement (Second) of Torts § 63 (1963). In *Crabtree v. Dawson*, 119 Ky. 148, 83 S.W. 557 (1904), defendant struck plaintiff, incorrectly thinking that plaintiff was someone he had a privilege to hit in self-defense. Because defendant's belief was reasonable, even though incorrect, he was privileged, and the totally innocent plaintiff was required to bear the entire loss. This result is explained on the ground that the law cannot and should not discourage self-defense. Keeton, et al., *Torts* § 19 at 125 (cited in note 4). Assuming that those reasons justify this result when the choice is to impose full liability or no liability, they may be insufficient now that it is possible to apportion losses. In instances like this, in which the law grants a privilege to a person who made an error, the determination whether comparative responsibility should be used requires a thorough consideration of the values being advanced by the privilege—a consideration that is beyond the scope of this Article.

121. 76 Cal. App. 3d 85 (1977), vacated on other grounds, 24 Cal. 3d 629, 596 P.2d 1143 (1979).

negligent, apparently by fleeing the alley where a fire had just started, and that his negligence contributed to his death. They divided the fault among the parties, assigning sixty-five percent to defendants and thirty-five percent to decedent. The appellate court held that the decedent's fault could not properly be considered because the tort was intentional. Although the tort was intentional, it arose from the investigators' negligence: had their decision to shoot been reasonable, there would have been no liability. Nothing distinguishes the moral fault of these defendants from that of the typical negligence defendant. The death resulted from the combined carelessness of decedent and defendants, and comparative fault should have been used.

Defendant's argument for comparative fault in cases involving a failed claim of privilege is even stronger when defendant was not morally at fault in concluding that his conduct was justified. For example, some privileges do not exist if defendant's belief that his actions were justified was based on a mistake, even a reasonable mistake, unless the mistake was "knowingly" caused by plaintiff.[122] A person "knowingly" causes a mistake if she either realizes or as a reasonable person should realize that her conduct "creates a substantial probability" of causing the mistaken belief. [123] Under this standard, even if a reasonable person in plaintiff's position would have realized that her conduct created an unreasonable risk (but not a substantial probability) of causing defendant's erroneous belief, defendant is not privileged. Thus, a plaintiff who negligently caused defendant to form his reasonable but mistaken belief would be permitted to recover fully for her losses.[124] As a result, a morally innocent, albeit mistaken, defendant is required to pay a careless plaintiff, whose fault is ignored. Such a defendant, who reasonably believed that his acts were socially desirable, should be entitled to at least the same care owed to a negligent defendant. Comparative fault[125] should be used.

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122. See, for example, Restatement (Second) of Torts §§ 88, 101, 119 (1963).

123. Id. § 119 cmt. r (1963).

124. An example of this unusual situation might be helpful. Suppose defendant saw plaintiff fighting with another person. Defendant yelled "stop," at which point plaintiff fled. Reasonably believing this fight to have been mutual combat (a breach of the peace), defendant arrested plaintiff. In fact, plaintiff had been defending herself, and the arrest was improper unless plaintiff realized or should have realized that her conduct created a substantial probability of causing defendant to believe that she had committed a breach of the peace. If plaintiff's conduct was sufficient to reach the "substantial probability" level, defendant would not be liable at all. However, if plaintiff's conduct (in fighting and fleeing) merely created an unreasonable risk that defendant would conclude that plaintiff had breached the peace, defendant would be fully liable. See id. § 119.

125. Comparative responsibility might better describe the method of allocating damages here because defendant's fault—making a reasonable mistake for which the law holds him liable—involves no opprobrium.

C. Defendant Did Not Intend to Inflict the Injury About Which Plaintiff Complains, but Did Intend to Inflict a Different Injury, Aware of Facts Under Which He Had No Right to Do So (E.g., Defendant Intentionally Shot at a Dog, Realizing It Was a Nonthreatening Dog, but the Bullet Struck Plaintiff)

Cases in this category present the most serious problems. Here defendant intended to cause one type of injury, knowing that he had no justification for doing so, but the injury being complained about is either a different, unintended injury or the intended type of injury, inflicted on a different person. Such a defendant often is found to have committed an intentional tort and is held liable for the unintended injuries under either the liberal damage rules applicable to intentional tort suits[126] or the doctrine of transferred intent.[127] If plaintiff's carelessness was also a cause of the unintended injury, should defendant's liability for that injury be decreased?

Defendant's argument for comparative fault in this type of case is not without basis. Although his conduct was intentionally tortious, it merely created a risk of the unintended injury of which plaintiff complains and thus, as to that injury, was at most negligent.[128] Arguably, if defendant's conduct with respect to the injury was at most negligent, he should be treated like other negligent defendants and be permitted to use comparative fault to impose part of the unintended loss on the plaintiff, whose misconduct was also a cause of that loss. Plaintiff's only response is that, because defendant tried to cause one type of harm, he should be prevented from contending that his liability for the unintended harm should be reduced to reflect plaintiff's fault. But why? Why should the fact that defendant intended some harm—perhaps a minor harm—mean that he has forfeited his right to demand that plaintiff take reasonable care to avoid a different, unintended harm? The fact that defendant intended to commit an intentional tort knowing that he had no right to do so should not render him a pariah.[129]

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126. See, for example, *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. 1960); *Rogers v. Kent Board of County Road Comm'rs*, 319 Mich. 661, 30 N.W.2d 358 (1947); *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891).

127. See, for example, *Talmage v. Smith*, 101 Mich. 370, 59 N.W. 656 (1894).

128. This defendant's position is similar to that of the defendant in a public nuisance case who knowingly created a dangerous condition that, in turn, created a risk of harm. Neither that defendant nor the defendant discussed in the text intended the harm that occurred. In the nuisance case, a number of courts have concluded that plaintiff's fault should be considered in assessing damages if it was a proximate cause of the harm despite the fact that the nuisance was intentional. See, for example, *Timmons v. Reed*, 569 P.2d 112 (Wyo. 1977).

129. This conclusion is in keeping with the modern view that possessors of land owe a duty of care to trespassers. See, for example, *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561 (1968); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976). The trespasser usually is invading the

There is one group of cases in which these defendants' arguments for comparative fault should be rejected. A defendant who took advantage of a plaintiff's carelessness should not be able to rely on that same carelessness to reduce his liability. Such a defendant's claim is that, even though he exploited plaintiff's lack of care, he should be able to complain about that lack of care. Such a claim must be rejected. Having used plaintiff's fault to advance his own objectives, defendant has forfeited any right to complain about that fault. Thus, if a defendant who robbed plaintiff at 2 a.m. on the subway tried to reduce his liability for unintended injuries by claiming that plaintiff was negligent in being on the subway at that time, his claim would get short shrift. By taking advantage of plaintiff's alleged carelessness, defendant has lost any right to use that carelessness to decrease his liability.

When defendant did not take advantage of plaintiff's carelessness, defendant's argument for the use of comparative fault is strong. For example, in *Rogers v. Kent Board of County Road Commissioners*,[130] defendant failed to remove an anchor post from decedent's land when defendant's license to have the post there expired. Decedent's mowing machine hit the post, throwing decedent to the ground. As a result of the injuries sustained, decedent died. Suppose defendant had intentionally left the post on the land because it was very hard to remove. Further suppose that the post was visible and that decedent failed to see it only because he was not paying proper attention. The law would hold defendant liable for the death because it resulted from his trespass, but why should decedent's negligence go unnoticed? As to this injury, defendant was merely careless. The mere fact that defendant intended to cause decedent some minor property injury should not excuse decedent's failure to act reasonably to protect his own life. This defendant did nothing that suggests that he should be deprived of the right to use comparative fault with respect to this unintended injury.

Eggshell plaintiff cases present a similar problem, but one that is more difficult because the intended and actual injuries often are more closely related. For example, in *Vosburg v. Putney*,[131] defendant kicked plaintiff, intending that the kick be offensive but not harmful. Because of plaintiff's poor physical condition, which was not known to defendant, the kick caused plaintiff serious injury. Suppose that plaintiff had carelessly forgotten to wear a bandage that he knew he needed to pro-

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possessor's interest in the land knowingly and intentionally. Nevertheless, jurisdictions following the modern view hold that the landowner owes this intentional tortfeasor a duty of reasonable care under the circumstances and can be held liable for injuries sustained by the trespasser regardless of the fact that the trespasser knowingly was committing an intentional tort.

130. 319 Mich. 661, 30 N.W.2d 358 (1947).

131. 80 Wis. 523, 50 N.W. 403 (1891).

tect himself and which would have prevented the kick from causing the extensive damage. Under these facts, plaintiff's argument regarding the extensive injuries is that, because defendant intended to give offense by touching him, plaintiff's fault in failing to wear the bandage must be forgiven and defendant should be saddled with the entire loss. The intended injury and the injury sued upon, however, are significantly different. Plaintiff can at most show that defendant was negligent as to the extensive injuries. Furthermore, defendant did not try to take advantage of plaintiff's carelessness or do anything else that would seem to make him less deserving of plaintiff's care than, for example, a defendant who carelessly created a foreseeable risk of seriously injuring a plaintiff. Comparative fault should be used[132] in cases similar to *Vosburg*.

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132. If, as the text suggests, in intentional tort cases the eggshell plaintiff rule is limited to instances in which plaintiff's susceptibility was not caused by her fault, the intended injury and the injury sued upon were of the same type, or defendant took advantage of plaintiff's susceptibility, those same limitations should be used in negligence cases. Thus, if defendant in *Vosburg* had negligently touched plaintiff, causing the same extensive injuries that plaintiff could have avoided by wearing a bandage, defendant should not be fully liable for those injuries, assuming the jury decides that plaintiff was also negligent and that his negligence was a proximate cause of the injuries. This may change the law, although it is not certain in which direction. Compare *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164 (1974) (plaintiff can recover nothing for enhanced injuries sustained as a result of her failure to wear an available seatbelt), with *Clarkson v. Wright*, 108 Ill. 2d 129, 483 N.E.2d 268 (1985) (improper to consider plaintiff's failure to wear a seatbelt). Such change is desirable, however, for the same reasons that comparative fault is desirable in instances in which plaintiff's fault is a cause of the incident rather than merely a cause of the extended injury.

An additional point should be made. As suggested by Professor McNichols, the rejection of the eggshell plaintiff rule under these conditions need not mean that plaintiff will bear full responsibility for the unintended injuries. McNichols, 37 Okla. L. Rev. at 676-77 (cited in note 19). Because the fault of both plaintiff and defendant were factors in causing those injuries, each should be partially responsible.

Finally, the mention of *Spier*, which treated the damages caused by plaintiff's failure to wear an available seathelt as if they were a type of avoidable consequence for which plaintiff would be responsible, raises the issue of the relation between the avoidable consequences rule and the use of comparative fault in certain intentional tort cases. There is disagreement whether plaintiff's negligent failure to mitigate damages is relevant when defendant's tort was intentional. Professor Dobhs asserts that an intentional tort plaintiff is denied recovery under the avoidable consequences rule only if she "was reckless or intentional in failing to protect [her] own interests," Dan B. Dobbs, *Handbook on the Law of Remedies* 186 (West, 1973), while Professor McCormick contends that the victim of an intentional tort "should still within reason be expected to avoid unnecessary harm," McCormick, *Law of Damages* at 139 n.58 (cited in note 116). The Second Restatement takes an intermediate position, holding that the avoidable consequences rule does not apply "if the tortfeasor intended the harm . . . unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interest." Restatement (Second) of Torts § 918(2) (1977).

A conflict exists between Professor Dobbs's approach to the avoidable consequences rule and this Article's proposal to use comparative fault in some intentional tort cases, for there is no good reason to hold plaintiff harmless when she carelessly exacerbates an injury caused by an intentional tort, but to hold her responsible for part of the consequences of her carelessness when it combines with defendant's intentional conduct to cause her initial injury.

Professor McCormick's approach to avoidable consequences comports with my proposal in

Transferred intent cases involve similar considerations. In these cases, thanks to a legal fiction, defendant is held to have committed an intentional tort even though he did not have the requisite intent as to plaintiff. The reasons for this doctrine are not entirely clear.[133] Perhaps intent is transferred to punish defendant, perhaps to deter. But, as dis-

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most respects although at first glance it seems to consider plaintiff's fault in two situations in which this Article would find that inappropriate: when defendant took advantage of plaintiff's carelessness and when defendant intended the harm knowing facts under which he had no right to inflict that harm. Regarding the first possible difference, no real conflict exists between Professor McCormick's rule and this proposal because the situation could not arise in the traditional avoidable consequences case. In such a case plaintiff's careless conduct occurred after defendant's tort, and thus defendant never could have taken advantage of plaintiff's carelessness. There may be a conflict between the position taken in this Article and Professor McCormick's avoidable consequences rule, however, in that he would permit plaintiff's carelessness to be considered "within reason" (*i.e.*, when it is reasonable to do so) even when defendant intended the barm. Given Professor McCormick's "within reason" limitation, this conflict appears to be negligible if a conflict exists at all.

The limits imposed on the avoidable consequences rule by the Second Restatement are quite similar to those that this Article proposes be imposed on the use of comparative fault. First, the Second Restatement uses the avoidable consequences rule and thereby considers plaintiff's fault in intentional tort cases in which the harm was not intended. The proposal espoused in this Article also usually considers plaintiff's fault in intentional tort cases in which the harm was not intended. An apparent difference between the two is tbat under my proposal there is an exception: plaintiff's fault is not considered even though the harm was not intended if defendant took advantage of that fault. No similar exception exists in the Second Restatement approach to avoidable consequences probably because, as explained above, it is not possible that defendant took advantage of plaintiff's carelessness in the traditional avoidable consequences case. Consequently, no real conflict exists between tbe two propositions in this respect.

Second, if defendant intended the harm that he caused, plaintiff's negligence in causing that harm usually is ignored under both Section 918 and this proposal. One point of departure between the two approaches to intended harms is that under my proposal a defendant who intended the injury nevertheless can use plaintiff's fault to decrease his liability if he believed that facts existed which, had they existed, would have justified his conduct. No such exception exists to the Second Restatement's prohibition on the use of the avoidable consequences rule when defendant intended the harm. Thus, a conflict exists, albeit not major, between my proposal and the Second Restatement's avoidable consequences rule.

Third, the Second Restatement applies the avoidable consequences rule to intended harms if plaintiff "intentionally or heedlessly failed to protect his own interests." Id. The somewhat comparable provision of my proposal applies when plaintiff provoked defendant. Thus, my proposal is, in theory, both broader (it considers plaintiff's fault when she intentionally *or negligently* provoked) and narrower (plaintiff's fault that does not amount to provocation is not considered, even if intentional) than the Restatement's avoidable consequences rule. However, these differences are not likely to surface frequently. Negligent provocation is unusual, and a plaintiff who engaged in intentional faulty conduct tbat caused her injury almost certainly will have provoked defendant.

Logic and consistency require that jurisdictions that adopt this proposal concerning comparative fault also adopt a similar approach to avoidable consequences. Both the Second Restatement and Professor McCormick set forth an avoidable consequences rule that, with minor modifications, would comport with the approach to comparative fault taken herein.

133. Perhaps the reasons for transferring intent lie in history, ratber tban in present day goals. See Keeton, et al., *Torts* § 8 at 37-38 (cited in note 4).

cussed above,[134] those goals provide little reason to reject comparative fault. Furthermore, they would be advanced even if plaintiff's fault were considered because defendant nevertheless would be required to pay for at least part of the injury he caused even though he caused it unintentionally and without negligence. Prosser posits that the reason for transferring intent is that defendant should be held liable for damage caused by his wrongful act even though the harm was unintended.[135] This may explain why defendant should be held liable, but provides no reason for ignoring plaintiff's wrongful conduct. The particular goals of transferred intent do not require that plaintiff's fault be ignored. Are there other reasons why that should be done?

There are two types of transferred intent cases. In one type, defendant intended one harm but caused a different harm. As in *Vosberg*, this defendant merely created a risk of the injury for which compensation is sought. Comparative fault should be used, as discussed in connection with *Vosberg*.

In the other type of transferred intent case, defendant intended and inflicted the same type of harm, but the victim was not the person at whom the conduct was directed. Once again, defendant did not intend the injury for which plaintiff seeks compensation, for he merely created a risk that it would result. Furthermore, as far as plaintiff is concerned, the fact that her injury was caused by conduct that was intended to injure another person is a mere fortuity. That fortuity provides one major benefit to plaintiff: she is allowed to recover without proving that defendant either intended the injury or was negligent in causing it. That fortuity provides no reason to give plaintiff a second benefit by ignoring her fault. As discussed in connection with *Vosberg*, comparative fault should be used.

D. Defendant Intended the Harm, Aware of Facts That Gave Him No Privilege to Inflict It (E.g., Defendant Shot a Dog for Fun)

At first blush it seems that defendants in this category have little standing to complain of plaintiffs' faulty conduct.[136] These defendants

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134. See text accompanying notes 93-107.

135. Keeton, et al., *Torts* § 8 at 38 (cited in note 4).

136. Oddly, in one group of these cases, the courts have rejected the usual prohibition against considering plaintiffs' fault in intentional tort cases and have held that even defendants who intended the harm can rely on plaintiff's misconduct to bar plaintiff's claims. Victims of deceit must prove that their reliance on defendants' misstatements was justified under the circumstances. Id. § 108 at 750-53. Although general agreement exists that this does not mean that the plaintiff in a deceit case must act as a reasonable person, id.; Restatement (Second) of Torts § 545A (1976); *Ampat/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1041-43 (7th Cir. 1990), it does mean that she owes defendant some duty, perhaps a duty not to be reckless, see *Ampat/Midwest, Inc.*, 896 F.2d at 1041-42. See Restatement (Second) of Torts § 541 (1976). This

intended to cause the particular harms of which plaintiffs complain, and the facts as defendants understood them gave defendants no justification for inflicting such harms. If plaintiffs' faulty conduct helped such defendants accomplish their objectives, that is nothing of which defendants have a right to complain.[137]

Nevertheless, a few defendants in this group do have a legitimate complaint about plaintiffs' faulty behavior. In certain instances plaintiffs' faulty conduct actually may have caused defendants to commit torts instead of merely making it easier for them to do so. Defendants who were thus provoked could point out that prohibiting a defendant from complaining about plaintiffs' failure to use care to prevent defendant from accomplishing his objective is quite different from prohibiting such a defendant from complaining of plaintiffs' fault in causing defendant to commit the tort. The plight of a handicapped person who was taunted until he hit his tormentor, who then sued him for battery, should convince most readers of the validity of considering provocation in assessing liability. The provoker should not be absolved of all responsibility for her faulty conduct simply because defendant succumbed to it.

One problem with reducing liability to reflect plaintiff's provocation is line-drawing. Some courts may want to distinguish the handicapped defendant mentioned above from the car thief who claims that his liability should be reduced because his victim carelessly left her car unlocked thereby tempting him to take the car. Is there some authority to which the courts can look to decide when plaintiff's provocation should be considered? Only a few jurisdictions have held that defendant's liability is decreased when plaintiff provoked the tort,[138] and the cases from those jurisdictions either shed little light on what type of conduct qualifies as provocation or take an extremely broad view of the

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requirement is said to be justified because it provides a way to corroborate plaintiff's assertion that she actually did rely. Keeton, et al., *Torts* § 108 at 750 (cited in note 4); *Ampat/Midwest, Inc.*, 896 F.2d at 1042. No reason is suggested, however, why this one aspect of plaintiff's case requires corroboration. If plaintiff can convince the jury that she—however carelessly—actually did rely on defendant's misstatement and that defendant intended that she rely, that should satisfy this part of the deceit case.

137. The conclusion that this type of defendant should not be allowed to rely on plaintiffs' fault to decrease his damages is bolstered in cases in which holding defendant to be only partially responsible would enable defendant to profit from a wrong. For example, if a thief who was sued for conversion could decrease his liability because plaintiff's carelessness had made the theft possible, the thief would be liable for less than the full value of the stolen item and thus would profit from the theft, a result contrary to public policy.

138. See, for example, *Jones v. Thomas*, 557 So. 2d 1015 (La. Ct. App. 1990); *Kennedy v. Parrino*, 555 So. 2d 990 (La. Ct. App. 1990); *Robinson v. Hardy*, 505 So. 2d 767 (La. Ct. App. 1987); *Neville v. Johnson*, 398 So. 2d 111 (La. Ct. App. 1981); *Hall v. Coplon*, 355 S.E.2d 195 (N.C. App. 1987).

type of conduct amounting to provocation.

The North Carolina case that permits mitigation based on plaintiff's provocation gives no definition of the type of conduct that amounts to provocation, but merely states that breaking and entering defendant's home would be sufficient.[139] Thus, the case provides little guidance as to what type of conduct on plaintiff's part should be considered.

Mississippi, by statute, and Louisiana, by case law, take a very broad view of the type of conduct on plaintiff's part that justifies mitigation of her damages. The Mississippi statute permits "any mitigating circumstances"[140] to be considered. Louisiana courts have held that "any conduct or action which contributes to the circumstances giving rise to the injury"[141] can be considered. Later cases appear to narrow this holding by using plaintiff's conduct to mitigate damages only if it justifies "a finding of fault on the part of plaintiff."[142] Under such a broad definition of provocation, the car thief could assert that his liability should be decreased to reflect the car owner's fault in leaving her keys in the car. Although this possibility seems unwarranted, it may not be especially troubling[143] as juries facing such a claim would undoubtedly allocate all or nearly all of the fault to the thief.

Any jurisdiction that wants to confine the provocation argument more strictly might do so by borrowing concepts from the somewhat analogous criminal law defense of entrapment.[144] Entrapment, as usually defined, occurs when a government agent induces a defendant to commit an offense that he was not predisposed to commit.[145] Merely

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139. *Hall v. Coplon*, 355 S.E.2d 195 (N.C. App. 1987).

140. Miss. Code § 11-7-61 (1972). The statute applies only to the torts listed therein, including a number of intentional torts.

141. *Harris v. Pineset*, 499 So. 2d 499, 503 (La. Ct. App. 1987).

142. *Jones v. Thomas*, 557 So. 2d 1015, 1018 (La. Ct. App. 1990). Accord *Baugh v. Redmond*, 565 So. 2d 953, 959-60 (La. Ct. App. 1990).

143. This conclusion is not invariably true. Under some circumstances the adoption of an extremely broad definition of provocation could lead to very troubling results. For example, under the standard set out in *Harris*, a woman who was attacked when she entered a bar could have her damages reduced because the jury disapproved of her going to a bar. 499 So.2d at 503. Such a possibility shows that courts must define provocation with some care.

144. Reasons similar to those given for recognizing the entrapment defense support the use of comparative fault in intentional tort cases involving provocation. One reason given for the entrapment defense is that it is necessary to do justice: the government should not be able to lure the innocent into committing crimes and then punish them for those crimes. Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* 423 (West, 2d ed. 1986). Similarly, a private person who was at fault in causing another to commit a tort should not be permitted to collect fully for injuries caused by that tort. The second justification for the entrapment defense is to enable the courts to control police excesses. Id. at 424. Although courts have no corresponding duty to control private citizens who torment others, it seems desirable for them to try to influence such people.

145. LaFave and Scott, *Criminal Law* at § 5.2(b).

affording "opportunities or facilities for the commission of the offense"[146] is not sufficient inducement to constitute entrapment.[147] Under this approach our handicapped person would be able to use comparative fault, but the car thief would not.

The parallel between entrapment and provocation, however, is not exact. First, unlike the police in entrapment situations, most people who provoke torts probably do not intend that their victims actually commit the torts. Rather they hope that the victim will suffer but not otherwise respond. Thus, the intent element present in cases of entrapment often will be missing in instances of provocation. Second, the police conduct in entrapment cases may not have been as egregious as plaintiffs' behavior in instances of provocation. In the case of entrapment, conduct similar to that engaged in by the police was desirable, but the police went too far. Provocation, on the other hand, does not involve an unreasonable extension of useful conduct; in these cases there is no justification for conduct that is at all similar to that in which plaintiffs engaged. Finally, the consequences of a finding that plaintiff provoked defendant are much less severe than those resulting from a finding of entrapment. In the provocation situation plaintiff's recovery will be reduced; in the entrapment situation plaintiff will lose.

In view of these differences between entrapment cases and provocation cases, tort law need not import all or any of the conclusions reached by the criminal law regarding the type of conduct sufficient to trigger the entrapment defense. Nevertheless, entrapment and provocation are sufficiently similar that entrapment cases can provide some guidance to courts facing claims that plaintiff provoked defendant.

Courts should permit defendants to argue that a plaintiff who was at fault in provoking the tort should have her damages reduced to reflect that fault. By doing so they would send a message that this type of behavior is unacceptable, and they might deter some provokers, thus reducing the number of these incidents. While some courts might elect to follow the lead of Louisiana and Mississippi and broadly define provocation, others might opt to develop a more restrictive definition, perhaps similar to the definition of entrapment used in criminal law. When plaintiff's fault does not amount to provocation, a defendant who intended to inflict the harm of which plaintiff complains and who knew of facts that gave him no privilege to inflict the harm should be prohibited from using comparative fault.

One final issue concerning the use of comparative fault in inten-

146. *Sorrells v. United States*, 287 U.S. 435, 441 (1932), quoted in *Jacobson v. United States*, 112 S. Ct. 1535, 1540 (1992).

147. *Sorrells*, 287 U.S. at 441.

tional tort cases remains to be considered. Some jurisdictions recently have concluded that plaintiffs injured as a direct result of their participation in criminal activity cannot recover for their injuries, at least if their criminality was serious.[148] The reasons that lead jurisdictions to deny injured criminals access to the courts to redress their injuries also might lead them to prohibit criminals from using comparative fault when the criminal's fault during the commission of a crime contributed to the injury about which the criminal complains. This would create another category of people who are not permitted to use comparative fault. Is there justification for depriving these criminals of the right to use comparative fault to decrease their liability? Should criminality have any part to play in the decision to use comparative fault?

The New York Court of Appeals confronted this issue in *Barker v. Kallash*.[149] The court held that the fifteen-year-old plaintiff who was injured while building a pipe bomb could not recover from those who sold him the explosive "because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act."[150] The reasons given by the *Barker* court for refusing to permit recovery by a person injured as a direct result of serious criminal behavior were that criminals should not profit from their own wrongdoing and that the criminal law should be obeyed.[151]

The *Barker* opinions traced the argument about profiting from a wrong to a case in which a beneficiary under a will murdered the testator to obtain his inheritance.[152] The rationale made some sense in that context, but does not appear to be applicable to tort lawsuits, in which no profit can be made. In tort suits, the issue is how to allocate a loss that has occurred. Even if the person who suffered the loss recovers for the entire loss, he in no way has profited; at most he has broken even. Because there is little possibility of profiting from a wrong,[153] this rea-

148. Alaska Stat. § 09.017.030 (Supp. 1991); *Barker v. Kallash*, 63 N.Y.2d 19, 468 N.E.2d 39 (1984). Although these authorities, by their terms, apply to intentional tort suits, the author doubts that they will be interpreted to do so because such an interpretation would render those engaging in serious criminal conduct "fair game" for intentional tortfeasors. Indeed, in *McCummings v. New York City Transit Auth.*, an intentional tort case, a lower New York court did not discuss the possibility of barring plaintiff's claim because his injury was sustained as a direct result of his participation in a serious crime. 177 A.D.2d 24, 580 N.Y.S.2d 931 (1992).

149. 63 N.Y.2d 19, 468 N.E.2d 39 (1984).

150. 468 N.E.2d at 41.

151. 468 N.E.2d at 41.

152. *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889).

153. Theoretically, a person could profit in a tort suit if she were awarded punitive damages. Punitive damages, however, are not always available and are unlikely, even if available, to be awarded to a person injured while committing a serious crime. But see *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971); *Allison v. Fiscus*, 156 Ohio St. 120, 100 N.E.2d 237 (1951). Even if punitive damages were awarded, plaintiff probably would not profit; she still must pay attorney's fees,

son for refusing to permit criminals to recover in tort is a red herring.

The second reason offered by the *Barker* court—that the law should be obeyed—presumes that refusing to hear criminals' tort claims will cause people to obey the criminal law. Refusing to permit injured criminals to recover seems unlikely to cause potential criminals to obey the law: a person who is not deterred from criminal activity by the possibilities of personal injury and criminal penalties is unlikely to be deterred by the chance that she may be unable to recover damages for such injury. Even assuming that refusing to permit criminal plaintiffs to recover does deter some criminals, that refusal often, as in *Barker*, could relieve another criminal of liability,[154] thus removing a disincentive for that person to engage in the criminal conduct. It is difficult to see how that result encourages obedience to the criminal law.

Perhaps the *Barker* court was motivated by a desire not to appear to condone illegal conduct by recognizing a criminal's claim. In contract cases this appears to be the primary reason for refusing to enforce many illegal agreements.[155] The courts' concern about appearances is stronger in contract cases, in which the court is being asked to enforce an illegal agreement, than in tort suits, in which no action to further an illegal scheme is sought. Even in contract cases, however, this concern is not always decisive, for illegal contracts sometimes are enforced.[156] In many tort cases the courts do not find it necessary to bar their doors to criminals even though the criminals are complaining of injuries received while committing serious crimes. For example, criminals intentionally injured during the commission of crimes sometimes may recover for those injuries;[157] criminal plaintiffs may be able to recover if their criminal conduct was a "condition" rather than a "cause" of their injuries;[158] and criminals who are defendants in negligence cases often can rely on plaintiff's negligence to bar or decrease their liability.[159] This evidence that, in many situations, the courts have overcome their fear of appear-

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and assuming the views expressed in this Article are adopted and comparative fault is available to reduce defendant's liability, plaintiff's compensatory award likely would be considerably less than her damage.

154. The two defendants in *Barker* not only were building the bomb with plaintiff, but allegedly had obtained the explosives used in the bomb. 468 N.E.2d at 39.

155. John D. Calamari and Joseph M. Perillo, *Contracts* § 22-1 at 888 (West, 3d ed. 1987).

156. Id. §§ 22-1 to 22-4.

157. See, for example, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971); *McCummings v. New York City Transit Auth.*, 177 A.D.2d 24, 580 N.Y.S.2d 931 (1992); *Allison v. Fiscus*, 156 Ohio St. 120, 100 N.E.2d 237 (1951); Restatement (Second) of Torts, § 79 (1963). It should be noted that the criminal plaintiff's conduct in *McCummings* (beating and robbing an old man) was much more reprehensible tban in Barker (making a pipebomb), but McCummings was allowed access to the courts.

158. E.R. Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 338-42 (1913).

159. Keeton, et al., *Torts* § 65 at 461 (cited in note 4).

ing to condone crime if they recognize the claims of criminals is some indication that such a fear is not a particularly strong justification for prohibiting recovery.

In the context of comparative fault, the issue of one party's criminal conduct most likely would arise in one of two ways: (1) the criminal could be a defendant seeking to decrease his liability for injuries he inflicted during a crime by proving that plaintiff's fault was a cause of her injury; or (2) the criminal could be a plaintiff, injured during the course of a crime, who wants to recover in full from defendant even though her fault contributed to her injury.

When the criminal is a defendant seeking to decrease his liability because plaintiff's fault contributed to her injury, the arguments for refusing to hear his claim would seem to be the same as those cited to support the refusal to permit injured criminals to recover.[160] As noted above those reasons are extremely weak. Moreover, they are offset by the need to discourage the other party from engaging in tortious conduct. They provide insufficient reason for rejecting the benefits of comparative fault.

When the criminal is plaintiff, the reasons causing some courts to bar their doors to criminals would support the use of comparative fault, for comparative fault would decrease the criminal's recovery. Such a result would decrease any "profit" the criminal otherwise might make, increase the criminal's incentive to obey the law, and lessen any appearance that the court condones criminal conduct. The reasons why some courts deny relief to some criminals indicate that comparative fault should be used in this instance.

Because the usual reasons for using comparative fault are, in the instance of a plaintiff injured while engaged in criminal conduct, augmented by these additional reasons, a defendant who, under the views espoused in this Article, is prohibited from using comparative fault might claim that that prohibition should be lifted because plaintiff's conduct was criminal.[161] Defendant is prevented from using compara-

160. Keep in mind that, under the proposal advanced in this Article, defendants can never use comparative fault if they intended the injury and realized that facts existed which gave them no right to inflict that injury or if they took advantage of plaintiff's carelessness. Consequently, most defendants who injure people during the commission of crimes would not be able to use comparative fault.

161. The appeal of the argument advanced by this defendant probably arises from the likelihood that the criminal's fault in such a case will involve some type of provocation. For example, under the general approach taken in this Article, it initially might appear that a defendant whose spring gun shot plaintiff as she broke into his warehouse should be denied the benefits of comparative fault. Defendant intended an injury substantially similar to the one inflicted, and the facts, as he understood them, gave him no right to engage in this type of conduct. This plaintiff's criminal conduct, however, which certainly involves fault, was the reason the tort was committed; it provoked defendant. Consequently, plaintiff's fault in provoking defendant should be considered in

tive fault only if he intended the injury aware of facts that gave him no right to inflict the injury, or if he took advantage of plaintiff's fault. In both of these instances, defendant simply has no right to complain about plaintiff's faulty conduct. The unconvincing reasons offered to explain why criminals should be denied access to the courts are insufficient to justify allowing such a defendant to use plaintiff's fault to reduce his liability.

Regardless of the criminal nature of either party's conduct, courts should use comparative fault in most types of intentional tort cases, for doing so advances the goals of comparative fault, enhances the courts' ability to consider both parties' faulty conduct, better enables the courts to spread losses, and does not undermine the other goals of tort law. Exceptions[162] arise when defendant either took advantage of plaintiff's fault or intended the harm of which plaintiff complains, knowing that facts existed under which he had no right to inflict that harm. In those two cases, defendant should be denied the use of comparative fault because his conduct shows that he abandoned any right he might have had to complain of plaintiff's fault. Even in those instances, however, comparative fault should be used if plaintiff's faulty conduct caused defendant to commit the tort.

V. Would Comparative Fault Impose an Untoward Administrative Burden?

Regardless of the intellectual merits of a proposal to change tort law, no such proposal can be justified if the burden it imposes on courts and litigants exceeds the benefits it creates. Thus, it is necessary to attempt to assess the burdens that might be created by the use of comparative fault in intentional tort cases.

Although estimating the additional burden, if any, is necessarily somewhat speculative, a rough idea of that burden can be obtained by studying the effect of the adoption of comparative fault in negligence cases. A 1959 study[163] concluded that the "[i]ntroduction of comparative negligence . . . did not drastically alter the size or quality of the courts' burdens in processing these cases."[164] A 1969 update of this study reached the same conclusion[165] as did a study of the effect of the

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determining damages even though defendant intended the injury. As a result, no need exists for a "criminal conduct" exception to permit the use of comparative fault in this type of case.

162. In addition to the general exceptions discussed here, a different, limited exception exists in conversion cases because of the nature of the remedy provided in those cases. See note 118.

163. Maurice Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 Ark. L. Rev. 89 (1959).

164. Id. at 108.

165. Billy Joe Thompson, Note, *Comparative Negligence—A Survey of the Arkansas Expe-*

adoption of comparative negligence on automobile insurance.[166] In assessing the relevance of this conclusion to the present inquiry, it is helpful to discuss the particular findings on which the conclusion was based and to decide whether those findings likely would be replicated if comparative fault were to be used in intentional tort cases.

The Arkansas study made the following findings: Comparative negligence "did not affect the preference for jury trials in personal injury cases; did not appreciably affect the length of trials; increased potential litigation; promoted before-trial settlements; and made damages harder to determine."[167] Is it likely that these findings would differ if the issue were the use of comparative fault in intentional tort cases?

With respect to the preference for jury trials, it would seem that the effect of the use of comparative fault would be, if possible, less in intentional tort cases than in negligence suits. In the negligence context it was argued that the contributory negligence rule caused contributorily negligent plaintiffs to request jury trials in the hope that the jury would ignore the court's instructions on contributory negligence and return a verdict for plaintiff.[168] Thus, the argument went, the introduction of comparative fault would obviate one reason for demanding juries, thus reducing the number of jury trials and lessening the burden on the courts.[169] Yet, according to the Arkansas study, the use of comparative fault did not affect the demand for jury trials in personal injury suits.[170] Either plaintiffs' hopes that the jury would disregard the instructions on contributory negligence was not the decisive factor in their decisions to demand jury trials, or if it was, the use of comparative fault caused sufficient additional defendants to demand a jury so that defendant-requested juries replaced those previously requested by plaintiffs.

In the intentional tort context, it might be argued that the law's refusal to consider plaintiff's fault would encourage defendants to ask for juries in the hope that the jury would, despite instructions, take plaintiff's fault into account and decrease plaintiff's damage award. Such an incentive would be offset to some extent by the prevalent belief

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rience, 22 Ark. L. Rev. 692 (1969).

166. Cornelius J. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 Mich. L. Rev. 689, 707-22 (1960) (comparative negligence had no observable effect on either the frequency with which claims were filed or insurance rates).

167. Rosenberg, 13 Ark. L. Rev. at 108 (cited in note 163). The increased difficulty in determining damages, although listed here, is elsewhere said to account for the fact that trials did not become shorter. Because this increased difficulty actually is reflected in another noted factor, I will not discuss it separately.

168. Id. at 92.

169. Id. at 92, 100-02.

170. Id. at 101.

that juries tend to award more damages than judges do[171] and by the possibility that evidence of plaintiff's fault would be held irrelevant and inadmissible, in which case it obviously could not influence the jury. Consequently, the present treatment of plaintiff's fault in intentional tort suits may give defendants a weak incentive to demand a jury trial, while providing plaintiffs with a weak incentive not to do so. The use of comparative fault would remove both of these incentives. Given that the removal of similar but stronger reasons[172] to demand a jury was insufficient to decrease the number of juries demanded in negligence suits, it is very unlikely that the removal of these weaker reasons would have a noticeable impact on jury demands in intentional tort cases.

The Arkansas study also concluded that the use of comparative fault did not "appreciably affect the length of trials."[173] Because comparative fault clearly introduces a new issue—the comparison of the

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171. This perception appears to have some basis in fact. In 1964 Professor Kalven determined that juries award about 20% more than do judges. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1064 (1964). A 1990 study concluded tbat the median jury award in tort cases was $26,213; the median judge award was $8,500. David B. Rottman, *Tort Litigation in the State Courts: Evidence From the Trial Courts Information Network*, St. Ct. J. 1, 12 (Fall 1990).

172. In negligence cases under contributory negligence, both of these factors encouraged plaintiffs to demand a jury: a jury might disregard instructions and permit a negligent plaintiff to recover, and a jury is more likely than a judge to return a large damage award. In an intentional tort case, the factors cut in opposite directions. On the one hand, defendant may prefer a jury because he hopes that the jury will disregard instructions and decrease plaintiff's damages to reflect plaintiff's fault. On the other hand, defendant may fear that a jury will decide that plaintiff's damage is much more extensive than would a judge. Thus, the defendant's concern that the jury will overestimate plaintiff's damage will, to some extent, offset his hope that the jury will decrease plaintiff's recovery to reflect his fault. The value of this rather attenuated incentive is further undermined by the possibility that evidence of plaintiff's fault might be inadmissible. Consequently, the plaintiff's incentive to demand a jury under the contributory negligence rule seems to have been considerably stronger than any possible corresponding incentive on the part of intentional tort defendants.

173. Rosenberg, 13 Ark. L. Rev. at 108 (cited in note 163). The study concluded that the reason trial length did not change was that "the greater difficulty of determining the damage issue was probably offset by greater ease in determining the liability issue." Id. at 102. While the responses to the questionnaires supported this conclusion, it is difficult to see why such an offset would exist. In negligence cases in which plaintiff's fault is an issue, the use of comparative fault may simplify the liability issue because plaintiff's fault is no longer considered in the liability phase. Plaintiff's fault remains in the case, however, as an issue to be decided in the damages phase, in which it is joined by a totally new issue—the share of culpability assigned to each party. Thus, it seems clear that there is no offset, but instead, the addition of a new issue.

Furthermore, in any case in which plaintiff's fault is clear, the use of comparative fault would make the liability phase of the trial more difficult, for it would require the jury to decide if defendant's conduct was negligent instead of simply finding for defendant because plaintiff had been contributorily negligent. An offset may result from the greater ease with which juries, freed from the draconian results of contributory negligence, can decide negligence cases under comparative fault. This type of offset should be replicated in those intentional tort cases—for example, those requiring decisions on the reasonableness of defendant's belief that plaintiff consented to defendant's conduct—that now require juries to make similarly unappealing decisions.

fault of the parties—into the trial, this is rather surprising. There is no reason to suppose that the introduction of this issue into intentional tort cases would have a greater impact on the length of those trials than it had in negligence cases. The use of comparative fault in intentional tort cases would, however, in some cases, introduce a second new issue: plaintiff's fault.[174] In those cases in which plaintiff's fault would not have been an issue,[175] this might lengthen trials. The increased burden imposed by this second issue, however, would be mitigated by the decreased difficulty with which jurors, no longer faced with imposing the entire loss on one of two faulty parties, could decide the liability issue in intentional tort cases. Despite this offset the use of comparative fault in intentional tort cases probably would lengthen some trials even though its use did not noticeably lengthen negligence trials. Nevertheless, given the experience in negligence trials and the fact that even under the present rules plaintiff's fault is an issue in many of the intentional tort cases in which comparative fault would be raised, no reason exists to believe that the use of comparative fault would make intentional tort trials dramatically longer.

The Arkansas study found that the use of comparative fault increased litigation[176] presumably because some negligent plaintiffs sued when they could expect a partial recovery even though they would not have sued if their negligence would have barred them from any recovery. The use of comparative fault in intentional tort cases, however, should decrease the number of lawsuits. Instead of permitting recoveries that previously were not available, as happened in negligence cases, the use of comparative fault in intentional tort cases would reduce the amount that some plaintiffs could expect to recover. As a result, some suits would become uneconomical and would not be brought. This reduction in the number of lawsuits would ameliorate any burden created by the increase in the number of issues to be addressed at trial once comparative fault is introduced into intentional tort cases.

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174. Plaintiff's fault is presently an issue in only a minority of intentional tort cases. For example, plaintiff's fault is sometimes relevant to whether a privilege exists. See Restatement (Second) of Torts §§ 77, 88, 101, 119 (1963). In some jurisdictions provocation mitigates compensatory damages, and in most jurisdictions it can mitigate punitive damages. Keeton, et al., *Torts* § 19 at 126 (cited in note 4); Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* 211-12 (Michie, 2d ed. 1989). Furthermore, when plaintiff's fault is not at issue, her conduct, which would require proof similar to that needed to show her fault, often is. For example, if the issue is whether defendant reasonably believed he had to defend himself or reasonably believed that plaintiff consented, evidence of plaintiff's conduct usually will be relevant even when comparative fault is not used.

175. Although plaintiff's fault presently is relevant in only a minority of intentional tort suits, tbat minority probably comprises a large part of the intentional tort cases in which comparative fault would be raised.

176. Rosenberg, 13 Ark. L. Rev. at 108 (cited in note 163).

The use of comparative fault in negligence suits was found to ease the burdens on the courts by promoting settlements.[177] The study suggested that defendants were less willing to settle when there was a possibility of totally avoiding liability by proving the plaintiff's contributory negligence.[178] An explanation for this result, based on psychology, is provided by prospect theory, which teaches that people are risk-seeking when evaluating prospective losses and risk-averse when considering possible gains.[179] Tort defendants usually would view the lawsuit as posing a possible loss, but plaintiffs would perceive a possible gain.[180] Prospect theory holds that plaintiffs, being risk-averse, take less money than they should, statistically, to avoid the risk that they will lose the lawsuit and receive nothing. Similarly, defendants, who are risk-seeking, demand more money than they deserve, statistically, to give up the possibility that they will win the lawsuit and pay nothing.

In the context of contributory negligence, the relevant risk is that plaintiff will be found to have been negligent and, therefore, will be barred from recovery. To focus on that risk, consider a situation in which the parties agree that defendant was negligent, that plaintiff's damages were one hundred dollars, and that the chance that plaintiff will be found to have been contributorily negligent is forty percent. The value of plaintiff's claim is sixty dollars[181] because if she goes to trial there is a sixty percent chance that she will get one hundred dollars and a forty percent chance that she will recover nothing. Prospect theory indicates that because plaintiff is risk-averse she will be willing to take less than sixty dollars in settlement to avoid the possibility that she might recover nothing if she goes to trial. Defendant, however, is risk-seeking and will not give up the chance to avoid liability unless he is compensated not only for the statistical value of his lost chance (forty dollars) but also for some additional amount that equals the value which he attaches to the chance itself. Thus, our defendant will not offer to settle for sixty dollars, but for some lesser amount.

This phenomenon would not affect the likelihood of settlement if it

177. Id. at 108.

178. Id. at 100.

179. Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 453 (1981).

180. Id. at 453. At the point that settlement negotiations are being considered, defendant faces two possibilities: either he will have to pay money to plaintiff or he will not. Because he is not in a position to gain anything from the suit, he should view it as a prospective loss. Correspondingly, a plaintiff would see the suit as a potential gain.

181. Costs of settlement and litigation are ignored here to simplify the example. They would not materially affect the analysis. For simplicity, I also ignore the tendency of juries to disregard instructions about contributory negligence and award negligent plaintiffs damages. This tendency would lessen the impact of the differing risk-taking characteristics of the parties, much as comparative negligence does, see text accompanying notes 185-87, but would not otherwise change it.

equally influenced plaintiffs and defendants.[182] Prospect theory concludes, however, that the effect of a risk on the decisionmaker's behavior is greater when it concerns a risk of loss than when it concerns the possibility of gain.[183] Because defendants would be more affected by this risk factor than would plaintiffs, settlements would tend to be more difficult.[184] When comparative negligence replaces contributory negligence, the statistical value of the chance involved in litigating plaintiff's fault decreases because a finding that plaintiff was at fault results in a decreased recovery instead of no recovery.[185] As a result, the psychological impact of that risk on the parties will be less, and the disparity between the parties' evaluations of that risk also should be less. As that disparity decreases, the difference between the settlement amounts acceptable to the parties decreases, making settlement more likely.

In addition, the impact of any disparity would be less under comparative negligence because a reasonable settlement figure for a given case will always be higher than under contributory negligence.[186] As the settlement value of a case increases, the importance of a given disparity between the parties' settlement offers decreases.[187] Consequently, the

182. For example, if plaintiff thought that it was worth an extra five dollars to eliminate the 40% chance of losing the case and defendant would accept five dollars to give up his 40% chance of winning the case, the case should settle although at a different dollar figure than if risk aversion were not a factor. Here the settlement amount would be $55 instead of the $60 that would appear to be statistically appropriate.

183. Tversky and Kahneman, 211 Science at 454 (cited in note 179).

184. To continue with the example discussed in note 182, although plaintiff is willing to give up an extra five dollars to ensure a recovery, defendant, because he is more affected by the psychological risk factor than is plaintiff, will insist on "receiving" more than five dollars extra to give up the 40% chance of having to pay nothing. Plaintiff will accept $55, but defendant will offer less than $55 thus impeding settlement.

185. In the contributory negligence example discussed in the text at footnote 181, the statistical value of the chance that plaintiff would be found negligent was $40—the amount at risk ($100) times the chance of losing that amount (40%). Under comparative fault the statistical value of the chance would always be less than $40 because even if plaintiff is found negligent she will recover something. In our example, there is still a 40% chance tbat plaintiff will be found negligent, but the amount lost by plaintiff if such a finding is made will be less than $100. Determining the amount at risk requires an additional fact—the percentage of the total fault attributable to plaintiff—for that will determine the size of the reduction in the judgment. Assume in our example, if plaintiff is found to have been at fault, her fault will be 50% of the total fault. That would mean that her recovery would be $50 if she were found to have been negligent. Thus, the statistical value of the chance that she would be found negligent is $20 (40% of $50) instead of $40.

186. The settlement figure is invariably higher under comparative fault because the careless plaintiff will not be barred, but will recover something. Using the example given above, under contributory negligence the statistically correct value of the case is $60 (the damages times the chance that the damages will be recovered). Under comparative fault the statistically correct value of the case is $80 because in addition to the 60% chance of full recovery there is a 40% chance of a $50 recovery.

187. For example, a $3 disparity would be less likely to derail an $80 settlement than a $60 settlement. This common sense conclusion also is supported by research. See Tversky and Kahneman, 211 Science at 453 (cited in note 179).

use of comparative negligence instead of contributory negligence facilitates settlements in two ways: first, it decreases the difference between the settlement amounts acceptable to the parties, and second, it lessens the impact of whatever disparity remains between plaintiff's and defendant's settlement offers.

The parties' differing evaluations of the value of the risk of litigation is one reason why comparative negligence made settlement likelier in negligence suits. Those differing evaluations, however, usually would have the opposite effect on settlements if comparative fault were introduced into intentional tort cases. In intentional torts cases, because plaintiff's fault usually is irrelevant, no legal risk would be attached to it.[188] When there is no risk, risk aversion is obviously irrelevant. Comparative fault introduces a risk in that the jury may find plaintiff to have been at fault, and if it does, the damages will be reduced. Because the dollar value defendant assigns to the chance of having to pay only decreased damages exceeds the amount plaintiff is willing to pay to avoid the risk of collecting only decreased damages, the use of comparative fault might hinder settlements in many intentional tort cases even though it aided them in negligence suits. The fact that reasonable settlement amounts under comparative fault would be lower would exacerbate this effect, thus increasing the impact of any disparity between the settlement offers of plaintiffs and defendants. Consequently, the availability of comparative fault most likely would make it more difficult to settle intentional tort suits.

In sum, the study of the effect on court administration of the use of comparative fault in negligence cases concluded that "the net tendency was not to tip the balance markedly in either direction."[189] In reaching that conclusion the authors relied on the four findings discussed above. One of them—that the demand for jury trials did not change—should be the same if comparative fault were applied to intentional tort cases. The other three probably would differ in that the use of comparative fault in intentional tort cases would: (1) slightly increase the length of

188. Although plaintiff's fault usually is irrelevant in these cases and evidence of that fault is inadmissible, under some conditions it is considered. See note 174. In those cases, the consequences of introducing comparative fault would differ from those described in the text. First, when plaintiff's fault presently protects the intentional tort defendant from liability (for example, if plaintiff knowingly caused defendant to believe that conditions existed which justified the defendant in arresting plaintiff, Restatement (Second) of Torts § 119 (1963)), the use of comparative fault should aid settlements as appears to have happened when comparative fault replaced contributory negligence. Second, any time evidence of plaintiff's fault is admissible there is a possibility that the jury will decrease the damage award to reflect plaintiff's fault even though the court instructs otherwise. When such a possibility exists, the introduction of comparative fault will not introduce a totally new risk, but nevertheless, will increase the risk and thus have an effect similar to that described in the text.

189. Rosenberg, 13 Ark. L. Rev. at 108 (cited in note 163).

trials even though it did not have that effect in negligence cases; (2) decrease the number of cases brought although it increased the number of negligence cases brought; and (3) decrease the number of cases settled even though settlements increased when comparative fault was used in negligence cases.

In the negligence context it was found that the increased burden imposed by additional lawsuits was offset by the increase in the number of settlements. In the case of intentional torts, the question is whether the increased burden imposed by slightly longer trials and somewhat fewer settlements would be sufficiently offset by the decrease in the number of cases filed. Although any attempt to answer this question must be speculative, the experience in negligence cases suggests that these effects would be slight. Certainly no evidence indicates that additional administrative burdens, if any, would be significant enough to influence the decision whether to use comparative fault in intentional tort cases.

VI. Conclusion

In cases in which both parties were at fault in causing plaintiff's injury, the courts have long endured the uncomfortable position of having to ignore the fault of one party to the benefit of the other. Most jurisdictions have resolved this predicament when it arises in negligence and strict liability cases by using comparative fault. In the instance of intentional torts, however, the courts continue to decide cases on an all-or-nothing basis, usually by ignoring plaintiff's fault and imposing the entire liability on defendant. With the advent of comparative fault, a reassessment of this remnant of the all-or-nothing approach is in order.

People, be they plaintiffs or defendants, should bear some responsibility for the injuries caused by their faulty conduct. In particular, a person who was at fault in causing her own injury generally should not be permitted to foist the entire liability for that injury onto someone else. Furthermore, in a system in which defendant's liability is based on fault, equal treatment demands that the fault of plaintiff also be considered in assessing damages. Both of these principles indicate that comparative fault should be used in many intentional tort cases, for doing so recognizes the faults of both parties and requires both faulty parties to bear responsibility for the loss they caused. An additional benefit is that comparative fault may help to spread the losses caused by intentional torts.

Nevertheless, there are instances in which a defendant's conduct is such that he should be prevented from complaining of plaintiff's fault. When defendant wanted to inflict the damage of which plaintiff complains, aware of facts under which he had no right to inflict such dam-

age, or when defendant took advantage of plaintiff's fault, defendant usually has used plaintiff's fault for his own purposes and consequently has forfeited any right he had to complain about that fault. Plaintiff, however, should not completely escape responsibility if she was at fault in provoking defendant to commit the tort even though as a result of the provocation defendant wanted to inflict the injury of which plaintiff complains. In that instance defendant, not having used plaintiff's fault for his own purposes or in any way having benefitted from it, should not be prevented from relying on that fault to reduce his liability.

Thus, most types of intentional tort cases would be more fairly decided if the courts could consider the fault of both parties. In such cases comparative fault should be used, thereby enabling the courts to equitably allocate losses.