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ARTICLE: CITIZEN NO-DUTY RULES: RAPE VICTIMS AND COMPARATIVE FAULT

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SUMMARY:

... In this Article, Professor Bublick examines the generally accepted practice of allowing third parties like hotels and landlords, and occasionally rapists themselves, to take advantage of broad defenses of rape victim fault in civil law rape cases. ... And third, even the Restatement of Torts: Apportionment of Liability originally endorsed an approach that would seem to have permitted at least some comparisons of rapist and rape victim fault. ... - Comparative fault defenses frequently call upon juries to determine when a rape victim's conduct has subjected her to an unreasonable risk of rape. ... Without detailing the many reasons why a rapist's intentional fault should not be diminished by a rape victim's negligence - a proposition that is a radical break from traditional law - there is an additional harm in letting persons who have intentionally caused harm to others, particularly the kind of egregious harm at issue in rape cases, shift the responsibility for their acts to their victims. ... Moreover, if courts are ambivalent about third-party liability, they may find ways to curtail it through a number of doctrines - from rape victim comparative fault defenses, to comparisons of rapist and third-party fault, or through direct limitations on third-party duties. ...

TEXT:

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

in the context of civil rape cases. The concept of no-duty rules was recently endorsed by the newly-enacted Restatement (Third) of Torts: Comparative Apportionment.

Introduction

Much has been written about the criminal law's inadequate response to rape. n1 In light of this literature, and the law's failure to combat sexual violence more generally, scholars eager to find avenues of redress for rape victims have begun to focus increased attention on the civil courts. n2 [*1414] These scholars surmise that because tort cases require a lower burden of proof than do criminal cases, rape victims will fare better in civil fora. n3

While there is no doubt that civil actions are an important remedial device for rape victims, n4 and may become more so, n5 neither scholars nor victims' advocates should assume that biases against rape victims will fall away in the civil courts. Nor should civil remedies be seen as a replacement for an inadequate criminal process. Tort law is not simply a diluted version of the criminal law, nor is it inherently less problematic for rape victims than the criminal law. The hundreds of published opinions in civil rape cases n6 reveal that many of the prejudices that obstruct criminal convictions - such as the requirement that rape victims physically resist their assailants - may also hinder civil recovery. n7 In addition, tort actions present anti-victim biases unique to the civil context in matters not directly involved in criminal proceedings, such as comparative fault and damages assessment. n8

[*1415] This Article confronts one tort doctrine that blames rape victims for rape - rape victims' "comparative fault." n9 Under existing law, defendants may successfully argue that a rape victim's conduct is a legal cause of her rape. n10 While most jurisdictions do not allow rapists themselves to raise rape victim comparative fault defenses n11 (though a very small and possibly growing minority of jurisdictions may n12), these same jurisdictions allow negligent third parties like hotels and landlords to raise virtually unlimited defenses of rape victim "fault." n13 Thus, while a court would ordinarily bar a rapist from asserting that the rape victim was at fault for her own rape because she agreed to drink alcohol with him, a hotel could nevertheless raise that identical defense. n14

[*1416] I contend that the current law is flawed. The predominant rule assumes that defenses of rape victim fault are problematic only if they are invoked by rapists (and under the minority, perhaps not even then). Accordingly, whatever limits courts have placed on rape victim comparative fault defenses arise solely from the moral culpability of the rapist defendant. This exclusive focus on defendant culpability fails to recognize that defenses of rape victim fault are problematic regardless of the identity of the defendants who invoke them. I argue that courts have overlooked a second, and equally compelling, basis for denying rape victim comparative fault defenses: citizen entitlements. n15 Even in cases involving negligent tortfeasors, a citizen should be entitled to shape her life around the assumption that others will not intentionally rape her.

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

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

As a result of citizens' freedom and equality interests, I argue that courts should prevent all defendants - whether rapists or third parties - from raising defenses of rape victim comparative fault. A rape victim's conduct should not be considered a legal cause of her own rape. To reframe the point in terms of duty rather than legal cause, I argue for judicial recognition of citizen no-duty rules in the context of rape cases - rules acknowledging citizens' legal entitlement not to adapt to the social reality of pervasive rape and fear of rape in our society. n16 Through such [*1417] no-duty rules, courts could refuse to reinforce and legitimate the distressing reality of female fear and restriction.

Recognition of citizen entitlements and corresponding no-duty rules is important not only for the development of civil rape law, but also for the development of tort law as a whole. The concept of citizen no-duty rules - also termed

"plaintiff no-duty rules" - has been a central aspect of the debate surrounding the proposed Restatement of the Law (Third) Torts: Apportionment of Responsibility. n17 The Restatement proposes no-duty rules to restrict claims of plaintiffs' comparative fault. n18 Because this Article supports the concept of plaintiff no-duty rules, it is germane to issues surrounding the Restatement. However, this Article's support for citizen no-duty rules in civil rape cases does not require, nor even suggest, that other Restatement proposals such as a comparative apportionment approach be adopted. n19

[*1418] The development of plaintiff no-duty rules is not dependent on acceptance or rejection of comparative apportionment, though the need for no-duty rules may be particularly acute in comparative apportionment jurisdictions. n20 Instead, a citizen no-duty concept recognizes that within either a traditional comparative negligence paradigm or a more recently developed comparative apportionment framework, citizens have certain interests in acting without fear of rape regardless of the culpability of the defendants they sue. These citizen interests should be protected in cases involving third-party defendants as well as in cases involving rapists themselves.

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

This Article proposes citizen no-duty rules in the context of civil rape cases, a particularly troubling area given concerns for equality as well as citizen freedoms. But many of the concerns raised in this Article are not exclusive to rape cases. Courts have applied the flawed analysis this Article seeks to correct in other contexts, such as robbery and murder. n21 As such, courts can, and I think should, craft no-duty rules in contexts involving other intentional torts, particularly those torts involving acts or threats of physical violence which are *malum in se*. n22

[*1419]

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

Before turning to issues of rape victim comparative fault, it is necessary to understand the background against which defendants' fault is assessed. Under existing law, rapists as well as a wide range of third parties may be liable to victims of rape. n23 Rapists may be sued for the intentional tort of rape, primarily through doctrines proscribing battery. Third parties may be liable for their negligence in failing to take reasonable care for the safety of others in the face of foreseeable criminal conduct. n24

A. Rapists' Civil Liability

Rapists may be civilly liable for rape under general tort law proscriptions against battery, n25 as well as assault, false imprisonment, and intentional infliction of emotional distress. n26 Rapists' civil liability is consistent with the many contexts in which wrongful conduct may constitute both an intentional tort and a crime. n27 That liability also comports with tort law goals of accountability, n28 compensation, n29 and deterrence. n30

Despite the recent attention given to civil actions, rapists' civil liability for rape is not new. It has been recognized in some jurisdictions since **[*1420]** at least the early 1900s n31 and has continued to be accepted throughout the century. n32 Moreover, the creation of new victim-protective civil rights measures such as the Violence Against Women Act n33 may expand rapists' liabilities under federal law. n34

B. Third Parties' Civil Liability

Third-party defendants, such as hotels, landlords, and employers, also may be civilly liable to rape victims. Third-party liability is generally grounded on theories of negligence, rather than intentional tort theories. n35 Under negligence rules, individuals ordinarily do not have a duty to take reasonable care to protect others from crime. n36 However, courts have created exceptions to this rule, primarily in cases involving special relationships. n37 When a defendant 1) has a special relationship with the **[*1421]** plaintiff, n38 2) has a special relationship with the rapist, n39 3) has

contributed to the dangerous situation in which the plaintiff is found, n40 or 4) has volunteered to render assistance, n41 the defendant's general duty of reasonable care may include the duty to take reasonable care to protect others from foreseeable criminal victimization. For example, many courts have held that a business owner's duty to "exercise due care and prudence for the safety of business invitees" extends to protection against "criminal acts by third parties." n42

In some courts, the question of third-party duty rests not only on the existence of a special relationship, endangerment of plaintiff, or volunteer of assistance, but also on the foreseeability of crime n43 - an issue that in other contexts is more frequently left to the jury as a question of breach. n44 Courts employ a number of different tests to evaluate foreseeability. n45 Those tests often look at the existence of prior similar incidents either on the premises or within the general vicinity. n46 Some courts also [*1422] limit third-party duties through categories related to the status of the plaintiff n47 and through other policy-based restrictions. n48

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

In the first context, because the third party's conduct affects others' exposure to potential danger, the third party has a duty to take reasonable care. For example, a landlord may have a duty to fix a broken entrance lock, lest a rape occur on the premises. n49 Similarly, when a property management company refuses to permit a tenant to install a deadbolt lock on her door and retains a copy of the tenant's apartment key for its own use, it is liable when it mishandles the key in a way that allows a rapist to get the key and use it to gain entry into the tenant's apartment. n50

In the second context of liability, because of its position of superior information, a third party may have a legal duty to provide accurate safety information, either by warning of latent dangers on the premises or by providing truthful safety information when such information is requested. A classic example of the duty to warn in cases of superior information arises in the context of innkeepers. Because a hotel conducts business on a daily basis in a particular location, and hotel guests may be unfamiliar with that location, the hotel is often in a better position than guests to know the danger of violent crime in the surrounding area. A hotel may therefore have a legal duty to warn its guests of recent criminal attacks. n51 Likewise, misrepresentation of safety-related information may lead to liability. Accordingly, a landlord may not tell prospective tenants that sheriffs' deputies live on and protect the premises, nor may he deny [*1423] knowledge of prior crimes on the premises, if that information is plainly false. n52

In either of these two contexts, third parties with special information or control are held accountable for exposing others to foreseeable and unreasonable risks. Where third parties make safety-related decisions like whether to install locks or hire personnel, their decisions must be reasonable. Where third parties have superior safety information, they must not mislead others and must at times reveal that information to certain unsuspecting persons. n53

Third-party liability is designed to deter entities from creating, ignoring, or disguising safety hazards. As the Tennessee Supreme Court recently noted, imposing a duty on third parties will encourage businesses "to take reasonable security precautions." n54 Courts want to encourage these precautions because "the merchant is in the best position to know the extent of crime on the premises and is better equipped than customers to take measures to thwart it," n55 thereby potentially reducing crime. n56 In many cases, third-party liability is tied to control over property. n57 Often the third party is the only party entitled by property laws to take the omitted safety-related precautions. n58

Courts also impose third-party liability to serve victim compensation objectives. Third parties are in a better position to "distribute the costs" of crime n59 and, in light of the profits that they make from their enterprise, they "must justifiably expect to share in the cost of crime attracted [*1424] to the business." n60 For these reasons among others, third-party liability is currently recognized in most jurisdictions n61 and has become more prevalent in recent times. n62

Because third-party actions often proceed in negligence, the plaintiff must prove the ordinary elements of negligence. As with other duties in negligence, the defendant's duty is one of reasonable care under the circumstances. A third-party defendant will avoid liability if it can show one of the following: 1) that it had no duty to take reasonable precautionary measures to protect the victim - i.e., because of the lack of a special relationship or other affirmative obligation; 2) that it breached no duty - i.e., by taking reasonable care under the circumstances; 3) that the plaintiff suffered no harm; 4) that its breach was not the actual cause of the plaintiff's harm - for example, that the rape would have occurred even if the defendant had taken reasonable care; or 5) that its breach was not a legal cause of the plaintiff's harm - for example, that its breach risked some other type of harm to some other class of persons. n63

Although courts sometimes state that a third-party defendant's duty is to "protect the victim" from rape, that statement is inaccurate to the extent that it implies that the third party has a legal obligation to ensure a particular outcome (strict liability) rather than to take reasonable precautionary measures (to behave non-negligently). n64

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C. Relationship Between Rapist and Third-Party Liability

Although courts broadly agree that both rapists and third parties may be liable to rape victims, the contours of that liability and their inter action vary greatly among jurisdictions. Traditionally, tortfeasors were jointly and severally liable for a single indivisible injury. n65 In addition, most jurisdictions refused to compare intentional and negligent fault, and therefore did not compare rapist and third-party responsibility. n66 As a result, both intentional and negligent tortfeasor defendants were liable to the plaintiff for her full injuries, with the caveat that the plaintiff could receive only one satisfaction. n67

However, in some states, the recent advent of comparative apportionment rules, which compare intentional and negligent fault, coupled with the elimination of joint and several liability, may virtually eliminate third party obligations. n68 Juries required to compare rapist and third-party liability will often find the rapist largely, if not entirely, responsible. n69 And when juries do not reach such conclusions, some appellate courts have sent cases back for redetermination. n70 Thus, the primary issue of the existence of third-party liability is intimately intertwined with the secondary issue of apportionment of fault. n71

The move to compare negligent and intentional fault in several-liability jurisdictions not only raises many issues regarding the purpose and [*1426] scope of third-party liability, n72 but also vividly illustrates the pressure on courts to minimize or eliminate that liability through other doctrines. At the same time, the numerous doctrines courts have crafted to avoid this diminution also illustrate courts' desire to preserve third-party liability. Some states that have comparative apportionment systems avoid the substantial dilution of third-party negligence rules by refusing to include intentional torts in their apportionment schemes. n73 In jurisdictions that do compare defendants' intentional and negligent fault, some courts have avoided diminution of third-party liability by holding negligent tortfeasors jointly and severally liable for the conduct of intentional tortfeasors when the very purpose of the negligent tortfeasors' duty was to prevent the intentional tort. n74 Another approach is to refuse to compare intentional and negligent torts in particular circumstances in which such comparisons would violate public policy. n75 Finally, at times diminution of [*1427] negligent tortfeasor responsibility can be avoided by concluding that fault need not be allocated to intentional tortfeasors not named as defendants in the action. n76

Consequently, while the contours of third-party liability may be contested, such liability is still the norm even in comparative apportionment jurisdictions. Against that backdrop, this Article examines how the many courts that do recognize third-party liability should apply defenses of comparative fault arising within those contexts. n77

II. Current Approaches to Rape Victim Comparative Fault Defenses

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

A. Comparative Apportionment: The Minority Paradigm

Although traditional tort law rules do not allow rapists to assert rape victim comparative negligence defenses, n78 a recent trend has persuaded a minority of jurisdictions to abandon traditional principles and compare intentional and negligent fault. n79 Under this approach, courts apportion [*1428] "responsibility" for an injury among intentional tortfeasors, third parties, and victims, into separate categories that always total 100%. n80 Within such a framework, a rapist's moral and financial responsibility for rape may be diminished by the rape victim's "fault." For example, if the

rape victim is adjudged five percent responsible for her own rape - a very real possibility under the prevailing law in comparative apportionment states - that determination would diminish the damages the rapist would pay by five percent. n81

Before a 1996 statutory change, Louisiana was the main producer of cases reducing intentional tortfeasor fault by victim negligence. n82 One such case, *Morris v. Yogi Bear's Jellystone Park Camp Resort*, n83 involved the gang rape of thirteen-year-old Sherry Morris by three seventeen-year-old boys in Jellystone Park. As the facts are set forth in the Louisiana appellate court opinion, Morris went with a friend and her family on a camping trip to Jellystone Park. At Jellystone, Morris and her friend went to a playground, where the three older boys approached them. The boys offered the girls illegally-purchased alcoholic beverages and the entire group drank. Morris then left with one of the boys to go to an enclosed area of the playground. n84 Another boy also went to that area of the playground. Morris's friend approached Morris and saw a boy unzipping his pants. Morris's friend, confused about what action to take, went to the bathroom to think, went back to the enclosed playground to try to get Morris out, and then ran and yelled for help. By the time help arrived, Morris "was moaning and groaning and would not answer questions. When asked if they raped her, she shook her head 'yes' and held up three fingers." n85 An examining physician found evidence of seminal fluid and severe physical trauma. Three to four hours after the rape, Morris's [*1429] blood alcohol level was 0.11%, above Louisiana's limit for intoxication while operating a motorized vehicle. n86

Morris's mother filed suit on her daughter's behalf against the three rapists, their custodial parents, Yogi Bear's Jellystone Park Camp Resort, and other third parties including Jellystone's insurer. n87 Morris reached a settlement agreement with the third parties before trial. At trial the jury apportioned fault as follows: 10% Yogi Bear's Jellystone Park, 38% rapist Darren Bouzigard, 22% rapist Wade Galjour, 18% rapist Randy Cher amie, and 12% rape victim Sherry Morris. n88 Ms. Morris moved for partial judgment notwithstanding the verdict with regard to the twelve percent fault attributed to her daughter. The trial court denied the motion, and Morris appealed. n89

In a unanimous opinion, a Louisiana appellate court affirmed the jury's finding that Sherry Morris was twelve percent at fault for her own gang rape. "There is no doubt," the court wrote, "that each of the parties were [sic] at fault to some degree." n90 The court defined Morris's fault as "willingly participating in the original beer drinking, and apparently willingly and voluntarily leaving her friend to go to a secluded place with a strange boy." n91 According to the appellate court, the victim's actions "undoubtedly set the stage for the terrible events which followed." n92 While the court considered Morris's age and lack of maturity to be "mitigating factors," and suggested that the appellate court de novo "might have come to different conclusions," the court refused to assign error on the ground that "we are not so clairvoyant that we can say that the percentages of blame assigned by the jury are clearly wrong," and that those percentages "seem to be reasonable considering all the circumstances of the case." n93 Accordingly, the Morris court allowed rapists themselves to mitigate their responsibility for their own intentional gang rape of a young unconsenting girl by focusing on the "faulty" conduct of their victim.

It is tempting to sweep aside the results of the Morris case as anomalous. The Louisiana Supreme Court distanced itself from the opinion, n94 no appellate courts outside Louisiana appear to have permitted rapists themselves to take advantage of rape victim comparative fault doctrines, [*1430] and even Louisiana - the leading source of comparative apportionment cases reducing intentional tortfeasor fault - has since passed a statute refusing to let intentional tortfeasors reduce their liability for damages based on victim comparative negligence. n95

However, given the present state of the law, courts in other jurisdictions could easily replicate the result reached by Morris when they are first asked to permit comparative fault defenses in rape cases. First, a plain reading of the statutes and case law in many comparative apportionment jurisdictions would allow rapists, like other intentional tortfeasors, to diminish their responsibility based on rape victims' alleged negligence. n96 Second, other state courts with comparative apportionment schemes have compared the conduct of other types of intentional tortfeasors, even murderers, to the victim's alleged fault. n97 And third, even the Restatement of Torts: Apportionment of Liability originally endorsed an approach that would seem to have permitted at least some comparisons of rapist and rape victim fault. n98 In fact, the draft not only endorsed comparison of defendants' intentional fault and victims' negligent fault, n99 but actually [*1431] listed the need for "adopting plaintiff negligence as a defense to intentional torts and strict product liability" as one of only two rationales for including disparate bases of liability in a single apportionment system. n100 The Restatement now takes "no position" on whether courts should compare plaintiffs' negligence with defendants' intentional torts. n101 Thus, other jurisdictions could easily replicate Morris when called upon to compare rapist and rape victim fault under their new comparative apportionment schemes.

B. Defendant Culpability: The Majority Paradigm

Within the more traditional and more broadly accepted paradigm, the availability of rape victim comparative fault defenses rests entirely on the status of the defendant being sued - rapists cannot avail themselves of any rape victim comparative fault defenses, while negligent third parties can take advantage of any such defenses. n102 Consequently, if the Morris case had been brought in a jurisdiction employing a defendant-culpability paradigm, the rapists would have been barred from asserting that Morris was twelve percent at fault for her own gang rape because she went off with them to drink beer, but third party Jellystone Park could have raised that exact same defense. The paradigm assumes that the rapist's culpability and resulting lack of moral standing are the sole problems in permitting rape victim comparative fault defenses.

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

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

1. Duty. - Consistent with the principle that comparative fault defenses involve no issue of duty, n103 courts examining rape victim comparative fault defenses routinely ignore questions of victim duty. n104 Even when courts have held that rape victims were not at fault, they have reached those decisions as a matter of deference to the jury, not as a matter of law. For example, in *Murrow v. Daniels*, the defendant motel argued that the rape victim "voluntarily exposed herself to danger by opening her room door, knowing there were questionable characters outside making noise and demanding entrance." n105 The jury concluded that the rape victim was not at fault, and the North Carolina Supreme Court affirmed the jury's verdict. The court based its ruling on the ground that the lower court had given sufficient comparative negligence instructions, which asked the jury to evaluate the reasonableness of the plaintiff's conduct. n106 The court did not suggest that the plaintiff could open the door assuming that the people on the other side, however loud, would not rape her.

Courts' failure to consider citizen no-duty arguments is not a result of litigants' failure to raise the issue. Even when plaintiffs explicitly argue that rape victim fault should not be at issue because "the conduct which injured [the victim] was intentional," courts often fail to consider those arguments beyond their standard defendant-culpability view. n107 Instead of addressing whether and to what extent a citizen has a duty to shape her conduct around the fear of rape, courts simply focus only on the status of the third-party defendant as a negligent tortfeasor. n108

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

2. Breach. - Comparative fault defenses frequently call upon juries to determine when a rape victim's conduct has subjected her to an unreasonable risk of rape. The answer, from a broad swath of case law, seems to be that almost any conduct by a woman (and the case law makes it clear that it's a woman) may subject her to an unreasonable risk of rape. According to the cases, a reasonable woman does not go outside alone at night to hail a cab n109 or walk to her car in a hotel parking lot, especially if [*1433] a man is outside. n110 She does not take four or five steps inside the door before closing it. n111 She double checks her door locks n112 and is certain that every window is closed. n113 She does not open the door when someone knocks n114 or invite a salesman into her home n115 or a man into her hotel room. n116 She never drinks alcohol with a man, particularly if he is older n117 or streetwise n118 or someone she has recently met. n119

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

The other thing we know about the reasonable woman is that, according to the defendants, she is forever doing the wrong thing when a man is trying to rape her. She cries when she should scream. n120 She does not run soon enough,

n121 or far enough or fast enough. n122 She fights when she should not, n123 and does not fight when she should. n124 As in the [*1434] criminal law, the focus of civil comparative negligence defenses "is on women generally, and on the victim as she compares (poorly) to the [jury's] assessment of the reasonable woman." n125

That judges and juries have found such a broad range of conduct unreasonable stems from several factors: ambivalence about third-party liability, lack of judicial mechanisms to review jury determinations of comparative fault, and a tendency to blame rape victims for rape. In part, the result also emanates from traditional tort law tests of reasonableness. In tort law, reasonableness is often judged by community custom or risk-utility analysis. Custom is shaped by what other members of the community actually do. Surely women do take extensive precautions to avoid rape. n126 As such, using custom as a standard of reasonableness could easily lead to gender-biased and extensive rape victim comparative fault rulings.

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

A case authored by Judge Richard Posner of the Seventh Circuit, *Wassell v. Adams*, n127 provides a useful illustration of a risk-utility approach in civil rape cases. In *Wassell*, plaintiff Susan Marisconish (later *Wassell*) stayed at a motel outside the Great Lakes Naval Training Station to attend her fiance's graduation from basic training. The motel, located four blocks west of a high crime area, had been the site of several incidents of violent crime in the past, including a rape and a robbery. The motel owners occasionally warned "women guests" about the neighborhood at night, but did not warn *Wassell*. n128 On the evening of the attack, *Wassell* locked her door and went to sleep. She awakened to a knock at the door. When she looked out the peephole she did not see anyone. She did not look out a pane glass window that was next to the door. n129 *Wassell* opened the door, thinking it was her fiance. It was not. Instead, a man she had never seen before asked for a glass of water. She got the water. The man then went into the bathroom. *Wassell* hid her purse. There was no telephone in the room. *Wassell* had not been told that there was an alarm that would have activated in case someone tried to steal the television set. When the man came out of the bathroom naked from the waist down, *Wassell* fled and pounded on the door of an adjacent room. No [*1435] one answered. The man ran after her and grabbed her. She screamed. No one heard. The motel did not have a security guard and the owners lived on the other end of the motel. The man raped her at least twice before she was able to escape. n130

Wassell brought suit against the motel owners for negligence based on two separate theories of liability - failure to warn about the dangerous neighborhood and failure to take adequate precautionary measures, such as installing phones or alarms in the rooms or hiring a security guard. The motel owners' counsel "argued to the jury (perhaps with the wisdom of hindsight) that [*Wassell's*] 'tragic mistake' was failing to flee when the man entered the bathroom." n131

A jury found the motel owners negligent, but also found that *Wassell* was negligent and that her negligence "had been 97% to blame for the attack." n132 On the basis of this allocation of fault, the jury awarded *Wassell* \$ 25,000 in damages. *Wassell* asked for judgment notwithstanding the verdict, based in part on her argument that she could not be held negligent as a matter of law. n133

Judge Posner, writing for the Seventh Circuit, affirmed the jury's verdict. Applying a risk-utility standard, the court compared the "respective costs to the plaintiff and to the defendant of avoiding the injury." n134 Under this standard, the court disregarded negligence claims for which there were no monetary costs in the record (like the claim for phones in the room), and compared the \$ 20,000-per-year cost of hiring a security guard with "the monetary equivalent of greater vigilance on the part of [*Wassell*] that would have averted the attack." n135 The court suggested that the jury verdict seemed to fail this risk-utility standard. n136 But as jury determinations of breach are reviewed only for abuse of discretion, the court chose not to reverse or modify the jury's apportionment.

The court's risk-utility calculus highlights three factors that are common to such analyses. First, risk-utility calculations do not account for citizen entitlements. n137 In *Wassell*, for example, women's obligation to take precautions against rape is bounded only by considerations of efficiency. If it is less costly for women to stay inside at night than for hotels, [*1436] employers, and stores to take precautions for women's safety, the risk-utility test requires women to stay indoors, not for third parties to take precautions.

Second, a risk-utility standard poses difficult valuation questions - what is the cost of citizen precautions? The *Wassell* analysis appears to have mistakenly evaluated the cost of victim precautions rather than citizen precautions. The court seems to have compared the hotel's aggregate costs of hiring a night security guard (\$ 20,000 per year), with

the disaggregated cost of greater vigilance by Wassell, an individual rape victim. n138 However, Wassell did not know in advance that she would be victimized while staying at the motel, nor did other guests know in advance that they would not be. As such, the appropriate cost of increased vigilance would be not only a cost of increased vigilance by Wassell, but by all potential victims at the motel over the course of the year. This problem is significant because examining costs to only the parties in the case greatly undervalues citizen costs from the outset. Had the court compared the \$ 20,000-per-year cost of a guard with this aggregate cost of citizen care, the price of the motel guard would have been more in the neighborhood of \$ 5 per room, per night - a significant cost, but still a seemingly different comparison.

Even when the problem is understood as a valuation of citizen precautions rather than victim precautions, the task of valuing those costs is just as difficult. Judge Posner aptly notes that "it cannot be assumed that the cost... was zero, or even that it was slight." n139 And yet, despite his vigilance in declaring that a cost exists, he suggests no method for valuing those costs. n140 Although there are costs in expecting women to assume that every knock on the door is a rapist lurking, these burdens are unvalued by the court, or at least not valued enough to upset a jury determination. Without an explicit price tag, non-monetary costs get lost in the shuffle.

Finally, as with other comparative fault questions, in the civil rape context courts lack any meaningful capacity for reviewing jury determinations. n141 Courts have few standards for evaluating whether a jury's assessment [*1437] of fault should be overturned, and are reluctant to overturn a jury verdict even when the available standards seem to be violated.

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

3. Actual Cause. - Actual cause determinations are often difficult because they are counter-factual, requiring courts and juries to imagine what would have happened had different actions been taken. But within this collective imagination of alternative scenarios, judges and juries are at times very willing to believe that systemic precautions would be ineffective in rape prevention and that individual action would achieve better results. In Wassell, for example, Judge Posner rejects the plaintiff's failure to warn argument based on his conclusion that "it is unlikely that a warning would have averted the attack." n142 But while he dismisses the idea that defendant's warning would have been effective, he is nevertheless willing to assume that the victim could have avoided the rape by "schooling herself to greater vigilance." n143 If the victim's decision to keep the door closed would have prevented the rape (an uncertain proposition given that a prior rape at the motel occurred after a hotel guest failed to answer the door and the rapist simply kicked the door open), a meaningful warning about specific dangers in the neighborhood could have provided the best influence over the plaintiff's level of care - action based on specific information rather than generalized fear. Even if the warning would not have changed plaintiff's decision to open the door, a meaningful warning could have averted the attack in another way: It could have encouraged Wassell to find a safer place to stay - a very real fear of the motel's. n144

The Cook case also illustrates the potential for juries to overestimate the usefulness of individual victim actions. In Cook, a Minnesota court stated that a rape victim might be contributorily negligent for drinking [*1438] alcohol with a passenger who raped her on a crowded bus. n145 The evidence in Cook indicated that a bus driver stopped to let a boisterous and visibly intoxicated passenger get more alcohol, which in turn created a loud environment of general drinking and intimidation. In that context, the victim's willingness to drink alcohol is of questionable import. n146 At times, courts and juries may overestimate the usefulness of individual rape victim precautions and underestimate other factors, including shared vigilance and structural crime-prevention measures. n147

C. Roots of Rape Victim No-Duty Rules

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

Perhaps the broadest articulation of a no-duty concept is found in Utah Supreme Court Justice Stewart's powerful dissent in the recent case *Field v. Boyer Co.* n148 In *Field*, a store employee was sexually assaulted on her way to the shopping mall's employee parking lot. The store owner and the mall moved to include the fault of the attacker in the jury's apportionment of fault. Although the court did not permit comparison in this case because the unknown attacker was not a party to the case, it did hold that the state's comparative fault statute permitted comparisons of intentional and

negligent fault, leaving open the possibility that a rapist's intentional fault and a rape victim's negligent fault could be compared in other cases where the attacker was a known party. In his objection to this troubling possibility, Justice Stewart boldly stated that "the law does not impose on a victim a duty to avoid a criminal act by another." n149 The principle behind this strong language suggests that Justice Stewart might preclude all rape victim comparative fault defenses - with respect to both [*1439] rapists and third parties. n150 However, since his opinion was primarily concerned with comparisons of rapist and rape victim fault, the applicable scope of Justice Stewart's proposition to the third-party context is unclear.

Still other cases support at least a limited rape victim no-duty rule in the context of third-party liability. In *Metropolitan Atlanta Rapid Transit Authority v. Allen* (MARTA), for example, a woman was raped while retrieving her automobile from a transit authority parking lot in a dark area where a burned-out floodlight had not been replaced. n151 In its defense, the defendant transit authority argued that plaintiff "was well aware of the danger in being out alone in the City of Atlanta at night and yet voluntarily chose to undertake those risks." n152 Based on this defense, the defendant disputed the adequacy of the lower court's instructions on issues of comparative negligence and assumption of risk. Although the appellate court noted that comparative negligence instructions had been provided to the jury, it then used strong language suggesting that submission of the third-party defendant's comparative fault defense was not required. n153 "We presume," the court wrote, "that MARTA does not take the position that anyone who uses its rail system at night is presumptively lacking in care for his or her safety." n154 Although the court's presumption recognized that such a defense would be problematic, it failed to articulate why the rape victim's decision to take public transportation alone at night (a possibly risky activity) could not constitute fault, or to clarify whether that was its holding as a matter of law. n155 Other courts have evinced similar [*1440] unease with plaintiff fault defenses in third-party cases, but have not identified a way for judges to address them. n156

The most thoughtful work on no-duty rules to date comes not from courts and case law, but instead from the new Restatement of Apportionment. The Restatement explicitly recognizes courts' power to develop no-duty rules for "plaintiffs injured by intentional tortfeasors." n157 Those rules would apply in third-party actions as well as actions against intentional tortfeasors. Moreover, the rules would allow courts to define entitlements more broadly in the case of an intentional tortfeasor defendant. n158 The rationale for these rules is explicitly based on giving an entitlement to individuals facing the risk of intentional torts. n159

Yet while the Restatement establishes the no-duty concept, and articulates some of the principles that warrant such entitlements, it does not attempt to delineate the appropriate scope of no-duty rules, declaring those questions "beyond the scope" of the Restatement. n160

D. A Summary

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

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

III. Inadequacy of Courts' Current Approaches

Courts and commentators have long recognized that it is "contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm." n161 However, the policy rationales for this intentional-tort exception have been multiple and loosely defined. n162 Because third parties originally had little or no obligation to take reasonable care to protect against rape or other intentional torts, the

intentional tort exception was consistent with both rapists' moral culpability and plaintiffs' entitlement to proceed on the assumption that others would not intentionally harm them. n163

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

Without considering, or perhaps even noticing, the divergent result of these rationales, courts have generally relied on an exclusive defendant-culpability approach. Little thought appears to have been given to the citizen entitlements left behind. n164 However, recognizing both defendant-culpability and citizen-entitlement rationales is crucial to defining the scope of rape victim comparative fault defenses.

Although defendant-culpability and plaintiff-entitlement approaches can be employed as mutually exclusive alternatives, as they were originally in the Restatement draft, n165 the two concepts are not necessarily in opposition. It is possible to acknowledge both that a victim has a legal interest [*1442] in not shaping her conduct around the risk of violent crime (through citizen no-duty rules), and that rapist and other intentional tortfeasor misconduct is more culpable than third parties' negligent misconduct (a defendant-culpability-based conception). Before outlining a few approaches that recognize both of these interests, this Part explores some of the problems inherent in the current paradigms.

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

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

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

A. Victim Freedom

"In civilized society men must be able to assume that others will do them no intended injury - that others will commit no intended aggressions upon them." n166 What is at stake in rape victim comparative negligence doctrines is precisely this assumption - that women citizens have a legal entitlement to act on a day-to-day basis on the premise that others will not intentionally rape them. n167 Under the current baseline, the law denies women this entitlement. This denial is particularly troubling to victim freedom because of its excessive scope, its potential to erode norms of individual liberty, and its impact on the design of broader institutional protections.

1. Scope of Citizens' Obligations. - Courts often justify a baseline that requires precautions against rape on a notion of perceived symmetry. That is, if third parties have a duty to take reasonable precautions to prevent rape, citizens should too. But the perceived symmetry under the current law is illusory. Third-party duties are limited in ways that

citizen obligations are not. In addition, the notion that third-party and citizen obligations should be the same ignores critical differences between citizens and third parties and the risks posed by their behavior.

In terms of scope, third-party duties are circumscribed with respect to who owes a duty and when a duty is owed. Courts restrict third-party duties through no-duty rules, narrow conceptions of foreseeability, and additional limits based on public policy. n168 Courts that adopt these restrictions often emphasize that such limits are necessary to prevent the creation of a general duty requiring third parties to take reasonable care to protect others from crime. n169

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

For example, a third party is on notice, through the doctrine of "special relationships," that it has a duty of care with respect to a certain limited number of individuals. However, even where a woman may benefit from a special relationship with a third party, she would have no reason to know of her own obligation without knowing when a third party has breached its obligation of reasonable care to her - for example, when a [*1444] door labeled self-locking isn't, n170 or a chain lock is installed backwards. n171 Therefore, a woman who wants to meet legal expectations of reasonable care must always take precautions against rape, depriving her of the ability to assume that others are taking reasonable care. n172

Similarly, judicial unwillingness to recognize citizen no-duty issues means that rape is always considered foreseeable to women, even though courts restrict foreseeability to third parties more narrowly. In third-party actions, some courts have disavowed broad analyses of the foreseeability of crime, finding foreseeability only where the third party has concrete knowledge of specific prior crimes or unsafe conditions. In premises-liability cases, for example, it has been said that "'crime may be visited upon virtually anyone at any time or place,' but criminal conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost anywhere, especially in a large city." n173 Instead, "most courts have looked to narrow geographic areas in analyzing the foreseeability of criminal conduct." n174 Even then, some courts have held that prior crimes in the area must have been directly reported to the landowner or widely publicized. n175 A few courts have taken even narrower views. n176

To say that some courts still take narrow views of foreseeability is not to suggest that they should do so. A narrow view of third-party foreseeability [*1445] has been soundly criticized as overly restrictive. n177 Still, to the extent that courts do elect this type of narrow foreseeability standard in the third-party liability context, one might expect courts to pay equal attention to the victim's right not to have to protect herself constantly from criminal acts. Yet courts expect women to foresee the possibility of rape regardless of whether they are in unfamiliar areas, are unaware of prior crimes in the vicinity, or could not have obtained actual data about the relative safety of various areas or locations. Courts expect women to act on the assumption that rape is foreseeable at any time and in any place, and give juries complete latitude to entertain that expectation. And because courts don't recognize the duty question in the context of citizens' obligations, those obligations are not limited by the kinds of explicit public policy factors that courts use to constrain third-party liability. Since courts do not currently recognize that citizens may at times have no duty, a citizen's obligation to take reasonable care to protect herself from being raped is generally in force. The reasonable woman must take constant precautions or risk being found to have failed to protect herself adequately.

In so broadly defining women's obligations to protect themselves against rape, courts overlook women's strong interest in not taking constant precautions against rape. Conditioning women's recoveries, or part of those recoveries, on their willingness to live in a world of fear and precaution creates real harms because the precautions required are themselves costly, all-encompassing, or based on misguided assumptions about risks. Persistent thoughts about protection itself imposes a toll on women, hindering their ability to experience the world and to participate in society. n178 Requiring constant vigilance and precaution as a precondition to recovery is particularly ironic, because the very thing required ex ante by the current legal rule - "lack of trust" - is often described as one of the main harms of rape. n179 The precautions themselves can chill individual liberties that are important facets of citizenship and autonomy. A citizen's interest in not having to take constant precautions against crime is not so weak that it is easily trumped by risk of conduct that may never happen, or may happen despite restriction. n180 For example, even with [*1446] the extensive precautions that women already take against rape, "three out of four American women will be victims of violent crimes sometime during their life." n181

The liberty interest in not being required to take precautions against crime is particularly strong in the context of rape, where citizen restrictions are either theoretically limitless or unrealistic. For example, if women are required to take precautions against acquaintance rape, not just stranger rape, every aspect of a woman's life could be constrained. n182 According to U.S. Department of Justice statistics, the largest percentage of rapes - thirty-five percent - occur at or in the victim's own home. n183 If a reasonable woman knows that she is more likely to be raped in her home than anywhere else, what is her legal obligation? If a reasonable woman knows that she is more likely to be raped by a male friend or acquaintance than by a stranger, then what? Does the victim's duty require her to look at every man as a potential rapist? To avoid all unsupervised contact with men? To avoid all men? n184

The more one considers how, when, and where rape tends to occur, the more problematic comparative fault defenses become. If the law took a realistic view of rape without recognizing a no-duty rule, women might be expected to forgo any number of activities. n185 Alternatively, if the law does not take acquaintance rape into account, and views rapists only as strangers hiding in bushes and sneaking in back windows, the law instead requires citizens to shape their conduct around overestimated risks rather than accurate ones.

A broad duty is problematic not only because of women's strong interest in not taking precautions, but also because the duty would often require reasonable care in times of duress, when rational action is least [*1447] likely. And what would constitute rational action is subject to dispute. n186 In addition, many rape victims are children. n187 Requiring these victims to take reasonable care for their own safety - even the limited care expected from a child of the same age and abilities - may be not only unrealistic, but ultimately contrary to individuals' long-term safety interests. n188

The broad scope of citizens' obligations under the current law is also worrisome in light of considerations that make the risks taken by citizens less objectionable than the risks taken by third parties. One difference is that third-party actions threaten physical harm to others, while citizens' actions pose risks of physical harm to self. That risks are to self rather than others makes those risks less culpable. n189 Thus while it is possible to say that citizens' exercise of liberties without regard to the possibility that they may be raped is "wrong" or "irresponsible" because it subjects them to risks of harm from others, it is wrong in a rather limited sense. Even when accountability is recognized as the explicit goal of tort law, it is possible to make a convincing case that some plaintiff negligence should not diminish the defendant's duty under a comparative fault system. n190

Another reason to expect citizen obligations to be narrower than third-party duties is that third-party duties are often placed on enterprises rather than on individuals. Indeed, even in the third-party context, some courts have been reluctant to impose liability when the defendants are not enterprises. n191 That the obligation is imposed on an enterprise is [*1448] relevant for several reasons. First, enterprise practices that create unreasonable risks often expose many people to those risks over substantial time periods, making harm to someone more foreseeable. n192 Second, enterprises do not have citizenship rights to lose. This is not to say that at times third-party precautions may not adversely impact nonparties' liberties. n193 Still, requiring due care when due care means an enterprise must install safe lighting or emergency telephones is less problematic than requiring due care when due care means that an individual cannot ride the subway at night, or open the door when someone knocks, or go for a drink with an acquaintance - activities that have a stronger association with citizenship. Finally, enterprises often receive monetary profits for their services. At times, courts have been more willing to impose obligations on for-profit enterprises, n194 whether because of earlier ideas about consideration, n195 or because of more recent concepts of loss spreading. n196

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

2. Trading Liberties for Security. - Under the current baseline, if citizens do not want to diminish others' duty of care, they must curtail their own liberties, potentially in myriad ways. The availability of broad victim comparative fault defenses gives citizens a choice - "voluntarily" surrender liberties or reduce third parties' legal responsibility to provide reasonable care. n197 Either way citizens lose - liberty or security. Even in [*1449] cases that do not pose the choice between liberty and security in such stark, all-or-nothing terms, the same issues are present in questions of degree.

In other contexts, courts have refused to condition plaintiffs' tort law recovery on their willingness to sacrifice otherwise applicable entitlements. For example, in *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway*, the Supreme Court refused to condition the plaintiff's recovery on his willingness to take reasonable care to protect his property against negligent harm. n198 Similarly, in *Marshall v. Ranne*, a plaintiff was permitted to recover for injuries

inflicted by his neighbor's vicious hog even though he could have taken steps to minimize the risk of injury to himself. n199 The rationale underlying these cases is that plaintiffs are not legally required to trade entitlements for tort law protection. n200

Even when self-harm is nearly certain to follow from plaintiffs' conduct - not merely a slight risk as in the rape cases - a few courts have still taken the view that citizens should not be forced to trade entitlements in order to obtain tort law protection. For example, in some jurisdictions persons who refuse blood transfusions for religious reasons may be able to recover from private parties the full costs of harm suffered although that harm resulted in part from their own refusal to seek treatment. n201 And even when the entitlements are small or nonexistent, and the gravity of the risk significant, some courts refuse to reduce citizens' tort law recoveries based on their failure to take precautions. For example, many states still do not allow failure to wear a seatbelt to be considered comparative fault even though persons injured in accidents without seatbelts suffer more damage than accident victims who were wearing seatbelts. n202 As such, drivers are neither required to take reasonable precautions for their own safety nor required to sacrifice compensation if they do not.

[*1450] Courts' refusal to condition citizens' tort recoveries on their abandonment of certain freedoms rests on a concept of entitlement. "Victim freedom is predicated on the belief that, within certain domains, persons may do what they wish with their persons and their property. That freedom includes the freedom not to take precautions for the protection of themselves and their property, even when doing so will prevent an accident at the lowest possible cost." n203 One commentator has effectively argued that victim freedom better affords both protection and freedom. n204 "If we conceive of our claims to freedom and security as dependent upon the balance of costs and benefits, we may erode our liberties in a thousand small steps." n205

It may seem rather perverse to argue that victims should have the freedom to put themselves into situations in which they face an unreasonable risk of rape. Who wants that right? Certainly women are likely to be more interested than any other group in preventing themselves from being raped and in restricting their own liberties if and when such an approach seems effective. However, abandonment of citizens' duty would allow women to balance for themselves the advantages and disadvantages of liberty restrictions - whether, for example, the benefits of working at night, or any other potentially risky activity, outweigh the risks of that activity. n206 Preserving women's right to make those decisions would promote women's interest in autonomy.

There is no reason to think women will give too little weight to the risk of being raped or that juries are better able to make decisions about the costs and benefits of activities forgone as a result of fear. A review of the case law shows that the reverse is true. Even courts that recognize the theoretical costs of citizen precautions are unable to estimate and factor these costs into their decisions in any concrete way. n207 An actual accounting is difficult, in part because of the intangible nature of citizens' interest, and in part because of tort law's focus on the cost of precautions to an individual victim rather than the aggregate cost to citizens.

In addition, the ad hoc nature of the jury process makes consistent valuation of women's liberties even less likely. Although some juries may value women's liberties and the costs to women of restricting those liberties, many will not. n208 With the current baseline, whether citizens' freedoms are valued is subject to the ad hoc whims of a jury. It is this type of concern for the difficulty of valuing important but intangible freedoms that has persuaded courts in other contexts to value freedoms as a matter of law - for example, by limiting civil liability where that liability might chill First Amendment rights. n209 As in the First Amendment context, allowing juries in civil rape cases to decide questions of intangible value is particularly problematic because it can chill individual liberties that are important facets of citizenship, moral autonomy, and equality. Even worse, in the context of comparative fault, unlike in the First Amendment context, courts have no systematic means to review jury determinations. n210

A person's right to proceed in the world without fear of violence is as important as her right to proceed over her specific property. The surrender of that intangible yet valuable right should not be required as a condition of full recovery. n211

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

The precautions required of a potential rape victim are extensive. As the law stands, a third party's duty of care fully extends only to a reasonable woman inside her house alone; in any other circumstances, a citizen's right to full care from others is unclear. Perhaps the clearest example of this phenomenon arises within the context of homosexual rape in prison, a context deeply connected with subordination by gender. n212

[*1452] In one such case, *McGill v. Duckworth*, n213 the Seventh Circuit determined that, as a matter of law, a prisoner in protective custody had assumed the risk of rape when he chose to leave his prison cell during the one hour of the day that he was entitled to do so in order to take a shower. The prisoner, McGill, had been placed in protective custody in part because of his slight build and rumors of homosexual overtones to his crime. After another prisoner made sexually suggestive comments to McGill, McGill nevertheless left his cell to take a shower. While in the shower, he was raped by three prisoners brandishing crudely fashioned knives. The officer who was in charge of "monitoring the shower area to protect the inmates from each other" had "left his post without authorization." n214

Despite a jury verdict for the prisoner for \$ 10,000 on the basis of the prison administrators' negligence, n215 Judge Easterbrook, writing for a divided panel of the Seventh Circuit, reversed the judgment. Although Indiana law requires prison officials and guards to take "reasonable precautions to preserve an inmate's health and safety," n216 Easterbrook held that McGill was not entitled to those precautions because he had not taken reasonable care for his own safety. This conclusion was based on the defendants' argument that "McGill assumed the risk [of being raped] by leaving his cell and proceeding into the showers when he knew that [the other prisoner] and pals were on his heels." n217 Judge Easterbrook explained his conclusion in typical defendant-culpability-based terms. According to Easterbrook,

if this were a suit against [the rapists], McGill's failure to return to his cell or alert the guards would be no defense. No one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood. Rape is an intentional tort, and defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts. So, too, these defenses often fall away when the defendant acts recklessly or wantonly. But McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety. n218

[*1453]

Under the majority's reasoning, had McGill exercised such care, he "could have stayed in his cell or arranged for individual shower and recreation periods - and as we have emphasized, he could have alerted the guards he passed on the way [that another prisoner had made a sexually suggestive comment]." n219 Thus under the majority approach, the third parties had a duty to take reasonable care for McGill's safety only so long as McGill stayed inside his locked private cell twenty-four hours a day or acted on the assumption that the guard assigned to the showers had abandoned his post. Once the plaintiff exercised the limited freedom he was permitted, or assumed that the prison was taking reasonable care for his safety, his right to defendants' care was lost as a matter of law.

The expansive conception of victim fault in McGill and other comparative fault cases is used to achieve an effect similar to recent comparisons of fault between rapists and third parties - to diminish if not eliminate third-party liability. n220 As Judge Cudahy aptly noted in his vigorous dissent in McGill, to conclude that prisoners voluntarily assume the risk of rape by venturing out into a dangerous prison environment "is virtually to exculpate prison authorities in advance for any responsibility to provide protection against homosexual rape." n221 Noting the potential breadth of this defense, Judge Cudahy cautioned, "I don't know what this approach to risk assumption in rape cases holds in store for multitudes of females innocently walking the streets or taking the sun on the beach." n222

Comparative fault defenses force courts to consider whether the defendant's duty is designed to protect the plaintiff's freedoms. n223 One might say that the purpose of imposing a duty on third parties is to protect women against rape, not to protect women's freedoms. But protection of women without protection of entitlements will provide little if any protection. In many cases, the plaintiff's allegedly negligent conduct gives rise to the very reason for the third party's duty. For example, in the MARTA case, n224 the rationale for imposing the legal duty to maintain adequate lighting is the use of public transportation at night. To allow MARTA to assert that the plaintiff was contributorily negligent for using public transportation at night would negate the very purpose of its duty. Similarly, in Wassell, the very reason that a duty to warn would be imposed (if the jury felt that such a duty should be imposed in the first place) is to [*1454] help the plaintiff make informed decisions about matters such as the propriety of opening her

motel room door at night. To allow the defendant to reduce its obligation to give accurate safety information by pointing to a decision the plaintiff made in the absence of such information defeats the purpose of imposing the duty. Even where the plaintiff's supposed negligence is not the reason for the defendant's duty, it may be desirable to have institutions provide protection even to negligent plaintiffs. So, for example, a hotel's front desk should respond to emergency calls, regardless of whether the woman being raped had previously exercised a great amount of care for her safety or not. n225

The reasons for not reducing third-party liability through expansive notions of victim fault include many of the reasons for imposing liability on third parties in the first place. In terms of deterrence, a growing body of criminological research suggests that institutional design can actually deter crime. Situational crime prevention literature indicates that security precautions may be effective in deterring particular acts of crime, as well as in reducing the general level of crime. Even "with respect to crimes thought to be the province of 'hardened' offenders, evidence is now accumulating of successes achieved by situational prevention, including the virtual elimination of aircraft hijackings by baggage screening and substantial reductions in robbery achieved by target hardening measures in post offices, convenience stores, and banks." n226 For example, studies have found that the presence of two cashiers greatly reduced the incidence of convenience store robberies. In some cases, even simple measures such as increased exterior lighting have been effective in reducing crime and the fear of crime in particular areas. n227

A myriad of anecdotal evidence also suggests that third-party tort liability encourages enterprises to think more carefully about their security practices. n228 For example, a door-to-door vacuum cleaner sales company that insisted it could not institute background checks of its employees did so after it lost a case in which an employee with prior convictions raped customers. n229 Extra care appears to have positive results. An article written for a trade publication reported that Wal-Mart's implementation of inexpensive parking lot security measures, ranging from patrols to surveillance cameras, produced "outstanding" results in reducing the 80% of the crime that occurred in the parking lots or outside perimeters of its stores. n230

Holding third parties accountable for precautions is not only beneficial to victims; third-party choices affect many of the costs to others associated with crime. A shift to a twenty-four-hour-a-day workplace, for example, may benefit individual store owners. Yet for employees and customers, this change may generate increased costs in terms of crime - to employees who are forced to work and travel to jobs at night, and to customers who may be unaware of prior incidents of crime. n231 If companies benefit from nighttime business, it is reasonable that they bear some of the costs associated with those benefits. For example, if Exxon has a policy requiring its contractors to stay open twenty-four hours a day, n232 it should expect to provide reasonable security measures for the employees that work these round-the-clock hours.

In terms of compensation, there are real differences in parties' abilities to bear the costs of security. The people working in late-night, unsafe jobs are disproportionately likely to be young or poor. n233 As one court noted in response to a third party's claim that its employee had been contributorily negligent in his robbery because he worked at the store late at night, it is a reasonable inference that persons who work in unsafe, low-paying jobs at night are unlikely to have many other employment opportunities. n234 Thus, the reasons for creating third-party duties also provide an argument against not diluting them.

An expansive conception of victim fault not only diminishes plaintiff's right to third-party care, it accomplishes that diminution by imposing an extra harm - blaming the victim for the injury suffered. Judge Easterbrook's assertion in McGill, that "no one surrenders his or her entitlement to bodily security by leaving home at night or entering an unsavory neighborhood," is only half true under his own analysis. n235 Under the present baseline, as against a rapist, a citizen does not surrender her entitlement to bodily security by leaving home at night, but as against a third party, she most assuredly may do so.

Diminishing the defendant's duty through an over-broad conception of rape victim negligence is troubling because it erodes the moral foundation of judgments about fault. If most conduct can be "fault," then fault loses its authority to delineate socially undesirable conduct and its capacity to assist courts. An expansive view of assumption of risk has been criticized on the basis that it is not really about consent. n236 When an over-broad assumption of risk defense becomes an over-broad contribution fault defense, it may not be about fault either. n237

That third-party liability has been limited through victim blame is not a surprising result of allowing comparative fault doctrines in civil rape cases. Instead, it is a foreseeable outgrowth of judicial ambivalence to ward third-party liability, the lack of legal limits on the concept of fault in comparative fault defenses, and tendencies to blame rape victims for their own victimization.

B. Equality

In the context of rape, the current baseline of citizens' duty also harms equality. n238 Rape is a gendered crime. n239 Fear of rape is a distinctly female fear. n240 And the fact of rape is perceived in this culture as justifying special restrictions on women's conduct. n241 In light of these factors, a baseline that requires citizen conduct to be fashioned around risk of rape and fear of rape poses specific threats to equality. First, a duty of care based on rape harms equality because that duty requires women to cede a greater portion of their liberties than do men in order to [*1457] obtain third-party protection. Second, the focus on rape victim fault undermines equality norms and contributes to the revictimization of rape victims in the legal process. And third, a citizens' duty shifts to individual women the financial costs of rape.

1. Precautions Based on Gender. - A duty of care based on rape has a disparate impact on women. The duty requires women to take liberty-restricting precautions because of gender. The differential impact of rape on women is similar to the differential impact of other hate crimes and harassment. n242 A hate crime not only creates the ordinary harms to the community that result from crime, but also harms to equality. n243 The harm to equality stems from the fact that members of different groups face different threats of harm, and varying fear of harm. n244 With rape, the persons threatened and not threatened are divided into categories along gender lines. n245 As such, a duty to take precautions against rape harms equality by creating two communities - one that must restrict liberties by taking precautions (women), and one that need not restrict liberties by taking precautions (men). n246 Thus, using rape as a baseline for citizen's legal duties translates the social harm of rape against women, which itself harms equality, into legal rules that further disadvantage women because of those harms. n247 The baseline harms equality by diminishing the legal capacity of women to participate in society as autonomous equals. n248

Gender-based violence already impairs women's ability to participate in the economy. n249 A baseline fashioned around gendered violence may further harm women's ability to participate in the economy as full and equal citizens - not simply because working alone at night may be considered an unreasonable risk for a woman (which it might), but because the availability of such defenses could reduce employers' need to provide safe work environments for women. Rape victim comparative fault doctrines create the possibility that third parties could keep an environment safe enough for men but not for women (or at least safe enough that men perceive it as safe even if women do not). n250 If third parties are not required to provide a work environment safe enough for all workers, women will be foreclosed from a large number of jobs in the economy.

It is easy to imagine that gender equity concerns might fall away given a broader focus on duties to take precautions against all crime. While women are more likely than men to be victimized by rape, to experience fear of rape, and to restrict their liberties because of rape, one might imagine that men, who are the predominant victims of other types of crime such as murder, would be more likely to experience fear from the risk of those crimes and to restrict their liberties based on them. Whatever the rational basis for this argument, it is simply not borne out in contemporary understanding. Extensive violence against men is not socially understood to require greater restrictions on men's conduct than women's when the risks of these crimes, such as murder, are at issue. Despite the greater overall incidence of violent crime to males than to females, n251 women consistently restrict their behavior in more dramatic ways than do men, and are expected to do so - refusing to work at night, [*1459] or to leave their homes to go out alone. n252 In an attempt to avoid victimization, 41.5% of women in one study often "stayed inside," "avoided being on the streets," or "avoided going to certain parts of town." n253 "Those women with fewer financial, educational, and personal resources - the poor, the elderly, blacks and Hispanics, and the less educated - relied even more than the average woman on these especially restrictive tactics." n254 Although women are only two-thirds as likely as men to experience victimization, n255 only 10.5% of men in this study often employed similar isolationist strategies. n256 In terms of other precautionary tactics, over 70% of women often employed "street smarts" strategies, which include avoiding eye contact and certain forms of dress and watching people nearby, while only 29.4% of men often employed these sorts of tactics. n257 Thus, regardless of whether men's overall risk of victimization in a given situation is actually lower than women's (and statistics don't reflect that fact due to women's greater precautions), or whether men's risks of victimization are in fact higher (but are nevertheless regarded as normal, perhaps because male risks are often regarded as the norm), risks of harm to men concerning murder and robbery are not socially understood as a justification for increased restriction on males as opposed to females.

The perceived need for women to take increased precautions because of rape may therefore reflect not only the gendered nature of the crime of rape, but also the social construction of the meaning of violence against women - female fear and female restriction. Indeed, a paternalistic notion that women should be "protected" from rape by restrictions

placed on women's own liberties has significant historical antecedents. n258 Nineteenth-century legislation "protecting" women workers "prohibited the employment of women in certain industries and occupations or limited women to daytime work." n259 In the Victorian era, "representations of women as sexual victims" were used to justify "limits on women's independence and repression of their sexuality." n260 And in more recent times, [*1460] colleges imposed female-only curfews, supposedly to protect women students, under the doctrine of *in loco parentis*. n261

Men's vulnerability to other types of victimization has not carried the same historical or cultural meaning. Until juries believe that men should not be working at convenience stores late at night because men's particular vulnerability to murder makes the job suited only for women, men's increased vulnerability to other sorts of crimes, even if true, will not diminish the equality concerns raised by a citizens' duty. n262

Consistent with the historical and social belief that vulnerability to rape requires restrictions on women and not men, both judicial opinions and jury verdicts suggest that women must take greater precautions than do men. The case law takes a gendered view of what reasonable women should do (or, as is more typically the case, not do) out of concern for their own protection. n263 For example, although Morris "set the stage" for rape by drinking with older boys, n264 under the same state's law, a fifteen-year-old boy who drank eight beers with an older man was not contributorily negligent for his subsequent rape. n265 And while there was no suggestion that a straight white man was negligent for his rape because he was out alone in a nightclub parking lot, n266 a female rape victim's negligence was set at thirty percent of the total, and her damages reduced accordingly, since certain streets "were dangerous places for a young lady to be at 3:00 o'clock in the morning." n267 The gender-specific language in courts' own analyses leaves little doubt that the gendered nature of juries' conclusions is not only sanctioned, but shared by judges.

One of the problems with the current system in which juries evaluate the reasonableness of rape victims' conduct is that it invites the jury to violate principles of formal equality. n268 By evaluating the precautionary measures that a potential rape victim is legally required to take against what is, in practice if not in theory, a reasonable woman standard, and [*1461] relying on sexist notions that reasonable women restrict their conduct in ways that men do not, women are penalized for conduct for which men would not be. n269 Thus, while a court or legislature could not directly enact a law saying that men but not women may go outside at night, and an employer could not directly restrict women's but not men's night work opportunities, juries may impose with impunity differential restrictions on men's and women's night activities in the tort context on the basis of gender.

As in the context of criminal rape cases, victim comparative fault arguments also perpetuate traditional rape myths - for example, that a girl who drinks beer with a group of boys is "asking for it." n270 Juries may be similarly biased against women's sexual agency and display particularly punitive attitudes toward women who violate sex role norms. n271 Required citizen precautions are not only based on gender in the sense that women must take greater precautions than men, but they are also based on gender in the sense that estimates of victim fault are particularly great against those women who violate sex role norms. For example, a woman who was raped by a vacuum cleaner salesman in her home - a more traditionally feminine setting - was considered only ten percent at fault for her rape, while a woman raped by a man that she had recently met and gone to bars with was considered fifty-one percent at fault - a determination that ultimately barred her recovery altogether. n272 When helping victims, [*1462] courts discuss the need to protect vulnerable women with children or older women at home alone. n273 However, the idea that a grandmother needs third-party protection from rape when in a hotel on business n274 gets less serious consideration. And the idea that the young woman at home alone with kids may also need protection when staying in a hotel with a friend for the weekend never gains serious currency. n275 Third-party duties are seen as protecting vulnerable, frightened, passive women, not women who are agents as well as victims.

The current case law also expects women to rely on sexist and racist stereotypes about danger, including stereotypes that all unknown males are aggressive - or, at least, that all men of color are. n276 Civil rape cases are replete with racial coding concerning perpetrators. n277 They are also replete with other kinds of coding about the men who women should expect not to be rapists. n278 These assumptions about rape are not only unsupported, but also impose harms of their own. n279

The concern that juries violate principles of formal equality and decide cases based on rape myths and racial sex-role stereotypes is particularly salient in this context, where appellate courts often exercise little if any oversight of comparative fault determinations. Indeed, appellate review is nearly impossible given the lack of standards for deciding comparative fault questions and the fact that juries need not give reasons for their verdicts. n280

[*1463]

2. Equality Norms Inside and Outside the Courtroom. - A citizens' duty in the context of rape also creates significant process-related harms. Rape victim comparative negligence defenses tell women, both collectively and individually, that they are at fault for rape.

Law has an expressive function. n281 It not only reflects, but also shapes social norms. n282 Current rape victim fault defenses tell women, individually and as a group, that they are at fault for rape when they choose to enter situations in which they risk being victimized by rape. According to the current law, women should restrict their liberties as a result of crime against them - after all, reasonable women do.

The message undermines norms of equality and women's entitlement not to be raped. When laws directly require women to restrict their conduct in ways that men do not, or to conform to traditional sex-role stereotypes, courts frequently conclude that such restrictions constitute gender discrimination. n283 Legal rules that require women to accept these same gendered restrictions in order to obtain full tort law protection undermine antidiscrimination norms.

Moreover, the tort law notion of rape victim fault undermines efforts to disband the popular belief that women are at fault for violent crimes committed against them such as rape. As one witness testified before Congress prior to enactment of the Violence Against Women Act, there persists "the widespread belief that people who are raped precipitate [it] in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date." n284 And yet the doctrine of rape victim comparative fault allows courts to reinforce this notion of victim precipitation on a regular basis.

To say that rape victim comparative fault defenses undermine equality is not necessarily to say that the Constitution or Title VII forbids this application of the tort law, though such an argument is possible. n285 [*1464] Rather, it is to say that tort law operates in the shadow of constitutional principles of equality, n286 and as such, violations of principles of formal equality are troubling in this context as well as others. n287

Ultimately, the message courts express about women and rape depends on the norms that we want as a society. Whether society considers rape victims' conduct faulty, or, conversely, whether we give victims an entitlement not to shape their conduct around rape, depends on whether "we want to get accustomed, whether we wish to become callous, or whether, instead, we think that as a society we would be better off if we continued to view some things as shocking, offensive, and even abominable." n288 The current rights norms in rape victim comparative fault doctrines suggest that we want a woman to expect that every time she hears a knock on her door at night, it is a rapist, and we want a thirteen-year-old girl to expect to be gang raped if she drinks with older boys. But while rape is prevalent, there is a harm in requiring women to view rape as a normal part of their environment. n289 To encourage women's full participation in society, the law should instead allow women to "take back the night" - by commending their exercise of freedoms, even when they are exercised in the face of constant risks of rape.

Not only do rape victim fault defenses cause collective harms to women, they also contribute to process-related harms. Holding that a victim has contributed to the causation of her own rape is necessarily victim-blaming. In the context of comparative fault, the duty of reasonable care [*1465] is breached by "conduct of the plaintiff which is improper because of its tendency to subject [her] to a risk of harm." n290 Comparative negligence doctrines evaluate whether the plaintiff's conduct "falls below the standard to which [she] is required to conform for [her] own protection" such that it contributes "as a legal cause to the harm [she] has suffered." n291 The contributorily negligent plaintiff is denied all or part of her recovery because her conduct has been adjudged to be a legal cause of her harm. n292 A jury determination that a plaintiff has been contributorily negligent declares the victim's conduct blameworthy. As in criminal rape cases, civil contributory fault defenses place "the victim as much on trial as the defendant." n293

This victim-blaming imposes harm on individual plaintiffs. n294 Comparative fault defenses focus attention on a rape victim's conduct in a way that is likely to revictimize her in the courtroom. Rape victims already experience significant shame and stigma. n295 Many victims pursue tort claims in order to obtain a sense of vindication. n296 Defenses that blame the victim diminish opportunities for vindication. n297 Among other things, victim-blaming defenses reinforce the use of "language as a form of domination in rape trials." n298 Such domination is often accomplished by defense attorneys' "reproduc[ion of] rape by assembling the facts to construct the victim's moral character in a way that holds her responsible for the incident." n299 Contribution to the rape defenses legally sanction such domination in the courtroom by providing a "legitimate" defense to which such victim-blaming arguments are relevant. In fact, the potential for damage reduction through contribution to the rape defenses is likely to encourage defendants to raise victim-blaming legal arguments, n300 and [*1466] may make victims less likely to pursue civil remedies. n301 Moreover, victim-blaming defenses are likely to expand the scope of invasive victim questioning considered "relevant" to the proceedings at other stages of litigation. n302 Although it may be therapeutic for rape

victims to see ways to avoid situations in which victimization is more likely, n303 it is improbable that ex post fault attribution in an adversarial courtroom process would have a therapeutic effect.

It has been argued that allocating a duty to potential victims to take reasonable measures to avoid rape can be "empowering" to women. In stead of treating women as victims, the argument goes, this allocation of rights treats women as powerful actors who control their own decisions. According to such logic, the potential rape victim who knew or should have known that she could be raped - if she went outside at night, if she had a drink with a stranger, if she opened her hotel room door, etc. - must accept the consequences of her own actions.

The key problem with this argument is its concession to the overall conditions of violence and victimization within which women are denied power. n304 Under this theory, potential victims are legally responsible for their actions, but third parties are not responsible, or are less responsible, for making the broader world into which women venture safe for them. n305 Under such an "empowerment" theory, many oppressive circumstances for women could be justified. For example, sexual harassment defendants could argue that female employees assume the risk of [*1467] hostility by choosing to work in male-dominated environments, or simply by choosing to work. n306

Establishing that women do not have to take reasonable precautions to protect themselves from rape does not deny women's agency. Rather, it recognizes the broader social constraints within which that agency is exercised. n307 A woman may have a choice between opening a door at night when someone knocks and being raped, or keeping the door closed. But without the choice of opening the door at night and not being raped, her consent is limited. n308

3. Shifting Costs to Individual Women. - A victim-based duty not only blames women, but does so in order to shift the costs of rape, in whole or in part, to individual women. Although courts are often reluctant to require third parties to absorb the costs of rape, they have not addressed why it is more fair for women in general, and individual rape victims in particular, who already bear the primary physical and emotional costs of rape, to bear these costs.

The United States Department of Justice estimates that the "aggregate out-of-pocket costs of rape are about \$ 7.5 billion" - primarily for medical and mental health care costs. n309 "When pain, suffering, and lost quality of life are quantified, the cost of rape" reaches \$ 127 billion. n310

Despite the magnitude of these losses, rape victims - like victims of many, but not all intentional torts - are largely excluded from traditional compensation systems such as insurance. n311 Insurance policies covering perpetrators often have provisions excluding coverage for intentional torts. n312 In some cases, the intentional tort exclusions are getting [*1468] broader. n313 And while many states mandate insurance coverage in some negligence contexts, like auto insurance, in the context of intentional torts, states may prohibit insurance coverage. n314 Even rape victims who have medical insurance may find that basic services such as mental health care are excluded or limited. Although there are some compensation programs specifically tailored to victims of violence, n315 these compensation systems are extremely modest.

The massive individualized losses suffered by rape victims raise broad questions about the need for adequate compensation systems for victims of intentional torts. n316 Although a full discussion of that important and underdeveloped topic is beyond the scope of this Article, the third-party liability system is one of the few existing mechanisms for spreading rape-related losses. A third-party liability system allows the costs of rape to be borne by a larger group of men and women - for example, a business's customers - through self-insurance or commercial insurance. n317

Requiring individuals to bear the full harms of injury can be disabling. n318 The harms attendant to uncompensated injuries from violence are particularly acute because they often fall on individuals with the least ability to cope with those losses. "Low-income women are more likely to experience violent victimizations" n319 and are the most susceptible to repeat victimization. n320 Rape victims' ability to cope with losses may be particularly strained in light of estimates that many rape victims lose their jobs after being raped. n321

[*1469] Allowing negligent third parties to reduce their liability because of women's conduct shifts more costs of rape back to women - the group disproportionately harmed by rape. Refusing to allow third parties to shift losses to rape victims is not simply a question of requiring enterprises to spread consumer losses (although a compelling case for enterprise liability could be made in this context). Third parties would only be prevented from shifting back losses associated with their own negligence.

C. Deterrence

Reduction of women's freedom and equality are in themselves harms sufficient to disavow a victim-based duty. However, deterrence is also a consideration, not only because it promotes efficiency, but also because it is "a generous, warm-hearted, compassionate, and humane goal." n322 But even within a discourse that accepts some "tradeoff between justice and efficiency," n323 recognition of a victim-based duty is still unwarranted.

It can be argued that elimination of comparative fault defenses in civil rape cases could lead to suboptimal safety precautions by women and thereby increase the overall number of rapes. At times, including groups of people in activities which are central to citizenship may well have "a price in lives and accidents." n324 According women equal freedoms could come at the cost of increased numbers of rapes. However, there are several reasons to doubt that eliminating comparative fault defenses in civil rape cases will increase that number to any substantial degree.

In theory, rape victim comparative fault defenses could induce optimal safety precautions in the same way other comparative fault rules are thought to induce optimal bilateral incentives. Certainly, in some circumstances women have superior safety information or control over safety precautions and consequently might be in the best position to reduce the risk of rape. The possibility of liability for both defendants and plaintiffs may induce "rational parties to take all cost-justified care - i.e., to purchase precaution up to the point at which the marginal benefit of that precaution (in terms of the reduced probability and severity of an accident) equals the marginal cost." n325 Absent a comparative negligence rule, women might be expected to take suboptimal safety precautions with respect to third parties, while third parties may end up taking excessive safety precautions. n326 A suboptimal level of citizen precautions [*1470] could, in an imperfect market, yield an increase in the number of rapes and result in overinsurance. n327

There is no way to determine the actual optimal level of citizen care, or to determine whether a comparative fault rule creates optimal citizen precautions. Still, there are reasons to suspect that imposing legal incentives on potential victims to protect themselves from rape, as the current baseline does, is unlikely to reduce the number of rapes to any substantial degree.

To reduce the number of rapes, a comparative fault rule would need to have three effects. First, the rule must increase women's level of care. Second, the increase in women's level of care must reduce the overall number of rapes. And third, the decrease in rapes resulting from women's increased care must not be offset by an increased number of rapes resulting from a decrease in third parties' level of care. At each of these three junctures, particularly the last, there are reasons to doubt that comparative fault defenses in civil law rape cases will reduce the aggregate number of rapes. In particular, victims have significant nonlegal incentives to take reasonable precautions to avoid rape, women's increased restrictions may increase rather than decrease the incidence of rape, and any marginal deterrence gained through victim fault defenses may be more than offset by the deterrence lost from third-party enterprises. In addition, any potential inefficiency from excessive third-party precautions is likely to be offset by other social gains.

1. Effect on Citizen Care. - Women take a wide variety of precautions in an attempt to avoid victimization. Fear of rape "is central to the day-to-day concerns of about a third of women" and alters women's conduct in myriad ways. n328 Almost fifty percent of women do not use public transportation alone at night because of their fear of rape. n329 Fifty-two per cent never walk by parks or empty lots alone after dark. n330 But while women take abundant precautions, it is unclear what portion of that care, if any, is due to a civil comparative fault rule.

Comparative fault rules are unlikely to have a direct effect on citizens' level of care. The actors to be influenced - citizens - are generally unsophisticated parties who are not repeat players in the tort law system. n331 Moreover, those actors have substantial nonlegal incentives to avoid the risks of rape where feasible. n332 Aversion to the devastating harms of rape, which include pain, physical and emotional suffering, and the risk of death, changes women's behavior. n333 If ever nonlegal incentives could provide adequate plaintiff caution, it is difficult to imagine why this would not be that context. n334 As such, persistent doubts about whether comparative fault rules deter plaintiff negligence in any context n335 are likely to be particularly acute in civil rape cases.

However, comparative fault rules may indirectly affect women's conduct. Such rules may reinforce existing (equality-subverting) norms that crimes against women should result in limitations on women's activities. In addition, the rule's result - limiting third-party care - could create less safe environments, which could in turn encourage women to further restrict their own activities, like going out at night. n336 Still, the many cultural sources of gender-restrictive norms, and the many direct legal limitations on private and public obligations to provide crime-safe environments make the indirect effects of a rape victim comparative fault rule difficult to isolate.

2. Effect of Victim Care. - It is unclear whether situational crime prevention measures, by third parties or victims, will actually deter crime, or whether they will merely displace it. To the extent that third-party situational prevention techniques are believed to reduce crime, there is no reason that citizen precautions could not reduce the number of rapes in [*1472] like fashion. Still, there are reasons to believe that third-party precautions are likely to be more effective than citizen precautions. Third parties have a wider range of situational crime prevention options than do individual citizens, and these precautions may affect more people over a longer period of time. n337 Although citizen crime prevention research is blossoming in response to citizen demand for information about the ways in which to promote their own safety, citizen restriction is unlikely to be an effective method of crime prevention because citizens need so much more of it in order to protect themselves. n338 Moreover, some of the methods of increased citizen precautions may promote individual safety at the expense of aggregate safety. n339 And citizen precautions may be less likely than third-party precautions to be effective because they are more likely to respond to rape myths rather than concrete knowledge of specific safety information. Third parties are often in a unique position to know the number, type, and severity of prior harms as well as the level of risk at a given location.

Moreover, in the rape context, the aggregate effect of citizen precautions on the number of rapes is a particular cause for concern as increased restrictions and lack of freedom for women may be conducive to more, not less, gender-based violence. "Macrosocial research on rape suggests that the prevalence of rape is positively correlated with a variety of social phenomena, including the acceptance of gender inequality." n340

3. Lost Third-Party Care. - Although a contributory negligence rule is designed to promote caution by plaintiffs, it may just as easily encourage negligence "by giving the defendant reason to hope that he will escape the consequences" of his negligence. n341 Here, where third parties are sophisticated repeat players, commerce - unlike citizens - may respond directly to a citizens' liability rule with decreased insurance or pre [*1473] cautions. n342 Consequently, the marginal deterrence lost from third-party defendants may more than offset the marginal deterrence gained through victim fault defenses.

In the context of third-party liability, there is already reason to think that those parties may take too few precautions to prevent foreseeable rape. First, because of the baseline no-duty rule, third parties must account for very few of the consequences of their lack of precautions. Accordingly, third parties already have fewer incentives to guard against foreseeable intentional torts than they do against foreseeable negligence.

Second, third-party incentives are likely to be inadequate because of the failure of markets in safety-related information. Without accurate safety information, customers and others to whom a duty is owed, who face ordinary collective action problems, are even less able to evaluate or bargain for a greater level of precaution. The lack of adequate safety information stems from many factors. In the first place, accurate safety information may be inaccessible because of widespread misrepresentation or deliberate nondisclosure of safety risks. Third parties' fear of losing business as a result of crime may lead to the inefficient solution that businesses simply try to conceal prior crimes from the unsuspecting public, n343 and at the very least do not affirmatively publicize them to assist citizens in doing business elsewhere. In addition, safety-related data is extremely malleable, n344 and manipulation of such data may be common. n345

Finally, even when safety-related data is available, it is often difficult to interpret. In the context of higher education, legislation was critical in making safety information accessible. n346 Institutions of higher education are now required to disclose the number of crimes reported to campus police. n347 While this information may be helpful, it is unlikely to reflect [*1474] the true extent of campus crime. n348 Moreover, it is unclear whether the underreporting would be a consistent percentage at each school, or whether it would be dependent on other factors like differences in the number of students living on campus or within the jurisdiction of campus police. Without being able to account for other differences, the crime reports do not give students enough information to accurately assess their relative risks at different institutions. In addition, the information is of extremely limited use. Beyond decisions about which university to attend, the information does not assist students in making meaningful determinations about their own protection once on campus.

Better consumer information regarding safety could assist citizens in making more accurate safety comparisons and could increase third-party accountability for taking care. There is no doubt that promotion of better safety-related data is an independently valid goal. However, given the current failure of safety information, in the absence of lawsuits some third parties may have too few incentives to take care.

4. Positive Externalities of Third-Party Care. - Even if increased third-party precautions would be greater than optimal, the overprecaution may nevertheless provide a useful subsidy. Even scholars who expressly argue that the law

should blame crime victims concede that victim blame may not be appropriate in rape cases given distributional concerns. n349 Rape already imposes differential burdens on women and their participation in the economy. Requiring greater precautions by third parties creates a subsidy to lighten some of these restrictions.

Though some have focused on potential positive externalities of citizen care, the substantial negative externalities of women's precautionary measures must also be acknowledged. n350 When a significant percentage of the population won't go out alone at night to see a movie or to go shopping, not only are women's liberties chilled, but a vast amount of potentially advantageous economic activity is chilled as well. Individuals are deterred from utility-maximizing pursuits, and businesses lose potentially profitable business to the extent that their customers cannot time- [*1475] shift the full measure of their economic activity. Businesses also lose valuable potential employees, and women lose opportunities for full participation in the economy. While some businesses may voluntarily respond to these considerations, particularly if a large percentage of their potential customers and employees are women, many will not. n351 As such, some environments will feel safe only to men and not women, and some commerce and employment opportunities will be accessible only to men and not to women. Greater third-party care can help women participate more equally in commerce.

Minimizing victim precaution is a positive goal, not only because it promotes equal participation in the economy, but also because much victim precaution may be overprecaution. n352 Citizens consistently overestimate the risk of violent victimization by strangers. n353 To the extent that third parties take greater care by creating safer environments, or at least environments that seem safer, they may reduce excessive victim precautions.

As has been noted, the state may benefit from increased privatization of security. However, privatization of security measures may be best achieved by third parties. In the civil law context, a refusal to blame victims may lead private businesses and other third parties to undertake additional safety precautions. Increased security by third parties may provide more of a benefit to the state than additional security measures taken by potential victims because of the potential for more systemic [*1476] crime prevention strategies, as well as greater ease in overcoming collective action problems. n354

Accordingly, abolishing the contributory fault rule is not likely to increase the prevalence of rape, and may even decrease it, or at least further other economic and social goals.

D. Additional Problems in Comparative Apportionment Schemes

Both traditional defendant culpability and newer comparative apportionment paradigms pose harms to victim freedom and equality without obvious gains to deterrence. Comparative apportionment jurisdictions that allow rapists themselves to diminish their liability based on rape victim fault, to any extent and in any circumstances, exacerbate those harms, particularly in relation to the expressive function of the law. To hold that a rapist's responsibility should be diminished by a rape victim's failure to use reasonable care to prevent rape is to explicitly shift responsibility for raping from rapists to rape victims. Without detailing the many reasons why a rapist's intentional fault should not be diminished by a rape victim's negligence - a proposition that is a radical break from traditional law - there is an additional harm in letting persons who have intentionally caused harm to others, particularly the kind of egregious harm at issue in rape cases, shift the responsibility for their acts to their victims. The message that victims can be at fault for rape when they did not consent to sex suggests that men have at least a partial entitlement to sex with unconsenting women who behave in certain ways, and that women, by their conduct, ask to be raped despite their nonconsent. This reasoning ignores the entitlement nature of intentional torts. n355 If a woman does not consent to sex, the fact that she did consent to a drink or the like should not make the rapist's act "her fault." n356

E. A Summary

The allocation of rights under current comparative fault approaches accepts as given the baseline level of violence in the broader culture. Such a system views rape as normal and rape victims as correspondingly obligated. n357 Under this theory, violence is the legally accepted reality; [*1477] the law does not strive to transform real violence through legal rules. In stead, the law not only accepts, but also legitimates and reinforces this reality. Requiring citizens to take measures to protect themselves from rape in order to invoke third-party obligations translates the reality of male rape into a legal obligation for women to limit their full participation in public and private spheres or to pay extra costs for the privilege of doing so. n358

The question of women's "duty" to take reasonable measures to protect themselves from rape is ultimately a question of entitlements. n359 Should women have a legal entitlement to enter into situations in which it is foreseeable that they may be raped - to open a door when someone knocks, to take public transportation home at night, to go to a party and drink with a man, or more? Should the law allow women to exercise the full range of their civil liberties or should it require them to cede some portion of those liberties based on the existence of violent criminal conduct directed at them in exchange for third-party protection? It is only by making the rights-denying assumption that women have no legal entitlement to engage in certain conduct that a court can conclude that a rape victim's conduct was, to any extent, a legal cause of her own rape. Because the current denial of entitlements diminishes women's freedom and equality, without having any clear impact on deterrence, courts should embrace citizen no-duty rules.

IV. A Proposed Framework for Analyzing Contributory Fault Defenses: Creating a Citizens' Privilege

A traditional paradigm focuses solely on the defendant's culpability; a comparative apportionment paradigm recognizes citizen entitlements, if at all, only to a limited extent with respect even to intentional tortfeasors. This Article argues that a third option is both possible and desirable - one that recognizes both that rapists' responsibility for their acts should not be reduced because of rape victim negligence, and that potential rape victims enjoy a legal entitlement not to shape their conduct around the reality of pervasive rape, even in suits involving third-party defendants. This Part outlines a general no-duty rule that would give women a legal entitlement to act on the assumption that others will not rape them. Given the continued reality of violence against women, this legal entitlement will not necessarily mean that women will no longer act in fear of rape, but simply that the law will not require them to do so in order to take advantage of other socially designed protections. After [*1478] addressing some potential criticisms of a full entitlement approach, the next Part suggests two more modest proposals that combine both defendant-culpability and plaintiff-entitlement concepts.

A. A Complete No-Duty Rule

One answer to the problems inherent in using pervasive rape as a baseline around which to fashion citizens' duties is simply not to do so. Courts could breathe new meaning into the traditional tort law rule that plaintiffs have no duty to take care to prevent the intentionally inflicted harm of rape. n360 Courts could do this by establishing that even in a society in which rape is foreseeable, a citizen may reasonably proceed upon the assumption that others will not rape her. This would mean that a rape victim's alleged fault could never be raised as a defense by any defendant. Even when the rape victim's conduct seems plainly unreasonable by prevailing norms - she forgot to lock her door, she went drinking with a group of men she barely knew - defenses of rape victim fault would be barred. n361

In rape cases, I support a complete no-duty solution because it is the only rule that would establish the basic tenet that rape is not women's fault, either individually or collectively. No other solution, current or alternative, would provide that answer. A complete no-duty rule could be part of a broader rule that citizens have no duty to shape their conduct around intentional torts, or specific egregious intentional torts (like rape, robbery, and murder), or some other broader category. Alternatively, the complete no-duty rule simply could apply in the context of rape - where a duty rule threatens both citizens' liberty and women's equality - and partial no-duty rules could be crafted for other intentional torts that involve some but not all of those interests.

A complete no-duty solution is both traditional in its conception of citizens' duties, and contemporary in its steadfastness to that principle even in cases of third-party liability. The key hurdle to adoption of a citizen no-duty rule is for courts to recognize that comparative fault defenses do raise issues of duty. n362 These duty issues are present in comparative [*1479] fault analyses even though "duty" per se is not always acknowledged as an explicit element. n363 And the existence or nonexistence of a duty is a question of law for the court to decide. n364

B. Benefits

A citizen no-duty approach would benefit victims and potential victims by acknowledging, in and out of the courtroom, that the law does not require them to forgo their liberties as a result of rape and fear of rape. The no-duty approach refuses to translate the reality of violent crime directed against women into trials that blame women for rape or norms that further restrict women's liberties. A no-duty approach also acknowledges that potential rape victims have significant nonlegal incentives to take precautions to avoid victimization, although such precautions will not necessarily reduce or eliminate the risk of rape.

In jurisdictions applying a traditional defendant-culpability paradigm, a broad no-duty approach would not alter rapists' inability to invoke comparative fault defenses. In comparative apportionment jurisdictions, on the other hand, a complete citizens' no-duty rule would be a way to prevent rapists from diminishing their responsibility based on allegations of rape victim comparative fault.

C. Potential Concerns

The most significant criticism of a citizen no-duty rule is that such a rule would be unfair to third parties, who would no longer be able to assert the victim's comparative fault, but would still have obligations to shape their own conduct around crime. If third parties must exercise reasonable care to protect women from rape, the argument goes, why shouldn't women themselves be held to such an obligation? Although some of the answers to this question are implicit in Part III, in view of its significance, I will address it more explicitly here.

From a fairness perspective, it is no more difficult to reconcile the existence of limited third-party duties of care with a citizen no-duty rule than it is to reconcile limited third-party duties with the current absence of a general third-party duty, or the current presence of a more general [*1480] citizens' duty. There are many reasons to believe that third parties should be legally required to take greater precautions than the general citizenry. Third parties have special control over some safety-related decisions and at times have access to superior safety-related information; they often occupy special relationships that traditionally impose higher duties of care. The risks created by third parties are nonreciprocal risks of physical harms to others. Moreover, although citizens have autonomy interests in voluntarily entering situations, even situations that may involve danger, allowing third parties to expose others to dangerous situations involuntarily harms citizens' autonomy. n365

In addition, third-party liability more often concerns enterprise liability than individual precautions. This is significant for several reasons: Enterprises do not have citizenship rights to lose, may receive consideration for their services, can more easily foresee hazards when dealing with large groups of people, can take fewer and sometimes less invasive precautions to prevent larger possibilities of harm, and can more easily spread losses across a broader group of consumers. Moreover, a requirement that third parties take some precautions, but that citizens need not, includes citizen freedoms in what is sought to be protected by third-party liability rules. As such, institutions are more likely to be structured around assumptions of citizen freedom rather than citizen restriction.

In terms of equality, in the context of rape, women are empowered by enhancing others' incentives to make the world safe for them, not by minimizing or eliminating those incentives. n366 While imposing on women a legal duty to take precautions against rape curtails women's freedoms, imposing a similar duty on third parties would increase those freedoms by promoting rape prevention efforts. The result requires third parties to create spaces that are safe enough for everyone - men and women.

To say that a court should not consider a woman's conduct to be a legal cause of her rape does not imply that women are feeble and powerless to control their own conduct. What it does say is that a woman can exercise the full range of her liberties - to open a door, to ride the subway alone, to engage in any other number of actions that others might think imprudent or unwise given the realities of violence - without being considered a legal cause of any violent crime that may be directed against her. The statement that shopkeepers and hotels are at times a legal cause of rape does not impose the same expressive harms that are caused by saying that women are a legal cause of rape. Moreover, blaming third [*1481] parties does not threaten replication of the long history of victim-blaming that has prevailed in rape trials.

While women will still suffer disproportionately from the harms of rape under any tort scheme, the financial costs of rape under this rule will be somewhat less gender-based. In the interest of equality, laws sometimes require that losses be spread across broader groups. n367 Certainly this is fair in the context of rape, where women bear more of the costs not because they create more risks, but because men create more risks to them.

Finally, in terms of deterrence, women have substantial nonlegal incentives to avoid their own victimization, while third parties have fewer such incentives. This is not to suggest that third parties have no incentives to take reasonable measures to protect patrons against violent crime. A hotel may reasonably fear that a violent assault on its premises may cause it to lose business from other patrons. But poor markets in safety-related information make that prospect less likely than it should be.

In light of freedom, equality, and deterrence considerations, there are significant reasons to impose greater liability on third parties than on women.

To say that a citizen no-duty rule can be reconciled with a third-party limited duty rule is not to say that a citizens' no-duty rule is without limitations. To the extent that third-party liability raises problems, any broadening of it - through this rule or others - may be problematic for the same reasons. n368 Nevertheless, courts have generally concluded that those limitations are outweighed by the advantages of third-party liability. n369 And, these problems can be more effectively addressed through doctrines that do not blame the victim. n370

The reverse concern, that third-party liability is defined too narrowly, could also lead to criticism of a citizen no-duty rule. Defining third-party duties more expansively may best increase citizens' security, and women's ability to participate in society as equals. If broad third-party duties are desirable, limiting citizens' duties could harm women's interests by leading to increased, or at least continued, restriction of third-party duties. Thus any gains from abolishing an expansive notion of contributory fault [*1482] would be more than offset by the losses associated with continued third-party restrictions. However, neither policy nor logic dictates that third-party duties cannot be drawn more broadly than citizens' duties. Indeed, contributory fault doctrines have often been construed more narrowly than have doctrines of fault, and there are particular reasons for such asymmetries in this context. Moreover, if courts are ambivalent about third-party liability, they may find ways to curtail it through a number of doctrines - from rape victim comparative fault defenses, to comparisons of rapist and third-party fault, or through direct limitations on third-party duties. As such, ambivalence to third-party liability would need to be confronted in whatever form it takes.

The other drawbacks to a no-duty approach are primarily practical problems. A no-duty rule returns rape victims to an all-or-nothing rule, preventing the compromise solutions afforded by comparative fault. n371 While these compromise solutions are often inappropriate where the issue is duty, breach, or proximate cause, n372 they may nevertheless be appropriate in some situations to reflect the probabilistic evidence of actual causation - for instance, in a case where a rapist could have entered the victim's apartment through a door with a faulty lock or a window that was left open, and there is no evidence as to how the rapist entered the apartment.

Moreover, "comparative negligence systems increase the pressure on concepts of duty, negligence and causation, any one of which might bar the plaintiff completely." n373 As such, courts that want to keep rape victim fault out of the case in comparative fault analyses must be equally vigilant not simply to allow defendants to raise victim fault arguments through other elements of the case - for example, by claiming that the third party had no duty because the possibility of rape was an open and obvious danger, that the third party breached no duty because it could not reasonably foresee the victim's conduct, or that the victim's conduct was a superseding cause of the harm. Courts may also find it desirable to instruct jurors expressly on citizen entitlements so that jurors will be less likely to implicitly blame the victim.

Despite these drawbacks, a complete citizen no-duty rule is still significantly better than the current system, because it confronts third-party [*1483] duty questions directly rather than through destructive conceptions of rape victim fault. n374

V. More Minimal Entitlements

Courts reluctant to take a broad view of women's entitlement to act without fear of rape should at least adopt modest protections of citizen entitlements. Instead of using defendant culpability as the sole factor for determining when to allow plaintiff contributory fault defenses, courts should also consider citizen interests independent of the culpability of the defendants that they sue. Under an approach that recognizes both defendant culpability and citizen entitlement, at a minimum, courts should completely bar rapists from invoking rape victim comparative fault defenses, and should curtail third-party use of rape victim comparative fault defenses. To limit rape victim fault defenses in the third-party context, courts can either develop specific plaintiff no-duty rules, or, in the alternative, narrow the plaintiff's duty by reference to the third-party defendant's breach of duty.

A. Establishing Specific Baseline Entitlements

One way to constrain rape victim comparative fault defenses within the context of third-party liability is by direct reference to the interests that animate the need for those constraints. Without creating an exhaustive list of those interests, negligent third parties could be barred from raising comparative fault defenses when the duty imposed on the plaintiff as a condition of recovery is a duty that would exceed the scope of protections required by third parties; unduly burden an individual's ordinary rights of citizenship if required directly; undermine equal protection norms; be borne by

groups of citizens who are systematically unlikely to be able to adequately care for themselves; or otherwise produce results that are unlikely to increase aggregate citizen safety.

This approach differs from a complete entitlement approach because it might still allow some defenses of rape victim fault. For example, in the case in which a rape victim left a door unlocked, the defense of contributory fault would be allowed if a third party would have had an obligation to lock the door; the interest in an unlocked door was not particularly significant; both a reasonable man and a reasonable woman would have locked the door, and the jury would have made the same determination of negligence if the plaintiff had been a man; the victim knew or should have known of crime in the area she was in; locking the door would have been effective in averting the attack; and locking doors [*1484] would not likely decrease aggregate safety. How many defenses would meet these requirements is unclear.

1. Symmetry. - One of the central problems with the current law is that third-party and victim duties are already asymmetrical: Third parties have limited duties toward others, which are tightly controlled by courts, and victims have a general duty to protect themselves, over which courts exercise little, if any, review. For courts that insist on some notion of "symmetry" between third-party and citizen duties, true symmetry demands that citizen duties also be limited by courts as a matter of law. This is not to suggest that courts' expansive view of their role in resolving the duty issue in third-party cases is correct. n375 Indeed, in many cases, it seems that courts are actually resolving the breach question, which should ordinarily be left to the jury. Still, courts that do take an aggressive view of their own role in third-party cases, based on a perceived need to limit duties related to criminal conduct, should be equally sure to protect those duties for citizens as well as third parties.

2. Citizenship Interests. - Courts should also be reluctant to permit comparative fault defenses where the rape victim "fault" alleged is an activity that involves significant citizenship interests. Recognition of victims' rights to take certain risks without relieving defendants of liability may be based on a collective desire not to exclude groups from activities that are central to citizenship. n376 Thus, even though it may be risky for a person to go outside alone at night, walk down the public streets, take public transportation alone, accept available employment, or associate with men, these are nevertheless significant facets of citizenship, that courts should not lightly restrict. n377 Indeed, the Constitution itself has been construed to include a "right to travel," a "right of locomotion," a right to "freedom of movement," and a "right to associate with others." n378 While there has been considerable recent debate about what those rights mean and require, n379 the questions are substantially easier where, as here, the restrictions would both formally restrict citizen liberties and likely result in ultimate liberty restrictions. Moreover, whether the Constitution actually requires restrictions on tort liability, as has been held in [*1485] some contexts, or whether constitutional values simply influence tort law norms, prudential concerns suggest that citizenship interests be taken into account.

3. Formal Equality Interests. - Courts should be equally unwilling to mandate as a condition of third-party recovery precautions that would require women to take greater precautions than men. First, such differential restrictions on women, though socially accepted, do not appear justified by the underlying risks to women and men. Although women are disproportionately likely to be the victims of rape, they are much less likely to be the victims of other major crimes. In light of this lower rate of overall victimization, requirements that women restrict their liberties in ways that men do not appear unsound. Second, even if additional restrictions of women seemed reasonable in light of women's increased risk of gender-based crimes such as rape, legal requirement of gender-specific precautions would still be inappropriate. Differential restrictions on women and men would violate principles of formal equality if directly required by courts or other government officials. They are no less harmful when required by juries as a condition of full tort law recovery. If a reasonable man would go out at night, to work, to travel, or just to drink with strangers, a reasonable woman should be entitled to do the same. These liberties are important to women's economic and social well-being; for the law to be otherwise sends the message that women are less than full citizens and their freedoms are not as valued as men's. "If state tort law furthers discrimination... then it will impede the accomplishment of Congress' goals in enacting Title VII." n380

To ensure that a woman need only take precautions that a man would be required to take, courts can specifically instruct jurors that the precaution required by the law is the least precaution required of either a reasonable woman or a reasonable man. A court might tell jurors: "The law requires that women and men be treated equally. As such, a woman need only take as much care for her safety as a man would also be required to take. Accordingly, if you find that a reasonable man or a reasonable woman would have acted as the plaintiff did, you must find that the plaintiff's conduct did not constitute comparative negligence, regardless of whether the plaintiff is a man or a woman. However, if you find that both a reasonable man and a reasonable woman would have taken precautions that the plaintiff did not, you may find that the plaintiff's acts constitute comparative negligence." Although this solution is problematic for the

essentialist assumptions it encourages about the reasonable man and the reasonable woman, it still seems like a better course for avoiding the subordination that plagues the current case law. n381

Not only should the jury be instructed to take equality into account, but courts should also devise better means of reviewing jury comparative [*1486] fault determinations for equality concerns. One method would be to give the jury a special verdict form asking what the plaintiff's and the defendant's exact negligence was. n382 Another would be for appellate courts to apply a less deferential standard of review. Courts could then be more vigilant in disallowing rape myths or expansive conceptions of victim fault. n383

4. Groups Systematically Unable to Care for Themselves. - Since one goal of third-party liability is to deter rape, courts should limit rape victim comparative fault defenses for groups that are systematically unlikely to be able to care for themselves - i.e., where expecting plaintiffs to take reasonable care would be unrealistic or harmful to the long-term interests of protecting the group. The classic examples of groups systematically unable to care for themselves are children and adults with mental disabilities. n384 In these contexts, third parties can foresee that the plaintiffs may not be able to care for themselves. Of course, groups that are unlikely to be able to protect themselves need not be exclusively defined by pervasive disabilities. Persons involved in repetitive tasks, under extreme duress, or unable to obtain adequate safety information about a particular location may also have more limited capacities for self care.

5. Deterrence Goals. - Finally, although some citizen safety measures may be thought to increase a particular citizen's safety without loss to aggregate citizen safety (like providing adequate door locks), other measures may actually be expected to decrease aggregate safety (such as requirements that citizens not go out at night). Courts should consider whether the plaintiff's conduct is conduct that will provide deterrence in the aggregate.

6. Limitations. - A no-duty approach that attempts to define particular citizen interests poses difficult line-drawing problems for courts. Judicial determination of significant and insignificant interests would be difficult and time consuming. Moreover, a case-by-case determination of the value of particular citizen interests might not adequately account for those concerns, since every liberty looks small and insignificant in isolation. In addition, while the strength of citizen interests is an important factor that is not presently accounted for, that strength may vary depending on other circumstances, including the culpability of the defendant's conduct. Consequently, while courts adopting this solution may be able to create a more narrow and well-defined exception, they also may find [*1487] that the complexities of the task outweigh the benefits of such a refined tool.

B. A Partial No-Duty Rule

Another approach that would allow courts to limit victim comparative negligence defenses without so much attention to particularized limits is a doctrine that I will term the "separate spheres analysis." Under this approach, courts would divide the rapist's intentional rape and the third party's negligent fault into two separate spheres. Courts would then evaluate the third-party defendant's comparative fault defense with respect to each of these spheres. If the defendant is arguing that the plaintiff's negligence was the legal cause of the rape, the defense would be barred. If, on the other hand, the defendant is arguing that the plaintiff's conduct caused the third-party defendant's negligence, the defense would be permitted. Under this rule, it is not the status of the defendant - intentional tortfeasor or negligent third party - that would determine whether comparative fault doctrines can be invoked. n385 Instead, the substance of the comparative fault defense invoked would be dispositive. Courts could draw a bright line rule allowing defendants to assert the victim's contribution to the defendant's negligence, but not her own alleged negligence.

Such an approach would permit defendants to raise comparative fault defenses, but only in an extremely narrow category of cases in which the plaintiff herself is responsible for the specific negligence allegedly caused by the third party. Such a framework is consistent with other contexts in which a negligent defendant raises a comparative fault defense against the victim of an intentional tort. In accountant malpractice cases, for example, this type of analysis is employed. Accountant malpractice cases are similar to rape cases because they typically involve three parties - a business that has been defrauded (the plaintiff), a defendant accountant (a third-party defendant), and, implicitly if not explicitly, the person who defrauded the business (an intentional tortfeasor). In that context, many courts have adopted rules that permit the allegedly negligent accountant to claim comparative negligence by the plaintiff, but only when the plaintiff's conduct is alleged to have caused the defendant's breach of duty. n386 Evidence of the plaintiff's purported comparative negli [*1488] gence is properly excluded as irrelevant where such conduct did not cause the professional's breach of duty. n387

Under this distinction courts have repeatedly refused to allow defendants to assert plaintiffs' unwise or risky business conduct as a defense. n388 The view that the plaintiff's risky or perhaps unwise conduct does not bar, or even diminish, his suit against negligent accountants has been adopted by the majority of American jurisdictions. n389 Although a few courts have changed the rule after the emergence of comparative fault, others have not. n390

The rationale for cases that deem irrelevant defenses of comparative negligence unrelated to a defendant's own breach of duty is that the very purpose of accountant liability is to protect plaintiffs, even negligent plaintiffs, from intentional misconduct by others. Thus, were a broad comparative fault rule to apply, the defendant could protect itself from liability by asserting plaintiff's role in the very conduct that its actions were designed to prevent. In the leading case, *National Surety Corp. v. Lybrand*, the court wrote:

We are, therefore, not prepared to admit that accountants are immune from the consequences of their negligence because those who employ them have conducted their own business negligently. The situation in this respect is not unlike that of a workman injured by a dangerous condition which he has been employed to rectify. Accountants, as we know, are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible. n391

[*1489]

The policy reasons that animate the rule employed in *National Surety* regarding accountants' liability apply with equal or greater force in third-party negligence cases concerning rape. The very purpose of third-party liability is to protect plaintiffs, even unwise plaintiffs, from intentional misconduct by others.

Although the majority of rape victim comparative fault defenses will be barred by this approach, there is some concern that recognition of any rape victim comparative fault defenses will undermine the legal privilege that citizens are afforded not to take reasonable care to prevent rape. But once narrowly confined, these defenses pose fewer problems because they focus on allocating responsibility for the third-party defendant's negligence. Under this approach, citizens' duty would not be to take reasonable care to avoid rape, but rather, to take reasonable care not to thwart third-party protections implemented for their benefit.

Still, to ensure that this exception is an exception, courts must be careful to operate at a narrow level of specificity with respect to the defendant's negligence. Thus, if the defendant's alleged negligence is a failure to provide adequate lighting, only defenses that assert that the plaintiff's negligent conduct caused the failure to provide adequate lighting would be allowed. Defenses that the plaintiff should not have been in the inadequately lit place, for example, would be barred. Any effort to assert that the plaintiff's conduct was improper beyond her alleged contribution to the defendant's specifically defined negligence, would in reality assert the plaintiff's negligent contribution to the rape - a defense which, as previously explained, should not be allowed.

Conclusion

When "everyone knows" that a reasonable woman in our society should fear rape, why should the law nevertheless give women a legal entitlement to conduct their lives without fear? Because the current law, which does not afford women this entitlement, not only reflects the tragic reality of rape and fear of rape in our society, but legitimates and reinforces that reality by translating it into victim-blaming comparative fault defenses and liberty- and equality-curtailling legal obligations.

An entitlement-based analysis, on the other hand, would reject the idea that rape victims themselves are at fault for the harm inflicted upon them. Women should not be considered a legal cause of rape. A citizen **[*1490]** no-duty analysis recognizes this basic principle of freedom and equality by refusing to allow any defendant to raise the plaintiff's alleged comparative fault in its defense.

Many women alter their conduct in myriad ways because of fear of rape and will continue to do so regardless of the tort law comparative fault rule. The reality of rape, the fear of rape, and the social meaning of that fear will continue to distort women's activities and lives. But the law should not require these distortions, either affirmatively or as a condition of tort law recovery. It should instead seek to counteract them. n392

FOOTNOTES:

n1. See, e.g., Susan Brownmiller, *Against Our Will: Men, Women and Rape* 347-404 (1975); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *Colum. L. Rev.* 1 (1977); Susan Estrich, *Real Rape* 57-104 (1987); Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* (1996).

n2. See, e.g., Robin Warshaw, *I Never Called It Rape* 144 (1988) ("Taking acquaintance-rape complaints to civil court is a new approach that offers many victims a better way to fight back than they may find through criminal law channels."); Cass R. Sunstein, *Words, Conduct, Caste*, 60 *U. Chi. L. Rev.* 795, 840-41 (1993) (arguing against restrictions on pornography and addressing as a future strategy civil actions stemming from sexual violence); cf. Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 *Golden Gate U. L. Rev.* 479, 480 (1979) (noting that rape victims "often are diverted to civil attorneys by the police themselves").

n3. See Warshaw, *supra* note 2, at 144; Holly J. Manley, Comment, *Civil Compensation for the Victim of Rape*, 7 *Cooley L. Rev.* 193, 199 (1990) (noting the civil law's lower standard of proof as "one major advantage" of such actions); Sunstein, *supra* note 2, at 841 ("An important advantage of [the civil action] route is that the 'reasonable doubt' standard of criminal law need not be met, and recovery can occur under the civil law's more lenient 'preponderance of the evidence' standard."); see also *Dean v. Raplee*, 39 *N.E.* 952, 954 (*N.Y.* 1895) ("If this was a criminal case, where the prosecution is bound to prove the charge beyond a reasonable doubt, the appeal would be entitled to prevail. But here [in a civil action] a preponderance of proof is sufficient.").

n4. See Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 *Harv. Women's L.J.* 105 (1981); Maureen Balleza, *Many Rape Victims Finding Justice Through Civil Courts*, *N.Y. Times*, Sept. 20, 1991, at A1.

n5. See, e.g., *Violence Against Women Act of 1994*, 42 *U.S.C.* 13981 (1994).

n6. The term "civil rape cases" is used to describe all cases in which rape is the underlying harm suffered by the plaintiff.

n7. See, e.g., *Cook v. Greyhound Lines, Inc.*, 847 *F. Supp.* 725, 734, 735 n.5 (*D. Minn.* 1994) (holding that a bus company could amend its answer to allege defenses of consent, assumption of risk, and contributory fault because of evidence that the plaintiff, who according to witness testimony cried and pleaded with the rapist and other passengers, "did not sound an alarm during the course of conduct, nor did she report [the rapist's] behavior on a contemporaneous basis," such that "a Jury might well conclude that the Plaintiff is not entitled to recovery"); *Kirkwood v. McFarland*, 47 *So. 2d* 74, 76-77 (*La. Ct. App.* 1950) (rejecting plaintiff's civil action for rape on the ground that she did not cry out or physically resist the alleged date rape).

n8. In terms of damages, for example, courts may not recognize the severe harm rape causes in the absence of other physical injuries. See, e.g., *Zerangue v. Delta Towers, Ltd.*, 820 *F.2d* 130, 133-34 (*5th Cir.* 1987) (holding that a jury award of \$ 228,000 to a woman who "was forcibly dragged to an abandoned house, held in fear of her life for over an hour during which time she was sexually assaulted in four episodes," and "left naked, bound and gagged," was excessive because "an even view of her injury includes the alleviation that she was not beaten and required only minimal medical attention"). Damages may also be reduced in light of the victim's prior sexual experiences. See *Birkner v. Salt Lake County*, 771 *P.2d* 1053, 1061 (*Utah* 1989) (holding that with respect to a woman sexually assaulted by her therapist, defense counsel's questions about whether victim's former husband ever kissed her and touched her breast when they engaged in sexual relations while married were appropriate because "the jury was entitled to consider [plaintiff's] prior [sexual] experience in assessing damages" and finding it "difficult to understand why [the plaintiff thought] that this evidence was improper"). Damage assessments such as these do not ask "What is the damage that rape causes?" as much as they ask "How damaged is the victim?" With this latter question, defendants may attempt to reduce their responsibility for the harm of rape by portraying rape victims as damaged people. See *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 *So. 2d* 70, 77 (*La. Ct. App.* 1989) (defendant argued that gang rape did not cause rape victim's emotional problems; "unstable" home environment and an "overprotective parent" did). And even when issues like the victim's failure to make a prompt outcry do not eliminate recovery, that same factor still has been used to reduce the victim's damages. See *Gavrik v. Burlington, C.R. & N. Ry. Co.*, 108 *N.W.* 327, 329 (*Iowa* 1906).

n9. Within this Article, the terms "comparative fault" and "contributory negligence" refer interchangeably to the defenses of contributory negligence, comparative fault, and assumption of the risk. These defenses either diminish the defendant's liability or relieve him entirely of a duty to the plaintiff. The reasoning behind comparative fault and contributory negligence theories is that even when a defendant has breached a duty of care, the plaintiff might by her

actions disentitle herself to any relief. The defense of assumption of the risk may also relieve the defendant of a duty. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 65, at 451-52 (5th ed. 1984). For the purposes of this Article, these doctrines do not materially differ.

n10. See, e.g., *Wassell v. Adams*, 865 F.2d 849, 852, 856 (7th Cir 1989); *Morris*, 539 So. 2d at 71.

n11. See Restatement (Third) of Torts: Apportionment of Liability 1 cmt. c reporters' note (Proposed Final Draft (Revised) 1999) [hereinafter Restatement 1999 Draft] ("Applying comparative responsibility to intentional torts is not the majority rule," and much of the recent support for such comparison of responsibility "is not a comparison of a defendant with a plaintiff"); see also *McGill v. Duckworth*, 944 F.2d 344, 352 (7th Cir. 1991) (stating the general rule that plaintiff's contributory negligence does not provide a valid defense to an intentional tort).

n12. See Restatement 1999 Draft, supra note 11, 1 cmt. c reporters' note (noting that some of the support for comparative responsibility "is in cases comparing a plaintiff's responsibility with that of an intentional defendant"); see also *Morris*, 539 So. 2d at 77-78 (comparing rapist and rape victim fault) (overruled by statute, *La. Civ. Code Ann. art. 2323(c)* (West 1997)).

n13. See, e.g., *McGill*, 944 F.2d at 352-53.

n14. See *Malone v. Courtyard by Marriott L.P.*, 659 N.E.2d 1242, 1245, 1249 (Ohio 1996) (holding that a hotel that failed to respond to repeated guest phone calls that "someone might be getting hurt" was not liable for its negligence because the rape victims were themselves negligent since they "invited [the acquaintance rapist] to their room, had drinks with him, went out to several bars, and upon return again allowed him in their room" among other factors).

n15. I use the term "entitlement" instead of "right" partly because a right, at least in Hohfeldian terminology, must be enforceable against one with a duty. In that strict sense, there is no right to go out at night. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1090 (1972) (describing entitlements as "the first order of legal decisions"). By using the term "citizen" I mean to suggest that these entitlements stem from citizenship concerns, not that the entitlements should be restricted to United States citizens.

n16. The term "no-duty" is a somewhat odd locution with respect to plaintiffs. The terms "privilege" or "right" may seem more apt. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (1966) (identifying and distinguishing fundamental legal relations); see also Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* 23 (1985) (noting that the victim of a negligent tortfeasor was "bound not to take risks of harm which he or she had no right to take.... Of course, the key to all that was the word right - what risks did one have a right to take without thereby 'assuming' the risk of injury... ? It all depended how one's 'rights' were defined."). Still, neither of these terms completely solves the problem. "Privilege" assumes a baseline of plaintiff obligation from which this rule would be an indulgence. And "right" is incomplete, since issues of plaintiff's fault are related to, but not necessarily identical to, issues of defendant's duty (because of different symbolic issues, for example). In the absence of a perfect term, I have chosen to employ the Restatement's "no-duty" terminology. No-duty cases are ones in which the plaintiff has no duty to protect herself from certain tortious conduct. "Put differently, they are cases in which the plaintiff has a liberty (or right) to be free from constraints imposed by the defendant." Dan B. Dobbs, *The Law of Torts* 200 (forthcoming, 1999) (carefully detailing cases in which risks are entirely allocated to defendants); see also Richard A. Epstein, *Torts* 8.2.1 (1999) (including "duty" as one of the elements of contributory negligence). However, a plaintiff's "duty" is not a primary one, and so parallels with a defendant's duty are not necessarily warranted.

n17. See *ALI Conference Report*, 66 *U.S.L.W.* 2726-27 (1998).

n18. See Restatement 1999 Draft, supra note 11, 3 cmt. d.

n19. The Restatement's first "final draft" adopted the highly controversial position that a defendant's intentional conduct and other parties' negligent conduct (such as failure to take care to prevent rape) should be routinely compared within a single apportionment of liability - a dramatic break from traditional tort law rules that bar comparisons of intentional and negligent fault. See Restatement (Third) of Torts: Apportionment of Liability 1 cmt. c reporters' note (Proposed Final Draft 1998) [hereinafter Restatement 1998 Draft]. This proposal raised the alarming prospect, already possible under the comparative apportionment schemes of several jurisdictions, that rape victim "fault" not only will be compared with negligent third-party fault, but also with the fault of rapists themselves. The Restatement has wisely backed away from much of its original position on the need to compare intentional and negligent fault, and now takes "no position" on the issue of whether defendants' intentional conduct and plaintiffs' negligent conduct should be

compared. Restatement 1999 Draft, *supra* note 11, 1 cmt. c reporters' note. However, the Restatement still raises the possibility that rapists can diminish their own liability based on a negligent third party's fault. So, for example, a rapist could say that he bears less than 100% liability for the rape because the hotel in which he raped the victim had inadequate security precautions. Although the rapist would still be jointly and severally liable to the victim for the hotel's share of liability, see Restatement 1999 Draft, *supra* note 11, 22, the rapist could ultimately reduce his liability to the negligent tortfeasors through the doctrine of contribution. See Restatement 1999 Draft, *supra* note 11, 32 cmt. e; 33 cmt. b, *illus.* 1.

n20. This greater need for plaintiff no-duty rules is due to the absence of other limits on comparing intentional defendant and negligent plaintiff fault in comparative apportionment jurisdictions.

n21. See, e.g., *Ozaki v. Association of Apartment Owners*, 954 P.2d 644 (Haw. 1998) (denying recovery to murder victim under Hawaii's modified comparative negligence statute where jury found that victim was five percent at fault for her own murder because she cursed at murderer waiting outside her apartment door and tried to get inside her apartment); *Smith v. Officers of Kart-N-Karry, Inc.*, 346 So. 2d 313 (La. Ct. App. 1977) (holding that cashier who was shot to death during grocery store armed robbery was contributorily negligent and had assumed the risk of being killed because he had knowledge that the store he worked in was unprotected and nevertheless continued to work there); *Bonpua v. Fagan*, 602 A.2d 287 (N.J. Super. Ct. App. Div. 1992) (holding that defendant who was convicted of criminal aggravated assault sufficiently alleged comparative negligence of victim who called defendant a "faggot" while defendant was talking to his girlfriend); *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 469 (Tex. App. 1991), *rev'd on other grounds*, 867 S.W.2d 19 (Tex. 1993) (implying that issues of teenaged service station employee's comparative fault and assumption of risk in armed robbery shooting were appropriate issues for evidentiary consideration).

n22. See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 150 (1987) (defining three categories of intentional torts).

n23. See Ballou, *supra* note 4, at 106.

n24. See B. Scott Andrews, Comment, Premises Liability - The Comparison of Fault Between Negligent and Intentional Actors, 55 *La. L. Rev.* 1149, 1157 (1995).

n25. See, e.g., *Ledbetter v. Concord General Corp.*, 651 So. 2d 911, 916 (La. Ct. App. 1995) ("Although all batteries are not rapes, all rapes necessarily are batteries." (quoting *Paul v. Montesino*, 535 So. 2d 6, 7 (La. Ct. App. 1988))). Battery occurs when a person acts intending to cause a harmful or offensive contact with the plaintiff, and such a contact actually results. See *Restatement (Second) of Torts* 13, 18 (1965).

n26. See, e.g., *Deborah S. v. Diorio*, 583 N.Y.S.2d 872, 874 (Civ. Ct. 1992) (victim sued rapist for intentional sexual assault, battery, and infliction of emotional distress).

n27. See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834 (Ct. App. 1984), overruled on other grounds by *Cedar-Sinai Medical Center v. Superior Court*, 74 Cal. Rptr. 2d 248 (1998) (explaining that in California "many torts have analogues in the Penal Code," and discussing the different purposes of criminal and tort law liability).

n28. "It was [plaintiff's] right, as a matter of law, to go through life... secure from any forcible invasion of her person by another. To have such rights wantonly trespassed upon ought not to be regarded as a trivial matter." *Ellig v. Powell*, 240 N.W. 271, 273 (Neb. 1932).

n29. See Leslie Bender, An Overview of Feminist Torts Scholarship, 78 *Cornell L. Rev.* 575, 590 (1993) ("Although criminal law may result in the incarceration of a rapist, the survivor must resort to a private law remedy to recover damages for physical and emotional harm."). Although criminal courts may require rapists to provide restitution to rape victims, civil law offers broader possibilities for compensation, reflecting a variety of factors: 1) the victim can initiate suit on her own regardless of whether the police or prosecutors elect to credit her charge; 2) the rapist may be compelled to testify or his silence may be used against him; and 3) the oft-cited lowering of the victim's burden of proof. Cf. Nubert S. Field & Leigh B. Bienen, *Jurors and Rape* 95 (1980) ("An individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.").

n30. "In a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" *Merest v. Harvey*, 128 *Eng. Rep.* 761, 761 (1814).

n31. See, e.g., *Harris v. Neal*, 116 N.W. 535 (Mich. 1908) (upholding trial court judgment for plaintiff who sued rapist in civil action); *Jensen v. Lawrence*, 162 P. 40 (Wash. 1916), *aff'd*, 166 P. 793 (Wash. 1917) (same). Victims may

have been precluded from recovery before the 1900s. See Lea VanderVelde, *The Legal Ways of Seduction*, 48 *Stan. L. Rev.* 817, 842-45 (1996).

n32. See, e.g., *Deborah S. v. Diorio*, 583 N.Y.S.2d 872 (Civ. Ct. 1992); *Pletnikoff v. Johnson*, 765 P.2d 973 (Alaska 1988); *Delia S. v. Torres*, 184 Cal. Rptr. 787 (Ct. App. 1982), overruled on other grounds by *Christensen v. Superior Court*, 820 P.2d 181 (Cal. 1991); *Standard v. Buckner*, 561 S.W.2d 329 (Ky. App. 1978); *Christensen v. Boucher*, 24 N.W.2d 782 (Iowa 1946); *Shaw v. Fletcher*, 188 So. 135 (Fla. 1939); *Ellig v. Powell*, 240 N.W. 271 (Neb. 1932); *Pashayan v. Kazanjy*, 138 A. 723 (N.J. 1927).

n33. 42 U.S.C. 13981(b) (1994) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender.").

n34. See *United States v. Morrison*, 1999 WL 459152 (granting petition for writ of certiorari to review constitutionality of the Violence Against Women Act); see also *Anisimov v. Lake*, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (stating that cases would "be few and far between" where rape would not be considered an act of violence "motivated by gender" within the meaning of the Violence Against Women Act, and holding that plaintiff who had been fondled, grabbed, assaulted, and raped by her employer stated a viable cause of action under the Act).

n35. However, claims against third parties may allege recklessness, which can be treated as either intentional or negligent torts.

n36. See *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (noting that "as a rule, 'a person has no legal duty to protect another from the criminal acts of a third person'" (quoting *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996))); *Restatement (Second) of Torts 314* (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

n37. See Dobbs, *supra* note 16, at 322 (detailing these exceptions); see also David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 *Tul. L. Rev.* 135, 181-82 (1992) (discussing justifications for holding parties liable in tort for failing to use reasonable care to prevent the criminal or intentionally tortious actions of third parties).

n38. See, e.g., *Restatement (Second) of Torts 314(a)* (1965) ("A common carrier is under a duty to its passengers to... protect them against unreasonable risk of physical harm An innkeeper is under a similar duty to his guests.").

n39. See *Restatement (Second) of Torts 315(a)* (1965) (an actor has a duty to "control the conduct of a third person so as to prevent him from causing physical harm to another [when] a special relation exists between the actor and the third person").

n40. See *id.* at 321(1) ("If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.").

n41. See *id.* at 323 ("One who undertakes, gratuitously or for consideration, to render services for another which he should recognize as necessary for the protection of the other's person or things" is under a duty to exercise reasonable care).

n42. See *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1344-45 (Utah 1993); see also *Doe v. Dominion Bank of Wash., N.A.*, 963 F.2d 1552 (D.C. Cir. 1992) (holding that commercial landlord has a duty to use reasonable care to safeguard tenants from foreseeable criminal conduct occurring in common areas within the landlord's control).

n43. See *Walther v. KPKA Meadowlands L.P.*, 581 N.W.2d 527, 535 (S.D. 1998) (noting that "a duty to protect a person from the unlawful acts of a third person" exists "if the following two conditions were met: (1) the existence of a special relationship between the landowner and the injured party, and (2) a finding that the intentional criminal acts were foreseeable"); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) ("The foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care on a person who owns or controls premises to protect others on the property from the risk."); Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 *S. Tex. L. Rev.* 89, 94-95 (1990).

n44. See Laura DiCola Kulwicki, Comment, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule, 48 *Ohio St. L.J.* 247, 260-62 (1987); Michael J. Yelnosky, Comment, Business Inviters' Duty to Protect Invitees from Criminal Acts, 134 *U. Pa. L. Rev.* 883 (1986).

n45. See *Delta Tau Delta v. Johnson*, 712 *N.E.2d* 968, 971 (*Ind.* 1999) (outlining tests of foreseeability); Kaufman, *supra* note 43, at 95-98 (outlining five different approaches courts have taken in determining when criminal attacks are foreseeable).

n46. See *McClung v. Delta Square L.P.*, 937 *S.W.2d* 891, 902 (*Tenn.* 1996) ("As a practical matter, the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred on or in the immediate vicinity of defendant's premises.").

n47. See, e.g., *Johnson v. State*, 894 *P.2d* 1366, 1370 (*Wash. Ct. App.* 1995), modified by 1995 *Wash. App. LEXIS* 267 (Ct. App. June 20, 1995) (discussing relevance of plaintiff's status as an invitee to defendant's duty of reasonable care).

n48. See, e.g., *Kentucky Fried Chicken, Inc. v. Superior Court*, 927 *P.2d* 1260, 1270 (*Cal.* 1997) (limiting inviter's duty to comply with unlawful demand of robber on grounds of public policy).

n49. See *Gans v. Parkview Plaza Partnership*, 571 *N.W.2d* 261, 269 (*Neb.* 1997) (reversing the grant of a third-party defendant's summary judgment motion where "fact finder could find it foreseeable that an unwelcome stranger would gain entry [to an office] at night through the unlockable door while [the office] was occupied by a lone woman").

n50. See *Berry Property Management, Inc. v. Bliskey* 850 *S.W.2d* 644, 654 (*Tex. App.* 1993).

n51. See *Wassell v. Adams*, 865 *F.2d* 849, 855 (7th Cir. 1989) (acknowledging that hotel may have duty to warn of the "dangers of the neighborhood"); cf. *Shurben v. Dollar Rent- A-Car*, 676 *So. 2d* 467, 468 (*Fla. Dist. Ct. App.* 1996) (holding that car rental agency had a duty to warn British tourist, who was subsequently shot, of foreseeable criminal conduct directed against tourists driving in rental cars that were identified as such).

n52. See *Veazey v. Elmwood Plantation Assocs.*, 650 *So. 2d* 712, 715 (*La.* 1994).

n53. See *Wassell*, 865 *F.2d* at 853 (rejecting motel's argument that "a warning would have been costly - it might have scared guests away," on the ground that "the loss of business from telling the truth is not a social loss; it is a social gain").

n54. *McClung v. Delta Square L.P.*, 937 *S.W.2d* 891, 903 (*Tenn.* 1996).

n55. *Id.*

n56. *Id.* at 902, 904 n.13 (arguing that "using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk to customers," and noting a specific instance where such measures did reduce crimes on the premises).

n57. See H. Jane Lehman, Renters See Safety in Lawsuits, *Chi. Trib.*, July 31, 1994, 16, at 1 (noting that in a sample of 800 suits brought against property owners, landlords and co-op associations were named as defendants in 38% of the suits, hotel and motel operators were named as defendants in 24% of the suits, and shopping malls and other retailers were named in 8% of the suits).

n58. See, e.g., *Ariz. Rev. Stat. Ann.* 33-1343 (West 1998) (preventing the tenant from restricting landlord access to the premises); *Brock v. Watts Realty Co.*, 582 *So. 2d* 438 (*Ala.* 1991) (noting lease provision that prohibited affixing additional locks to or changing existing locks on any door, without the landlord's written consent); *Berry Property Management, Inc. v. Bliskey*, 850 *S.W.2d* 644 (*Tex. App.* 1993) (plaintiff was told that the lease prohibited measures that would make the unit inaccessible to the landlord, such as installation of a deadbolt lock, and was then raped when an intruder obtained access via the landlord's key); Balleza, *supra* note 4, at 137 (the rape victim explained that the rapist "had a say about who he was going to get, yet I had no say on how I would protect myself.").

n59. *McClung*, 937 *S.W.2d* at 903.

n60. *Id.* at 902.

n61. See *id.* at 898 (citing recent cases from numerous jurisdictions). But see *Rosen v. Red Roof Inns, Inc.*, 950 *F. Supp.* 156 (*E.D. Va.* 1997) (noting that Virginia has refused to adopt *Restatement (Second) of Torts* 314A).

n62. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 *Ga. L. Rev.* 601, 649-50 (1992) (discussing the recent expansion of liability endorsed by courts); Fred C. Zacharias, *The Politics of Torts*, 95 *Yale L.J.* 698, 699 (1986) (discussing trend toward liberalized liability in the negligent security context). Although third-party liability is often traced to influential decisions of the 1970s, in fact, third-party liability for failure to protect against foreseeable crime was promoted and adopted in some contexts, particularly those involving defendants with heightened duties, well before that time. See *Neering v. Illinois Cent. R.R. Co.*, 50 *N.E.2d* 497 (Ill. 1943) (upholding liability of common carrier); *Danile v. Oak Parks Arms Hotel*, 203 *N.E.2d* 706 (Ill. Ct. App. 1964) (affirming liability of hotel). In addition, vicarious liability for rape had also been recognized. See *Garvik v. Burlington, C.R. & N. Ry. Co.*, 108 *N.W.* 327 (Iowa 1906) (affirming liability of railroad for rape of passenger by brakeman).

n63. Because the essence of the negligence in a third-party action is the defendant's very failure to take reasonable precautions against a foreseeable crime, the fact that a crime occurred does not negate the third party's liability. A few courts mistakenly have continued to reach a contrary conclusion by using meaningless language of "superseding cause" to suggest that a third party cannot be held liable when the intervening cause is an intentional tort. See *Leslie G. v. Perry & Assocs.*, 50 *Cal. Rptr. 2d* 785, 790-91 (Ct. App. 1996); *Bell v. Board of Educ.*, 646 *N.Y.S.2d* 499, 499-500 (App. Div. 1996), rev'd on other grounds, 687 *N.E.2d* 1325 (1997). Under the contemporary view, however, "in any case in which it can be said that the risk of harm by [an intentional tortfeasor] was one of the central reasons for deeming [the defendant's] conduct negligent, the legal cause issue should present no obstacle to recovery." Robertson, *supra* note 37, at 139.

n64. When a third party owes a duty to others, it is "the duty to exercise reasonable care for their personal safety...." The third party "is not an insurer of [others'] safety under any and all circumstances." *Murrow v. Daniels*, 364 *S.E.2d* 392, 397 (N.C. 1988); see also *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 *F.2d* 477, 481 (D.C. Cir. 1970) (discussing duty of landlord to take reasonable steps to protect his tenants).

n65. See Keeton et al., *supra* note 9, 52, at 347 ("Where two or more causes combine to produce such a single result, incapable of any reasonable division, each may be a substantial factor in bringing about the loss, and if so, each is charged with all of it.").

n66. See, e.g., *Turner v. Jordan*, 957 *S.W.2d* 815, 823 (Tenn. 1997).

n67. See Keeton et al., *supra* note 9, 48, at 330.

n68. See, e.g., *Thomas v. First Interstate Bank*, 930 *P.2d* 1002, 1003-04 (Ariz. Ct. App. 1996) (comparative fault statute and joint and several liability statute required allocation of fault between allegedly negligent bank and nonparty murderer).

n69. Cf. *Ozaki v. Association of Apartment Owners*, 954 *P.2d* 652 (Haw. Ct. App.) (appeal of case in which jury found murderer 92% at fault, victim 5% at fault, and third party 3% at fault), rev'd in part on other grounds, 954 *P.2d* 644 (Haw. 1998).

n70. See, e.g., *Ortega v. Pajaro Valley Unified Sch. Dist.*, 75 *Cal. Rptr. 2d* 777 (Ct. App. 1998) (reversing jury verdict which found that school district bore 100% responsibility and teacher bore 0% responsibility for molestation of student); *Scott v. County of Los Angeles*, 32 *Cal. Rptr. 2d* 643, 659 (Ct. App. 1994) (remanding case where jury apportioned most fault to agency and employee who failed to visit child on a monthly basis and not to woman who intentionally burned six-year-old). But see *Hutcherson v. City of Phoenix*, 961 *P.2d* 449 (Ariz. 1998) (upholding jury determination that city whose 911 operators failed to dispatch timely assistance to victim was 75% responsible for victim's murder and murderer was 25% responsible).

n71. See Restatement 1999 Draft, *supra* note 11, 1 cmt. a reporters' note (acknowledging that the line between first-order issues involving rules of liability and second-order issues about apportioning a loss between two or more persons "has been difficult to maintain").

n72. It is difficult to understand why a jurisdiction would voluntarily embrace third-party liability as an initial matter, yet would then be willing to virtually eviscerate that obligation by requiring comparison with the intentional tortfeasor. The fact that some courts have done so appears to indicate both that comparative apportionment schemes have not been appropriately tailored to this problem, and that some courts continue to be ambivalent about the existence of third-party liability as an original matter. But if a desire to limit third-party liability is implicated in comparative apportionment cases, the method seems particularly paradoxical. Comparison of intentional and negligent fault could not only limit third-party liability but could also limit intentional tortfeasors' liability, through doctrines of contribution.

In addition, reducing third-party liability through comparison with intentional tortfeasor misconduct may have the paradoxical result of imposing less liability on third parties who expose plaintiffs to more egregious harms than it does on those who expose plaintiffs to less egregious harms, since third-party negligence will look proportionately less culpable when compared with more loathsome acts.

n73. See *Welch v. Southland Corp.*, 952 P.2d 162, 163 (Wash. 1998) (ruling that "intentional acts are not included in the statutory definition of 'fault,' and a defendant is not entitled to apportion liability to an intentional tortfeasor").

n74. See *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 606 (Kan. 1991) ("Negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); see also Restatement 1999 Draft, supra note 11, 24 ("A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person."). It had also been suggested that joint and several liability could be retained based on the legal fiction that the two tortfeasors acted in concert. See Restatement 1998 Draft, supra note 19, 24 cmt. b. Additional complexities are posed by comparison of intentional and negligent fault in states that have modified comparative fault regimes. See *Ozaki v. Association of Apartment Owners*, 954 P.2d 644, 649-50 (Haw. 1998) (negligent defendant would be jointly and severally liable with intentional tortfeasor for economic damages if its fault were greater than plaintiff's fault but not otherwise).

n75. See *Veazey v. Elmwood Plantation Assocs.*, 650 So. 2d 712, 719-20 (La. 1994) (stating that comparison of defendants' negligent and intentional torts would violate public policy when: 1) "the scope of [the third party's duty] clearly encompassed the exact risk of the occurrence which caused damage to plaintiff," 2) "application of comparative fault principles in the circumstances presented... would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future," and 3) "a true comparison of fault based on an intentional act and fault based on negligence" is not possible).

n76. See *Field v. Boyer Co.*, 952 P.2d 1078, 1081 (Utah 1998) ("[Utah's statute] provides the mechanism for attributing fault only to plaintiffs, defendants, and persons immune from suit. It does not contemplate allocations of fault to nonparty tortfeasors.").

n77. This Article does not address per se the initial question of whether and to what extent rapists and third parties should be liable. Compare *Leslie G. v. Perry & Assocs.*, 50 Cal. Rptr. 2d 785, 795 (Ct. App. 1996) ("we find it difficult to say that [the victim's landlord] owed her a duty to protect her from criminal acts that not even the entire Los Angeles Police Department can prevent"), with *Veazey*, 650 So. 2d at 719 (holding that third-party defendant could be liable for poor security and for security-related misrepresentations).

n78. See Dobbs, supra note 16, at 200 ("Contributory negligence of a plaintiff was never a defense to claims for intentionally inflicted harm.").

n79. See Restatement 1999 Draft, supra note 11, 1 cmt. c (applying comparative responsibility to intentional tort is not the majority rule, but it commands significant support in courts that have addressed the question, especially in cases apportioning damages among defendants).

n80. Restatement 1998 Draft, supra note 19, 1 cmt. a ("The intellectual underpinning of comparative responsibility and its single set of percentages to compare different parties is that a single injury is more or less unitary."). Often courts that apply this single set of percentages to intentional and negligent torts in several liability jurisdictions seem to be returning to formalist notions of "scientific causation." See Morton J. Horwitz, *The Doctrine of Objective Causation*, in *The Politics of Law* 360, 361 (David Kairys ed., 1990) (noting that within objective causation "above all, it was necessary to find a single 'scientific' cause and thus a single responsible defendant, for any acknowledgment of multiple causation would open the floodgates of judicial discretion"). Comparative apportionment schemes differ from traditional claims of objective causation by acknowledging multiple causes of an injury, but are nevertheless similar in their liability-limiting objectives and in their requirement that for each percentage of fault only a single defendant can be "truly" responsible.

n81. See, e.g., *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70 (La. Ct. App. 1989).

n82. See, e.g., *Provost v. Provost*, 617 So. 2d 1267 (La. Ct. App. 1993) (battery award reduced by plaintiff's negligence); *Jones v. Thomas*, 557 So. 2d 1015 (La. Ct. App. 1990).

n83. 539 So. 2d 70 (La. Ct. App. 1989).

n84. See *id.* at 72.

n85. *Id.* at 73.

n86. See *La. Rev. Stat. Ann.* 14:98, 14:98.1 (West 1986); *Morris*, 539 So. 2d at 73.

n87. See *Morris*, 539 So. 2d at 71-72.

n88. See *id.* at 72. Jellystone was at fault for informing the minors of where they could go to purchase alcohol illegally after refusing to sell them alcohol directly. Telephone conversation with Scott Silbert, plaintiff's attorney (July 15, 1998).

n89. See *Morris*, 539 So. 2d at 72-73.

n90. *Id.* at 77.

n91. *Id.* at 77-78.

n92. *Id.* at 78.

n93. *Id.*

n94. See *Morris v. Yogi Bear's Jelleystone [sic] Park Camp*, 542 So. 2d 1378 (La. 1989) (denying cert., noting that the case had not been appealed and therefore that review would not be appropriate).

n95. See *La. Civ. Code Ann. art. 2323(C)* (West 1997) (stating that "if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.").

n96. While many comparative apportionment states have statutes holding intentional tortfeasors jointly and severally liable for other defendants' negligent fault, see Restatement 1999 Draft, *supra* note 11, 22 cmt. b reporters' note, those statutes do not make intentional tortfeasors liable for any share of fault apportioned to the plaintiff.

n97. See Restatement 1999 Draft, *supra* note 11, 1 cmt. c reporters' note (noting that although much of the "growing support" for applying comparative responsibility to intentional torts "is in cases involving a comparison of defendants' responsibility, not a comparison of a defendant with a plaintiff," "some of the support" is "in cases comparing a plaintiff's responsibility with that of an intentional defendant."); see, e.g., *Ozaki v. Association of Apartment Owners*, 954 P.2d 644 (Haw. 1998); *Bonpua v. Fagan*, 602 A.2d 287, 288-89 (N.J. Super. Ct. App. Div. 1992); *Barth v. Coleman*, 878 P.2d 319, 322 (N.M. 1994). It is possible that despite the apparent consequences of comparing intentional tortfeasor and negligent plaintiff fault, some courts, when called upon to diminish defendants' damages, will craft ways to avoid this result.

n98. Although the draft contained vague language counseling courts to be "sensitive" to the concerns raised by an intentional tortfeasor's claim of victim comparative negligence, Restatement 1998 Draft, *supra* note 19, 1 cmt. c, it appeared to pose only one significant limitation on comparisons of rapist and rape victim fault - victim no-duty rules. See *id.* 3 cmt. d reporters' note. However, the no-duty concept proposed in the original draft was narrow and would have granted plaintiffs the same limited entitlements with respect to rapists and third parties, with the result that at least some comparisons of rapist and rape victim fault would have been likely. See *id.* For example, to the extent that a court found a victim had a duty to hotel to lock her hotel room door, the rapist too would have been able to diminish his legal liability based on this "victim fault." A few other sections of the draft may have diminished comparisons of rapist and rape victim fault, such as the draft's elimination of the affirmative defense of assumption of risk and its redefinition of comparative fault by reference to harms to others. But none of these provisions would have been likely to prevent all such comparisons.

n99. See *id.* 1 cmt. b reporters' note ("A decision to include intentional tortfeasors in a comparative responsibility system supports a decision to count the plaintiff's negligence as a percentage reduction against an intentional tortfeasor.").

n100. See *id.* 1 cmt. c (citing the difficulty in applying "different apportionment rules to different parts of the same lawsuit" as the second "rationale for including disparate bases of liability ... in a single system").

n101. Restatement 1999 Draft, *supra* note 11, 1 cmt. c.

- n102. See *McGill v. Duckworth*, 944 F.2d 344, 352 (7th Cir. 1991).
- n103. See Keeton et al., supra note 9, 65, at 453.
- n104. See, e.g., *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989).
- n105. 364 S.E.2d 392, 396 (N.C. 1988).
- n106. See *id.* at 396.
- n107. *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725, 735 (D. Minn. 1994).
- n108. See *id.*; see also *McGill v. Duckworth*, 944 F.2d 344, 353 (7th Cir. 1991) ("McGill sued his custodians, not the aggressors, and we have shown above that the custodians did not intentionally injure McGill. Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety....").
- n109. See *Zerangue v. Delta Towers, Ltd.*, 820 F.2d 130, 132 (5th Cir. 1987).
- n110. See *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328, 1331 (S.D.N.Y. 1996).
- n111. See *id.*
- n112. See *Ledbetter v. Concord Gen. Corp.*, 651 So. 2d 911, 913-14 (La. Ct. App. 1995).
- n113. See *Jackson v. Post Properties, Inc.*, 513 S.E.2d 259, 262-63 (Ga. Ct. App. 1999) (holding that "[a] question of fact exists as to the proper use of the window locks" and that "a jury must [also] determine whether [plaintiff's] move to a ground floor apartment was a failure to exercise ordinary care for her own safety").
- n114. See *Wassell v. Adams*, 865 F.2d 849, 855-56 (7th Cir. 1989).
- n115. See *Scott Fetzer Co. v. Read*, 945 S.W.2d 854, 858 (Tex. App. 1997), *aff'd*, *Read v. Scott Fetzer Co.*, 990 S.W.2d 732 (Tex. 1998).
- n116. See *Malone v. Courtyard by Marriott L.P.*, 659 N.E.2d 1242, 1246 (Ohio 1996).
- n117. See *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70, 77-78 (La. Ct. App. 1989). Within the context of third-party liability, the comparative apportionment cases are extremely similar to the majority approach: Third parties are presumptively allowed to take advantage of all victim comparative fault defenses. As such, where relevant to third-party liability, the comparative apportionment cases will be included in the status-based paradigm analysis.
- n118. See *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725, 735 n.5 (D. Minn. 1994) ("Without attempting to be exhaustive," the court listed many grounds for plaintiff's possible contributory negligence, including voluntary participation at certain times in consuming alcohol on the bus, "while in the company of one whose appearance forewarned others of his street-wise nature; an appearance that was corroborated when [the alleged rapist] advised the Plaintiff that he was a drug dealer.").
- n119. See *Malone*, 659 N.E.2d at 1243.
- n120. See *Cook*, 847 F. Supp. at 729, 735 n.5.
- n121. See *Wassell v. Adams*, 865 F.2d 849, 853 (7th Cir. 1989).
- n122. See *Malone*, 659 N.E.2d at 1244-45.
- n123. See *id.*; cf. *Dye v. Schwegman Giant Supermarkets, Inc.*, 599 So. 2d 413, 417 (La. Ct. App.) (noting victim's active resistance to robber and expert testimony that her response was "inappropriate"), *rev'd on other grounds*, 607 So. 2d 562 (1992).
- n124. See *Cook*, 847 F. Supp. at 728, 734 (defense accused plaintiff of contributory negligence for drinking with boisterous and visibly intoxicated rapist where plaintiff testified that the rapist "started pestering me about having a beer. I didn't want it, and I kept telling him I didn't want it. And finally I just took it so maybe I thought he would leave me alone, you know, because he kept pestering me, you know. That didn't work.").
- n125. Susan Estrich, Rape, 95 Yale L.J. 1087, 1118 (1986).

n126. See Margaret T. Gordon & Stephanie Riger, *The Female Fear* 112-13 (1989) (describing the myriad ways in which women change their conduct because of their fear of rape).

n127. *865 F.2d 849 (7th Cir. 1989)*.

n128. See *id. at 850-51*.

n129. See *id. at 851*.

n130. See *id.*

n131. *Id. at 853*.

n132. *Id. at 852*.

n133. See *id. at 852*.

n134. *Id. at 854*.

n135. *Id. at 856*.

n136. See *id.* ("If we were the trier of fact," the court wrote, "persuaded that both parties were negligent and forced to guess about the relative costs to the plaintiff and to the defendants of averting the assault, we would assess the defendants' share at more than 3 percent.").

n137. See William Powers, Jr., *Border Wars*, *72 Tex. L. Rev. 1209, 1210-11 (1994)* (noting that unlike the "property paradigm" which "gives individuals entitlements to do as they please with their own property," tort law "requires people to act reasonably under the circumstances").

n138. See *Wassell, 865 F.2d at 856* ("The cost of the security guard, whether on all nights or just on busy nights - or just on unbusy nights - might be much greater than the monetary equivalent of the greater vigilance on the part of Susan that would have averted the attack.").

n139. *Id. at 855*.

n140. The incommensurability problem with the risk-utility test is not exclusive to the rape context. See Cass R. Sunstein, *Incommensurability and Valuation Law*, *92 Mich. L. Rev. 779, 795-99 (1994)* (showing some ways in which economic analysis misses other normative commitments); see also Michael D. Green, *Negligence = Economic Efficiency: Doubts*, *75 Tex. L. Rev. 1605, 1640-42 (1997)* (noting that the "incommensurability problem" is one impediment to an economic risk-utility test).

n141. The concern that courts cannot adequately review jury determinations in comparative fault schemes has been raised as a critique of comparative fault more broadly. See Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, *57 Tenn. L. Rev. 199, 234 (1990)* (citing critics of comparative fault who contend that juries' apportionment of fault with percentages is "uncontrollable"). Those concerns are particularly acute when "strict liability" torts and intentional torts are added to the mix, since courts in such cases have even less clear standards for how jurors are supposed to apportion fault. See Geoffrey C. Hazard, Jr., *Foreword to Restatement 1998 Draft*, *supra* note 19 (noting that comparisons "between an actor charged with negligence and an actor charged with intentional misconduct" are "impossible in theory," but nevertheless maintaining that this comparison has proved "entirely feasible in practice").

n142. *Wassell, 865 F.2d at 855* (noting that a warning against opening doors to strangers is unnecessary information for a reasonable person - "everyone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night").

n143. *Id.*

n144. See *id. at 853* (restating defendant's argument that "a warning would have been costly - it might have scared guests away").

n145. See *Cook v. Greyhound Lines, Inc.*, *847 F. Supp. 725, 735 & n.5 (D. Minn. 1994)*.

n146. While there is a high correlation between alcohol use and victimization, it is still a leap to assume that but for the victim's consumption of alcohol she would not have been raped. It is not clear whether the jury would have made that leap in this case, but it is certainly easy to see how it, or a jury in a similar case, might do so.

n147. See *Tanja H. v. Regents of the University of California*, 278 Cal. Rptr. 918 (Ct. App. 1991) (university was not liable to student acquaintance rape victim because of its failure to enforce its policy against underage drinking in dormitories).

n148. 952 P.2d 1078, 1082 (Utah 1998) (Stewart, J., concurring in part and dissenting in part).

n149. *Id.* at 1088 (Stewart, J., concurring in part and dissenting in part). In support of this proposition, Justice Stewart quoted a Michigan case that found that "[a] person's obligation to guard himself from injury caused by design is insignificant, if existent at all, compared to his obligation to guard himself from injury caused by another's simple lack of care." *Id.* at 1084 n.4 (Stewart, J., concurring in part and dissenting in part) (quoting *Melendres v. Soales*, 306 N.W.2d 399, 403 (Mich. 1981)).

n150. At least one other court's holding appears consistent with that principle. In *Perkins v. Spivey*, 911 F.2d 22 (8th Cir. 1990), the appellate court refused to allow a third-party defendant to assert that a rape victim, who had been repeatedly raped by a superintendent, assumed the risk of rape. The court held that the woman "did not, and could not, assume the risk of rape whatever her knowledge of the risk." *Id.* at 32. The court reached its conclusion by examining the contractual underpinnings of the assumption of risk doctrine. It then found that "given the state's strong policy against [violent acts such as rape], we do not believe Kansas courts would sanction a contract, whether implied or express, with such an illegal subject matter." *Id.*

n151. 374 S.E.2d 761, 762-63 (Ga. Ct. App. 1988).

n152. *Id.* at 766.

n153. See *id.*

n154. *Id.*

n155. A sympathetic reading of the Hawaii Supreme Court's decision in *Dunlea v. Dappen*, 924 P.2d 196 (Haw. 1996), also suggests a limited rape victim no-duty concept. The Dunlea court noted that the comparative fault defenses asserted by a father who allegedly raped his minor daughter were so "offensive," "frivolous," and "repugnant" that their mere assertion "would have warranted appropriate sanctions." *Id.* at 200 n.6. However, because a case decided by the Hawaii Supreme Court two years later (*Ozaki v. Association of Apartment Owners*, 954 P.2d 644 (Haw. 1998)) would apparently allow a murderer to reduce his liability for murder because of the victim's comparative negligence, the court's refusal to allow a comparative fault defense in Dunlea would seem to be based on the victim's particular entitlement - as a child, or as a rape victim.

n156. See *Carmen P. v. PS & S Realty Corp.*, 687 N.Y.S.2d 96, 99 (App. Div. 1999) ("Plaintiff did look through her peephole and only opened the door in the mistaken belief that the intruder was a UPS delivery man. It is for the jury to decide whether to reduce or deny her recovery based on this action.").

n157. Restatement 1999 Draft, supra note 11, 3 cmt. d.

n158. See *id.* 3 cmt. d reporters' note.

n159. See *id.* ("The entitlement insulates the individual from an ad hoc, post hoc evaluation of his or her conduct by a jury.").

n160. The Restatement 1998 Draft originally attempted to outline specific cases in which a no-duty rule would be appropriate. See Restatement 1998 Draft, supra note 19 3(d). However, those attempts ran into difficulty because the specific enumeration of particular entitlements seemed to suggest an underlying lack of entitlements, which was particularly problematic in light of the Draft's apparent support for comparing plaintiff and intentional tortfeasor fault.

n161. *McLain v. Training and Dev. Corp.*, 572 A.2d 494, 497 (Me. 1990); Dobbs, supra note 16, 200; Keeton et al., supra note 9, 67, at 477-78.

n162. See Gail D. Hollister, Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault, 46 Vand. L. Rev. 121, 132 (1993).

n163. See *id.*

n164. However, after the adoption of comparative apportionment schemes, some attention has been paid to entitlement concepts because courts no longer have any other way in which to limit defenses of victim fault.

n165. The Restatement 1998 Draft originally applied no-duty rules as the sole limit on comparisons of plaintiff and intentional tortfeasor fault. However, the Restatement 1999 Draft acknowledges that not only may no-duty rules apply, but also in some jurisdictions a plaintiff's negligence does not reduce recovery from an intentional tortfeasor, although it could reduce recovery from other tortfeasors.

n166. Roscoe Pound, *An Introduction to the Philosophy of Law* 169 (1925).

n167. See Calabresi & Melamed, *supra* note 15, at 1090 ("The first issue which must be faced by any legal system is one we call the problem of 'entitlement.'").

n168. See, e.g., *Kentucky Fried Chicken, Inc. v. Superior Court*, 927 P.2d 1260 (Cal. 1997) (rejecting shopkeeper's duty to comply with intentional tortfeasor's unlawful demand as contrary to public policy because it would encourage similar unlawful conduct); *Hill v. Charlie Club, Inc.*, 665 N.E.2d 321 (Ill. App. Ct. 1996) (finding that it is not reasonable to impose duty on hotel owner to investigate in order to discover every known offender who might enter premises).

n169. See, e.g., *Timberwalk Apartments Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) ("If a landowner had a duty to protect people on his property from criminal conduct whenever crime might occur, the duty would be universal. This is not the law.").

n170. See *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328, 1332 (S.D.N.Y. 1996).

n171. See *Ledbetter v. Concord Gen. Corp.*, 651 So. 2d 911, 915 (La. Ct. App. 1995).

n172. Cf. *McGill v. Duckworth*, 944 F.2d 344, 353 (7th Cir. 1991) ("Under Indiana law a guard such as Webb is entitled to assume that the prisoners will exercise care for their own safety...."); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1566 (7th Cir. 1987) ("Due care is the care that is optimal given that the other party is exercising due care. It is not the higher level of care that would be optimal if potential tort victims were required to assume that the rest of the world was negligent." (citations omitted)).

n173. *Timberwalk*, 972 S.W.2d at 756 (quoting *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 56 (Tex. 1997)).

n174. *Id.* at 757. To find crime foreseeable, "there must be evidence that other crimes have occurred on the property or in its immediate vicinity." *Id.* (holding that one sexual assault within a one-mile radius in the previous year, and six assault-type crimes in a neighboring apartment complex, did not make rape by person who allegedly came in unlocked access gate and sliding door in victim's apartment foreseeable).

n175. Third parties need not necessarily keep themselves informed about safety issues. See *id.* at 759 ("Property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area.").

n176. See, e.g., *R.B.Z. v. Warwick Dev. Co.*, 725 So. 2d 261, 264 (Ala. 1998) (stating that a rape that resulted from an apartment complex's failure to institute safety precautions to protect master keys was not foreseeable because there "was no showing of any prior misuse of a master key" in this complex, even though the complex manager's husband had been previously convicted of rape). See also *Boren v. Worthen Nat'l Bank*, 921 S.W.2d 934, 940 (Ark. 1996) (recognizing "the duty of a business owner to protect its patrons from criminal attacks... only where the owner or its agent was aware of the danger presented by a particular individual or failed to exercise proper care after an assault had commenced").

n177. See, e.g., Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 *Chi.-Kent L. Rev.* 313 (1993).

n178. See generally Elizabeth Stenko, *The Case of Fearful Women: Gender, Personal Safety and the Fear of Crime*, in 4 *Women and Criminal Justice* 117 (1992); see also Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women's L.J.* 81, 94 (1987) (arguing that women respond to pervasive fear of violent male sexuality by "redefining" themselves).

n179. *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328, 1333 (S.D.N.Y. 1996).

n180. Cf. Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 *U. Chi. L. Rev.* 1219, 1232 (1986) (arguing that women's interests in employment are too "easily trumped" by a potential fetus through sex-specific fetal vulnerability policies in the workplace).

n181. Violence Against Women Act of 1993, H.R. Rep. No. 103-395, at 25 (1993).

n182. See Bureau of Justice Statistics, U.S. Department of Justice, Special Report NCJ- 126826, Female Victims of Violent Crime 2 (1996) ("In 1992-1993, a majority of women victims (78%) indicated that the offender who victimized them was a person known to them, sometimes intimately.... This is in contrast to the victim-offender relationships in male victimization that more frequently involve strangers."); cf. Katherine Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, *110 Harv. L. Rev.* 568, 576-78 (1997) (outlining research that suggests that "the class of rapists is neither small nor particularly likely to be depraved").

n183. See Steven R. Schlesinger, How Justice Department Collected the Data for its Rape Study, *N.Y. Times*, May 24, 1985, at A24 (noting that its recent study "The Crime of Rape" concluded that "a third of the completed rapes occurred in the home").

n184. See Bender, *supra* note 29, at 579 (interspousal tort immunity bars wives from recovering for rape, suggesting that a woman assumes the risk of rape by marrying a man).

n185. Some courts have taken a restrictive view of a woman's duty to take precautions to protect others from a violent husband. See *Fiala v. Rains*, 519 N.W.2d 386 (Iowa 1994) (woman had no duty to warn date about her extremely jealous ex-boyfriend). A contrary view could let his violence control her life. See, e.g., *Wilkins v. Siplin*, 13 Cal. Rptr. 2d 634, 635 (Ct. App. 1992) (finding woman negligent for failing to warn co-worker of husband's violence and letting husband into locked cabin, and therefore liable for her husband's assault upon male co-worker).

n186. Of course, the duty of due care is a duty of due care under the circumstances, and a jury can take account of exigent circumstances. But not all people will be able to take reasonable care when faced with a situation of crime against them - maybe a woman exercising due care in this exigent situation should have run earlier, but this woman, for whatever reasons, was unable to take that care. To penalize people for not being rational in moments of the most extreme irrationality (crime) seems like a bad idea from the outset. Good Samaritan laws have provided ex ante protection to others in just these kinds of exigent circumstances. The emergency doctrine provides even broader protection in states in which it applies.

n187. "Nearly two-thirds of all forcible rapes occurred during childhood and adolescence." Panel Discussion, Men, Women and Rape, *63 Fordham L. Rev.* 125, 136 (1994).

n188. It is foreseeable that some children may not be able to take appropriate care to protect themselves from rape. The legal system should be set up around that assumption. Cf. *Zerby v. Warren*, 210 N.W.2d 58, 62 (Minn. 1973) ("Rape may be the one area in which it is important to encourage supervision of the trial process.").

n189. See generally *Restatement (Second) of Torts* 463 cmt. b (1965); Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, *75 Tex. L. Rev.* 1801, 1828 (1997) (harms to self, or to others' financial interests, do not give rise to the same moral indignation as physical harms to others).

n190. See Dan B. Dobbs, Accountability and Comparative Fault, *47 La. L. Rev.* 939, 943 (1987) (noting that "the lodestone at the center of tort law is the common belief that people ought to be held accountable for their wrongs and correlatively responsible for themselves," but outlining a limited duty/risk principle that should survive under comparative fault); see also George P. Fletcher, Fairness and Utility in Tort Theory, *85 Harv. L. Rev.* 537, 551-56 (1972) (arguing that strict liability may be the appropriate moral rule for nonreciprocal risk creation).

n191. See *Parish v. Truman*, 603 P.2d 120, 122 (Ariz. Ct. App. 1979).

n192. See Dobbs, *supra* note 190, at 970 ("A defendant who inflicts an unreasonable risk upon multitudes of people and does so by a condition that remains risky not for a few moments but over a long period of time, must anticipate that some of those upon whom the risk is inflicted may be in no position to protect themselves.").

n193. At times, third-party precautions may affect citizens' liberties. For example, security cameras may raise privacy concerns. Similarly, equality concerns could also affect third parties. For example, it would be problematic if Jewish organizations were held to have greater obligations than other community organizations due to the fact that Jewish institutions might be subject to increased risk of violent hate attacks. Direct restrictions upon third-party precautions that overly restrict citizens' freedom or equality may be warranted in some situations.

n194. Doctrines relating to invitees are an example of this, as are recreational use statutes.

n195. See Francis H. Bohlen, The Basis of Affirmative Obligations in the *Law of Tort*, *53 Am. L. Reg.* 209, 220 (1905) ("This, then, is the original conception of a duty to take precaution to insure the safety of others who have

voluntarily come into contact with the obligor. It was an incident of the assumption of a business carried on for gain....").

n196. See Robert L. Rabin, Some Thoughts on the Ideology of Enterprise Liability, 55 *Md. L. Rev.* 1190, 1192 (1996).

n197. This concept is similar to the problems raised by unconstitutional conditions. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 *Harv. L. Rev.* 1413 (1989) (arguing for a broad construction of the doctrine of unconstitutional conditions that precludes government from granting a benefit on the condition that the beneficiary surrender a constitutional right).

n198. 232 *U.S.* 340, 350 (1914).

n199. 511 *S.W.2d* 255, 259-60 (Tex. 1974).

n200. See *id.* at 260 ("Plaintiff could have remained inside his house, but in doing so, he would have surrendered his legal right to proceed over his own property.... The latter alternative was forced upon him against his will and was a choice he was not legally required to accept.").

n201. In these cases, the harm done by the plaintiff's exercise of rights is more certain than in the rape context. See *Munn v. Algee*, 924 *F.2d* 568 (5th Cir. 1991) (jury should consider the religion of husband and wife in determining reasonableness of refusing a blood transfusion following an automobile accident); cf. *Montgomery v. Terminal R. Assoc.*, 392 *N.E.2d* 77 (Ill. App. 1979) (railroad worker had no duty to undergo back surgery to mitigate injuries suffered in an accident).

n202. See *Hopper v. Carey*, 1999 *WL* 744151 (Ind. Ct. App.) (barring contributory negligence claim on the basis that a driver did not have a "duty" to wear a seat belt); see also *Davis v. Knippling*, 576 *N.W.2d* 525, 528-29 (S.D. 1998) ("A clear majority of states have judicially refused to admit evidence of a plaintiff's nonuse of an available seat belt as proof of failure to mitigate damages likely to occur in an automobile accident.").

n203. Gregory C. Keating, The Idea of Fairness in the Law of Enterprise Liability, 95 *Mich. L. Rev.* 1266, 1277-83 (1997) (arguing against "the implicit premise that persons are always and everywhere obligated to arrange their lives in ways that maximize overall social wealth").

n204. See *id.* at 1376.

n205. *Id.* at 1314.

n206. See Becker, *supra* note 180, at 1222.

n207. See *Wassell v. Adams*, 865 *F.2d* 849 (7th Cir. 1989).

n208. See Baker, *supra* note 182, at 587 ("The most comprehensive study of citizens' perceptions of rape found that sixty-six percent of one sample group believed that women's behavior or appearance provokes rape." (citing Field & Bienen, *supra* note 29, at 54-57)).

n209. See, e.g., Sandra Davidson, Blood Money: When Media Expose Others to Risk of Bodily Harm, 19 *Hastings Comm. & Ent. L.J.* 225, 228 (1997) (listing cases highlighting the tension between First Amendment freedoms and civil liability). The rape context is considerably more sympathetic than the free speech context because a rape victim's conduct poses a risk only to herself, while the publications at issue in the free speech cases posed risks to others - less deserving candidates for privilege. In addition, many of the First Amendment cases involve commercial speech.

n210. Compare *Hutcherson v. City of Phoenix*, 961 *P.2d* 449, 451 (Ariz. 1998) (complete deference to the jury), with *New York Times v. Sullivan*, 376 *U.S.* 254, 285 (1964) (clear and convincing evidence based on the appellate court's independent examination of the whole record).

n211. See Keating, *supra* note 203, at 1376 ("People do not forfeit a share of their authority over their own lives and property simply because they suffer the misfortune of having those lives and that property violated by accidental injury.").

n212. That males, particularly subpopulations of men such as boys and prisoners, are subject to rape does not diminish the gendered nature of the crime. See Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 *Cornell L. Rev.* 1169, 1200-82 (1998) (citing Catharine MacKinnon for the argument that "sexual abuse of men by men

is a phenomenon deeply connected with the subordination of women"); Katherine Franke, What's The Wrong of Sexual Harassment?, *49 Stan. L. Rev.* 691, 696 (1997) ("Sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex, not because it is sexual, and not because men do it to women, but precisely because it is a technology of sexism.").

n213. *944 F.2d 344 (7th Cir. 1991)*.

n214. *Id. at 350*.

n215. See *id. at 351*.

n216. *Id. at 351*.

n217. *Id.*

n218. *Id. at 352-53* (citation omitted).

n219. *Id. at 353*.

n220. An overbroad notion of assumption of risk would allow a shopkeeper who failed to properly care for an icy parking lot to claim that an elderly plaintiff who slipped on the ice "could have refrained... from leaving her home in inclement weather when she was well aware of the icy conditions outside." *Id. at 355* (Cudahy, J., concurring in part and dissenting in part).

n221. *Id.* (Cudahy, J., concurring in part and dissenting in part).

n222. *Id. at 354* (Cudahy, J., concurring in part and dissenting in part).

n223. See Wex S. Malone, Some Ruminations on Contributory Negligence, *1981 Utah L. Rev.* 91.

n224. See *Metropolitan Atlanta Rapid Transit Auth. v. Allen (MARTA)*, 374 S.E.2d 761 (Ga. Ct. App. 1988).

n225. But see *Malone v. Courtyard by Marriott L.P.*, 659 N.E.2d 1242 (Ohio 1996) (affirming verdict that hotel was not liable to one rape victim for failure to respond to emergency calls because rape victim had voluntarily gone drinking with the acquaintance who raped her, and granting hotel new trial on jury verdict awarding damages to the other rape victim).

n226. Ronald V. Clarke, Situational Crime Prevention, *19 Crime & Just.* 91, 105 (1995) (citations omitted). Target hardening is making the target of a crime less accessible. See *id. at 110*.

n227. See *id. at 115-16*.

n228. See H. Jane Lehman, *supra* note 57, at 1 (against the backdrop of successful lawsuits brought by crime victims for landlords' "shoddy security practices," "property owners and managers are starting to take more extensive security precautions, according to the rental property industry").

n229. See *McLean v. Kirby Co.*, 490 N.W.2d 229, 239 (N.D. 1992) (employee who had been convicted of two assault charges with weapons earlier in the year and had a charge of criminal sexual conduct pending against him used company "gift" set of knives to rape plaintiff in her home on the pretense of demonstrating Kirby vacuum cleaners); see also *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 n.1 (Tex. 1998) ("As a result [of a prior lawsuit, defendant] put warnings in its training manuals of the need to do a 'thorough criminal background check.'").

n230. *McClung v. Delta Square L.P.*, 937 S.W.2d 891, 904 n.13 (Tenn. 1996).

n231. See Accidents and Murders Cause Most Job Deaths, *N.Y. Times*, April 25, 1998 at A16 (the Center for Disease Control estimates that homicide is now the second leading cause of death for workers).

n232. See *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 460 (Tex. App. 1991).

n233. See Jo Thomas, Experts Take a 2d Look at Virtue of Student Jobs, *N.Y. Times*, May 13, 1998 at A16.

n234. See *Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 469 (Tex. App. 1991).

n235. *McGill v. Duckworth*, 944 F.2d 344, 352 (7th Cir. 1991).

n236. See, e.g., Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, *67 B.U. L. Rev.* 213 (1987).

n237. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 *Cardozo L. Rev.* 1693, 1702-07 (1995) (distinguishing victim negligence from victim strict responsibility).

n238. The current baseline is problematic from both an antistatutory and a formal equality perspective.

n239. "Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender." Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1301 (1991); see also Brande Stellings, Note, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 *Harv. C.R.-C.L. L. Rev.* 185, 185 (1993) ("All of the precautions in the world cannot eradicate the single biggest risk factor for rape - [women's] femaleness.").

n240. See Gordon & Riger, *supra* note 126, at 4-5; see also Kenneth F. Ferraro, *Fear of Crime: Interpreting Victimization Risk* 85 (1995) ("Virtually all investigations which examine fear across different victimizations show important gender effects for each offense as well as for overall fear.").

n241. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 *Harv. L. Rev.* 517, 539 (1993) (noting limitations on mobility as a result of rape and harassment, for instance "whether to go to the movies alone, where to walk or jog, whether to answer the door or telephone").

n242. Whether rape is a hate crime has been a topic of recent debate. Compare Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 *Harv. Women's L.J.* 123, 124-25 (1999) ("Congress, in enacting the 1994 Violence Against Women Act, expressly recognized the connections among domestic violence, rape, and sexual assault and other hate crimes."), with Owen D. Jones, *Sex, Culture and the Biology of Rape: Toward Explanation and Prevention*, 87 *Cal. L. Rev.* 827, 924 (1999) ("While it is possible that a statutory mechanism designed to deter and fairly compensate for violent hate crimes [VAWA] may be equally effective in the context of sexual violence, 'biobehavioral theories suggest that view may be overly optimistic.'").

n243. See *Wisconsin v. Mitchell*, 508 *U.S.* 476, 488 (1993) (upholding Wisconsin's sentence enhancement for bias-related crime enacted because "this conduct is thought to inflict greater individual and societal harm").

n244. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320, 2376 (1989) ("The constitutional commitment to equality and the promise to abolish the badges and incidents of slavery are emptied of meaning when target-group members must alter their behavior, change their choice of neighborhood, leave their jobs, and warn their children off the streets because of hate group activity.").

n245. The vast majority of rape victims are women. It is estimated that 1-10% of rape victims are male. However, homosexual rape may be particularly subject to underreporting and may be significantly higher for particular subpopulations which include prisoners and minors. See Stellings, *supra* note 239, at 186 n.3.

n246. However, those categories need not be understood as essential or biologically determined. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. Pa. L. Rev.* 1, 2 (1995) (arguing that sexual identity "must be understood not in deterministic, biological terms but according to a set of behavioral, performative norms").

n247. See MacKinnon, *supra* note 239, at 1302 ("Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status."). The same critique would apply if, for example, a defendant were to argue that an African American plaintiff did not act reasonably when she moved into neighborhood in which racist violence had been threatened.

n248. See Stellings, *supra* note 239, at 188 (arguing that rape diminishes capacity of women to participate in society). To the extent that it is actually effective, imposition of a legal duty curtails women's liberty; to the extent that it is not effective, it imposes the symbolic harms addressed *infra* without any arguable reduction of the harm. Whether the harm is purely symbolic or instrumental as well does not alter the analysis. "The impact of the symbolic and instrumental effects of rape law reform were intended to be complementary." Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 *J. Crim. L. & Criminology* 554, 555 (1993).

n249. "Gender-based violence bars its most likely targets - women - from full [participation] in the national economy." S. Rep. No. 103-138 at 54 (1993).

n250. See *Jackson v. Post*, 513 S.E.2d 259, 263 (Ga. Ct. App. 1999) (holding that the jury "must determine whether [plaintiff's] move to a ground floor apartment was a failure to exercise ordinary care for her safety").

n251. "Victimization rates of men exceed those of women in all violent crime categories except rape and sexual assault." Bureau of Justice Statistics, *supra* note 182, at 3.

n252. See, e.g., *Wassell v. Adams*, 865 F.2d 849, 851 (7th Cir. 1989) (noting that the hotel owners sometimes warned "women guests" about the crime in the area); Gordon & Riger, *supra* note 126, at 113-14.

n253. Gordon & Riger, *supra* note 126, at 113.

n254. *Id.* at 114.

n255. "In 1994 women were about two-thirds as likely as men to be victims of violence." Bureau of Justice Statistics, *supra* note 182, at 1.

n256. Gordon & Riger, *supra* note 126, at 114.

n257. *Id.* at 115.

n258. This legal strategy attempts to control crime by controlling its victims. See Molly Giles, *Obscuring the Issue: The Inappropriate Application of In Loco Parentis to the Campus Crime Victim Duty Question*, 39 *Wayne L. Rev.* 1335, 1348 (1993).

n259. Becker, *supra* note 180, at 1222.

n260. Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction", 93 *Colum. L. Rev.* 374, 392 (1993).

n261. See Giles, *supra* note 258, at 1349.

n262. See Becker, *supra* note 180, at 1258-60 (noting that employers are unlikely to adopt gender-exclusive policies with respect to men's heightened risks. The employer would more likely remove the hazards than remove the men.).

n263. See generally Susan Estrich, *Sex at Work*, 43 *Stan. L. Rev.* 813, 814-16 (1991).

n264. *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70, 78 (La. Ct. App. 1989).

n265. See *Miles v. Louisiana Landscape Specialty*, 697 So. 2d 348, 351 (5th Cir. 1997) ("comparative fault is not applicable to the intentional tort of sexual assault and battery of a minor"). This result might have been shaped solely by Louisiana's change in law. It is difficult to know whether the same result might nevertheless have been reached under the prior law.

n266. See *Peterson v. Gibraltar Sav. & Loan*, 711 So. 2d 703, 714 (La. Ct. App. 1998), *rev'd on other grounds*, 733 So. 2d 1198 (La. 1999).

n267. *Zerangue v. Delta Towers, Ltd.*, 820 F.2d 130, 132 (5th Cir. 1987) (emphasis added).

n268. For a discussion of principles of formal equality, see, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, in *Feminist Jurisprudence* 82, 82-90 (Mary Becker et al. eds., 1994).

n269. In cases of victimization, "asking juries and judges to decide what a reasonable woman would have done may generate new stereotypes about appropriate sexual behavior for all women...." Larson, *supra* note 260, at 470. This is not to suggest that the reasonable woman standard may not make sense in other contexts in which it furthers anti-subordination goals. See, e.g., Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified* 32-45 (1987); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 *Cornell L. Rev.* 1398, 1404-06 (1992). In some other contexts, the reasonable woman standard acknowledges the reality of women's lives, rather than translating that reality into subordination. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (noting that the reasonable person standard "tends to be male-biased and tends to systematically ignore the experiences of women").

n270. "Society views women who drink as sexually promiscuous and acceptable targets for sexual assault." Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 *Stan. L. Rev.* 115, 121 (1994). Under society's double standard regarding intoxication, "if the rapist was drunk, it reduces his

culpability, but if the victim was drunk, it increases her culpability." *Id.* at 115. "Society demands that if [a woman] wants to avoid being the target of sexual aggression, she should not participate in social drinking." *Id.* at 122.

n271. See *Malone v. Courtyard by Marriott L.P.*, 659 N.E.2d 1242, 1248 (Ohio 1996) (upholding jury verdict finding victim who recently met and went to bars with attacker 51% at fault, which fault ultimately barred her recovery); cf. E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexual" Standard, 18 *Berkeley J. Emp. & Lab. L.* 56, 82 (1997) ("The reasonable person standard is ideally suited for subordinating sexual minorities who do not conform to the majority's norms.").

n272. Compare *Scott Fetzer Co. v. Read*, 945 S.W.2d 854, 862 (Tex. App. 1997), with *Malone*, 659 N.E.2d at 1248.

n273. See *Scott Fetzer Co.*, 945 S.W.2d at 862 (discussing risk to homebound women of ill-intentioned salespeople).

n274. See *Ledbetter v. Concord Gen. Corp.*, 651 So. 2d 911 (La. Ct. App. 1995) (grandmother who was employed as "traveling salesperson" was 35% at fault for rape that occurred in her hotel room with her granddaughter present because she did not double-check door lock before going to sleep).

n275. See *Malone*, 659 N.E.2d at 1248.

n276. See Amy Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law, 63 *U. Cin. L. Rev.* 269, 284 (1994) ("It is not enough to say that Wassell knew about male violence and therefore should have known not to operate the door. Judge Posner's conclusion depends on something more. It depends upon an image of violence awaiting Wassell on the other side of the motel-room door. If it was not dangerous outside, then it could not have been careless to open the door. Is every outside dangerous?").

n277. See *Peterson v. Gibraltar Sav. & Loan*, 711, So. 2d 703, 705 (La. Ct. App. 1998) ("As he exited the interior of the building and entered the parking garage, two black men dressed in blue jeans and T-shirts forced him into a car at gunpoint" and raped him), rev'd, 733 So. 2d 1198, 1200 (La. 1999) (also noting that the attackers were "two black men"); Kastely, supra note 276, at 280-86 (citing, e.g., *Wassell v. Adams*, 865 F.2d 849, 851 (7th Cir. 1989) ("it was a respectably dressed black man")).

n278. See *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328, 1331 (S.D.N.Y. 1996) (noting that the rapist "did not look suspicious"); *Malone v. Courtyard by Marriott L.P.*, 641 N.E.2d 1159, 1162 (Ohio Ct. App. 1994) (describing the rapist as professionally dressed).

n279. See generally Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 *U. Miami L. Rev.* 127, 150-55 (1987) (discussing harms of racist assumptions).

n280. Cf. Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 *S. Cal. Rev. L. & Women's Stud.* 133, 182 (1992) (noting that the best interest of the child standard is so open-ended it "facilitates the operation of all forms of bias," and discussing several forms of bias against women that arise in cases decided under that standard).

n281. See generally Cass R. Sunstein, On the Expressive Function of Law, 144 *U. Pa. L. Rev.* 2021 (1996).

n282. See *id.* at 2026 ("Prevailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces, possibly including law." (footnote omitted)).

n283. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (stating that an accounting firm could not use gender-stereotyped criteria in making partnership decisions).

n284. S. Rep. No. 102-197 at 47 (1991) (quoting testimony of Gill Freeman, "Women and Violence," hearing before the Senate Judiciary Committee).

n285. If the First Amendment requires extensive limits on tort law actions, see, e.g., *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (First Amendment barred wrongful death action against filmmaker even though murderer had just seen its film about gang violence, "The Warriors," and had uttered a line from the film while committing the murder.); *BJF v. Florida Star*, 491 U.S. 524 (1989) (First Amendment prohibited imposition of civil damages against newspaper for publishing rape victim's full name in violation of state statute), it would seem that the Fourteenth Amendment could require similar limitations. For example, the Constitution could bar state tort law from explicitly requiring women to act in gender-specific ways in order to receive financial compensation through the state's tort system. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (action of state courts in enforcing private race-restrictive

covenant constitutes state action for purposes of the Fourteenth Amendment). The problem seems no less difficult because the state itself has not articulated an explicitly discriminatory rule, but has instead delegated excess discretion to jurors to make such discriminatory decisions. See *Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (holding that a defendant's discriminatory exercise of a peremptory challenge is state action and a violation of Equal Protection); cf. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (delegation of regulatory power to churches violates First Amendment); *Buyeks-Roberson v. Citibank*, 162 F.R.D. 322, 330 (N.D. Ill. 1995) (plaintiffs could bring class action race discrimination claim based on practice of excess subjectivity in decision-making). That said, I am dubious about increasing efforts to constitutionalize the law. See *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (1999) (ruling that state tort law claims were barred by Noerr-Pennington). And it seems that even in the First Amendment context, many of the laws that do not jail a speaker or suppress an idea, but merely require that the speaker bear the financial costs of the foreseeable harm caused by his speech, ought to be curbed, when appropriate, by prudential rather than constitutional limits.

n286. See Calabresi, *supra* note 16, at 34.

n287. Cf. *Rejent v. Liberation Publications, Inc.*, 197 A.D.2d 240, 245 (N.Y. App. Div. 1994) ("The notion that while the imputation of sexual immorality to a woman is defamatory per se, but is not so with respect to a man, has no place in modern jurisprudence. Such a distinction, having its basis in a gender-based classification, would violate constitutional precepts.").

n288. Calabresi, *supra* note 16, at 83.

n289. See generally Stenko, *supra* note 178; see also West, *supra* note 178.

n290. Restatement (Second) of Torts ch. 17 scope note (1965) (emphasis added).

n291. Keeton et al., *supra* note 9, 65, at 451.

n292. See Special Verdict Form, *Ozaki v. Association of Apartment Owners*, Civ. No. 91-3551-10, at 2-3 (Haw. 1st Cir. Ct. May 2, 1994) (asking the jury "Was the [murdered plaintiff] negligent?," and "Was the negligence of [plaintiff] a legal cause of the injury to the Plaintiff?" and reporting an answer in the affirmative to each question).

n293. Estrich, *supra* note 125, at 1094.

n294. See *id.*; Gordon & Riger, *supra* note 126, at 120.

n295. See Panel Discussion, *supra* note 187, at 127, 131 ("Rape is different because it overwhelmingly involves male perpetrators and female victims" and "because of the shame and stigma associated with it and the resulting psychological and physical harm" (footnote omitted)); *Kukla v. Syfus Leasing Corp.*, 928 F. Supp. 1328, 1332 (S.D.N.Y. 1996) ("Although her boyfriend arrived and tried to comfort her, her reaction was to apologize repeatedly, as if she had done something wrong.").

n296. See Bender, *supra* note 29, at 586.

n297. See Estrich, *supra* note 1, at 32.

n298. Dorothy E. Roberts, Book Review, 44 *J. Legal Educ.* 462, 462 (1994).

n299. *Id.* at 464.

n300. Permitting defendants to assert the plaintiff's alleged contribution to the rape may also encourage defendants to assert racist stereotypes of "chronically promiscuous" African American women, since defendants are exculpated from liability for their own negligence to the extent that they can portray the rape victim as having "asked for it." See Darci E. Burrell, Myth, Stereotype, and the Rape of Black Women, 4 *UCLA Women's L.J.* 87, 89 (1993) (citing Angela Y. Davis, Rape, Racism and the Myth of the Black Rapist, in *Women, Race & Class* 172, 182 (1983)).

n301. In the context of criminal rape law, where there has been reform over time, one statistical analysis concludes that a "symbolic effect that rape law reform may have had... is a reduction in rape victims' perceptions that the legal process would stigmatize them, which in turn made them more likely to report their victimization." Bachman & Paternoster, *supra* note 248, at 574. In addition, "subsequent to rape law reforms, rape offenders were more likely to be sent to prison. This increased probability of incarceration in recent years was not due to the general punitiveness of the criminal justice system." *Id.*

n302. Similar concerns have prompted limitations on discovery in rape cases, like rape shield laws, e.g., *Fed. R. Evid.* 412.

n303. See Leonore M.J. Simon, Sex Offender Legislation and the Antitherapeutic Effects on Victims, *41 Ariz. L. Rev.* 485, 524 (1999) (noting that "parents do not educate their daughters (and sons) about the dangers of dating relationships or avoiding high risk situations" and suggesting that this is "unfortunate").

n304. See generally Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, *67 B.U. L. Rev.* 213, 217 (1987) ("The problem with applying the notion of consent here is that, under the circumstances, the consent is quite limited. I would rather play professional football with the risk of a brutal blow than not play at all. But I would also rather play and not run that risk.").

n305. In wanting more for women than acquiescence in their present sexual constraints, feminism places itself into intellectual tension with liberal understanding of consent and choice.... Liberal thought frequently treats the mere presence of a choice as a sufficient moral justification for otherwise unjust, degrading, or exploitative relationships.... Inquiry into either the circumstances of [the individual's consent] or its consequences implies disrespect for the individual who chose her situation.

Larson, *supra* note 260, at 428.

n306. See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986) (noting that in certain societies, reasonable people are used to "sexual jokes, sexual conversations and girlie magazines" at work); Estrich, *supra* note 263, at 814-16.

n307. See Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, *95 Colum. L. Rev.* 304, 305-06 (1995) (arguing that feminists who posit an "unconstrained" female agency fail to account for all vagaries of socioeconomic conditions).

n308. See Simons, *supra* note 304, at 217-18.

n309. Ted R. Miller et al., National Institute of Justice, Victim Costs and Consequences: A New Look 1 (1996).

n310. *Id.* at 5.

n311. See *id.* at 19 ("Taxpayers and insurance purchasers cover almost all the tangible victim costs of arson and drunk driving. They cover \$ 9 billion of the \$ 19 billion in tangible nonservice costs of larceny, burglary, and motor vehicle theft. They cover few of the tangible expenses of other crimes. Victims pay about \$ 44 billion of the \$ 57 billion in tangible nonservice expenses for traditional crimes of violence - murder, rape, robbery, assault, and abuse and neglect."). These expenses may be covered by first-party or third-party insurance. The availability of first-party insurance to cover the costs of rape would diminish loss spreading but not equality or other distributional concerns.

n312. See Ellen S. Pryor, The Stories We Tell: Intentional Harm and the Quest for Insurance Funding, *75 Tex. L. Rev.* 1721, 1722-23 (1997) ("Most standard liability policies do not cover liability for harm that the insured intentionally causes.").

n313. See July 15, 1998 telephone interview with Scott Silbert, plaintiff's attorney from *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So. 2d 70 (La. Ct. App. 1989) (noting that the intentional tortfeasors in that case were covered by insurance, but that the insurance company later broadened its intentional tort exclusion to bar coverage of intentional acts committed by any person covered under the insurance policy, not merely intentional acts committed by the insured).

n314. See, e.g., *Cal. Ins. Code* 533 (West 1993).

n315. See Virginia Cope, Third-Party Liability: Victims' Rights Movement Spurs Expansion in Law, 24 *Trial* 85 (1998) ("Forty-four states now have victims' compensation programs, and, in 1984, the federal government created the Crime Victims Fund, which had provided more than \$ 44 million in funds to victims' programs.").

n316. See Charlene L. Smith, Victim Compensation: Hard Questions and Suggested Remedies, 17 *Rutgers L.J.* 51 (1985) (arguing that current victim compensation schemes are inadequate due to a misunderstanding of victims' circumstances and due to financial constraints).

n317. Although loss-spreading arguments have been called "outdated" in light of the widespread availability of first-party insurance, see Mark Geistfeld, Should Enterprise Liability Replace the Rule of Strict Liability for

Abnormally Dangerous Activities, 45 *UCLA L. Rev.* 611, 627 (1998), the lack of first party insurance for crime-related losses makes this criterion more relevant.

n318. See Guido Calabresi, *The Cost of Accidents* 39 (1970) ("accident losses will be least burdensome if they are spread broadly among people").

n319. Bureau of Justice Statistics, *supra* note 182, at 3.

n320. See Graham Farrell, *Preventing Repeat Victimization*, 19 *Crime & Just.* 469, 477 (1995) (noting that revictimization constitutes a large portion of all victimization).

n321. See S. Rep. No. 103-138 at 54 (1993) ("almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime").

n322. Schwartz, *supra* note 189, at 1831.

n323. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1432 (1996).

n324. Cf. Calabresi, *supra* note 16, at 34 (using the example of driving by those of the "risky age" of 16-24).

n325. Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 *Wis. L. Rev.* 433, 441 (1997).

n326. Third-party and victim precautions may be suboptimal compared to intentional tortfeasor avoidance. From that perspective, the possibility of an "optimal level" of citizen precautions may start as, at most, a second-best solution. See Landes & Posner, *supra* note 22, at 154 ("We do not want A [the victim of the intentional tort] to spend \$ 10 on self-protection. If he did, B would not injure A, but there would still be a social loss of \$ 10, which can be avoided by making B liable."); see also Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 *Harv. L. Rev.* 932, 933 (1993) (noting that the theory of the second best "holds that where the conditions for optimality cannot be fully satisfied, correction of the flaws in only some of the conditions will not necessarily lead to an improved outcome").

n327. Cf. George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 *Yale J. on Reg.* 237, 241-42 (1992). In a perfect market, the parties could bargain around the legal rule. See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

n328. Gordon & Riger, *supra* note 126, at 21.

n329. See *id.* at 15.

n330. See *id.*

n331. See Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 *S. Cal. L. Rev.* 1705, 1733-37 (1996) (arguing that placing tort liability on firms rather than particular individuals making safety decisions may result in a lower incidence of unreasonable conduct).

n332. See Gordon & Riger, *supra* note 126, at 21.

n333. See *id.* One commentator even suggests that fear of rape may have a biological basis. See Jones, *supra* note 242, at 905 (asserting that "the fear of rape is a psychological predisposition in females").

n334. Cf. Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Cost of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 *Harv. L. Rev.* 1785, 1903 (1995) (arguing that "pain and suffering itself constitutes a copayment mechanism" that guards against moral hazard because "pain-and-suffering losses are not fully compensable"). For a systematic analysis of nonlegal sanctions in the commercial context, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 *Harv. L. Rev.* 375 (1990).

n335. See Green, *supra* note 140, at 1609-10 n.23 ("the marginal deterrence provided by tort law when liability is imposed on defendants is greater than the marginal deterrence provided by tort law when liability is imposed on plaintiffs"); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 *Cal. L. Rev.* 555, 560 (1985) ("There is, unfortunately, little reason to believe that tort law today actually serves an accident avoidance function."); Schwartz, *supra* note 189, at 1804 ("no one supposes' that the negligent conduct of motorists is in any way influenced by the prospect of liability") (quoting William L. Prosser, *Handbook of the Law of Torts* 444 (3d ed. 1964)).

n336. Cf. Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 *UCLA L. Rev.* 377, 379, 416 (noting that "moderate" version of the tort law deterrence argument can generally be sustained, and specifically making that argument in the context of third-party liability).

n337. See Clarke, *supra* note 226, at 109 (listing twelve techniques of situational prevention).

n338. See, e.g., Karen Rodgers & Georgia Roberts, Women's Non-Spousal Multiple Victimization: A Test of the Routine Activities Theory, 37 *Can. J. of Criminology* 363 (1995) (exploring how much women must change their lifestyle to avoid victimization).

n339. Cf. Tomas J. Philipson & Richard A. Posner, The Economic Epidemiology of Crime, 39 *J.L. & Econ.* 405, 415 (1996). Philipson and Posner note that some private and public expenditures on crime prevention are complements. For example, public expenditures that make people feel safer and bring people out into the street at night could make streets safer and thereby augment the benefits of such expenditures. As such, certain types of individual precautions - like refusing to go out at night - may make streets less safe rather than more.

n340. Baker, *supra* note 182, at 577. Cf. Jones, *supra* note 242, at 839-40 (noting that feminist scholarship on rape suggests that "rape is a consequence of (a) social traditions that reflect male power and dominance, on the one hand, and female powerlessness and exploitation, on the other; (b) socially stratified and unequal gender roles; and (c) cultural attitudes about men, women, and rape," but focusing on biobehavioral influences).

n341. Keeton et al., *supra* note 9, 67, at 469.

n342. See generally Croley, *supra* note 331. The doctrine of foreseeable misuse embraces a similar policy rationale - deterrence may be better achieved by defendants than by plaintiffs.

n343. See *Wassell v. Adams*, 865 *F.2d* 849, 853 (7th Cir. 1989) (where defendant argued that a warning would have scared away guests); *Schmidt v. HTG, Inc.*, 961 *P.2d* 677, 682 (Kan. 1998), cert. denied, 119 *S.Ct.* 409 (1998) (parole officer did not inform employer that employee was a paroled sex offender "because he was concerned that [the employee] would be fired" even though that failure to disclose placed female employees at "risk of harm," and employee ultimately killed coemployee who accepted a ride home with him).

n344. For example, the city of Tucson simply decriminalized gasoline thefts to obtain an instant dramatic drop in its crime rate. See Paul Weber, Giving Up to Crime, *Phoenix Gazette*, Jan. 12, 1996 at B4.

n345. See Fox Butterfield, As Crime Falls, Pressure Rises to Alter Data, *N.Y. Times*, Aug. 3, 1998, at A1.

n346. Student Right-to-Know and Campus Security Act 101-205, 20 *U.S.C.* 1092 (1994) (requiring colleges and universities to provide an annual report on campus crime to students, staff, and applicants on request).

n347. See *id.*

n348. For example, in 1996 the University of Arizona reported that it received no reports of rape or sexual assault. In that same year, Arizona State University reported only three rapes. See University of Arizona Campus Safety and Security Report 1996-1997; Arizona State University Police Department Record 965. While it is possible that these statistics reflect the actual number of rapes at those schools, the numbers seem improbably low. See Todd Hardy, Likins Says Campus Crime 'Has to be Reported,' *Arizona Daily Wildcat*, Oct. 10, 1997 (new university president stresses importance of "fully and honestly disclosing all information about crime on this campus" amidst newspaper questions about the university's past reporting practices).

n349. See Alon Harel, Efficiency and Fairness in the Criminal Law: The Case for a Criminal Law Principle of Comparative Fault, 82 *Cal. L. Rev.* 1181, 1209 (1994).

n350. Fear of gender-based violence "deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.... Women often refuse higher paying night jobs in service/retail industries because of the fear of attack." S. Rep. No. 103-138, at 54 & n.70 (1993).

n351. See, e.g., *Jackson v. Post Properties, Inc.*, 513 *S.E.2d* 259, 262-63 (Ga. Ct. App. 1999).

n352. One legal commentator argues that crime victims' nonlegal incentives to protect themselves from violent crime are suboptimal due to positive externalities of victim precautions. According to this theory, potential victims' precautions contribute "to the general well-being of other potential victims" because the precautions will "increase the costs of crime for the criminal, thereby reducing the number and severity of his crimes," and because "the relative

immunity of cautious victims [from crime] contributes to a general societal feeling of security and stability." Harel, *supra* note 349, at 1195. In addition, Harel argues that "the state itself benefits from victims' precautionary measures because such measures reduce the cost of the enforcement system." *Id.* When these two positive externalities are coupled with the author's assertion that imposition of a legal duty would "increase victims' incentives to invest in precautionary measures," he concludes that providing legal incentives for potential victims to take precautionary measures against crime will promote efficiency and reduce crime. *Id.* at 1196. This commentator goes so far as to propose a criminal law principle of comparative fault under which "criminals who act against careless victims would be exculpated, or would have their punishment mitigated," although he himself admits that such a proposition seems unjust. *Id.* at 1181. Harel asks whether "protection of victims [can] be better achieved by perceiving the victim (in addition to the criminal) as an agent," and concludes that in many circumstances other than rape it can be. *Id.* at 1189.

n353. See Research & Forecasts Inc., *America Afraid: How Fear of Crime Changes the Way We Live* 43-44 (1983) (stating that the fear of crime "far outstrips the reality" and using the case of rape as an illustration).

n354. Cf. Philipson & Posner, *supra* note 339, at 407 (noting that "the University of Chicago has one of the largest police forces in the state of Illinois").

n355. See generally William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 *Okla. L. Rev.* 641 (1984).

n356. For situations in which the defendant made a negligent or unreasonable mistake about another's consent, it may be more desirable to allow a claim of "negligent rape" than to permit a judgment for intentional rape to be diminished based on the victim's asserted comparative negligence. See Note, *Real Reform?*, 101 *Harv. L. Rev.* 1978, 1981 (1988) (reviewing Estrich, *supra* note 1, and characterizing her argument as supporting a "negligent rape" standard).

n357. See *McGill v. Duckworth*, 944 *F.2d* 344, 345 (7th Cir. 1991) ("prisons are dangerous places").

n358. See Brownmiller, *supra* note 1, at 15 (arguing that rape is a culturally sanctioned process by which men keep women in a state of fear).

n359. See Keeton et al., *supra* note 9, 53, at 357-58 ("The statement that there is or is not a duty begs the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.... 'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that plaintiff is entitled to protection.").

n360. See *Restatement (Second) of Torts* 302B cmt. d (1965) ("In the ordinary case [an actor] may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law.").

n361. Other attempts to find places where an absolute no-duty rule would result in an injustice to third parties have left me even more convinced that this category of cases is small and would raise more problems to include than to exclude. The recurrent hypotheses about difficult cases, such as one in which a woman leaves her hotel room door open with a sign that says "please rape me," makes me doubt courts' ability to apply a limited exception.

n362. See Calabresi, *supra* note 16, at 23 (noting that the victim of a negligent tortfeasor was "bound not to take risks of harm which he or she had no right to take.... Of course, the key to all that was the word right - what risks did one have a right to take without thereby 'assuming' the risk of injury... ? It all depended how 'rights' were defined.").

n363. See *Olshefski v. Stenner*, 599 *A.2d* 749, 750 (*Conn. App. Ct.* 1991) ("Contributory negligence...is the duty of the plaintiff to exercise reasonable care to avoid harm to herself."); Keeton et al., *supra* note 9, 65, at 453 (contributory negligence involves a duty only if we "ingeniously" say "that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence").

n364. See *H.B. v. Whittemore*, 552 *N.W.2d* 705, 707 (*Minn.* 1996); *Ward v. Lange*, 553 *N.W.2d* 246, 250 (*S.D.* 1996); Leon Green, Mahoney v. Beatman: A Study in Proximate Cause, 39 *Yale L.J.* 532, 542 (1930) ("Certainly, juries have nothing to do with imposing duties or defining them.").

n365. See Dobbs, *supra* note 190, at 976 ("even in a world where we strive for autonomy and the self-responsibility that goes with it, we are highly dependent on many others for our own personal safety").

n366. See Larson, *supra* note 260, at 434 ("When a proposed sexual regulation does not limit the range of sexual choices available to an individual woman, but instead reinforces her power to choose for herself, feminists should support that use of state power," as should others.).

n367. See Calabresi, *supra* note 16, at 40.

n368. For example third-party liability does not necessarily address the root causes of rape. Furthermore, the aggregate effects of increased situational crime prevention measures are unclear, and increased third-party liability could result either in some crime-increasing effects or other social losses, such as discouraging businesses from locating in neighborhoods with higher crime rates. See *McClung v. Delta Square L.P.*, 937 S.W.2d 891, 900 (Tenn. 1996) ("Business may react [to expanded liability] by moving from poorer areas where crime rates are often the highest.").

n369. See, e.g., Dobbs, *supra* note 16, 323 ("The defendant's relationship to the plaintiff has been recognized as a ground for requiring the defendant to take affirmative acts in a substantial body of cases.").

n370. For example, the federal government could provide subsidies for premises liability insurance in high crime areas.

n371. See David W. Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 *La. L. Rev.* 1341, 1342-43 (1984) (arguing that virtually all of the "duty-risk" limitations that *Wex Malone* would ask courts to determine "are properly left to triers of fact as part of their assessment of the degree of fault of the parties").

n372. See Malone, *supra* note 223, at 113 ("My remaining fears arise from an awareness of the indiscriminate range of uses to which contributory negligence and assumption of risk have been put in the past and my own apprehension that the alluring invitation to avoid all conceptual niceties by adjusting damages [through comparative fault] will serve to enhance, rather than to minimize, past confusion.").

n373. Dobbs, *supra* note 190, at 953.

n374. See Malone, *supra* note 223, at 108 ("The all-important point, however, is that the proper effect to be accorded the victim's misbehavior cannot be considered in isolation from the nature of the duty or rule whose breach is chargeable against the defendant.").

n375. Certainly courts can have a role in determining third-party duties, as they should in setting citizen duties. See generally Green, *supra* note 140.

n376. See Calabresi, *supra* note 16, at 34 ("The unfettered participation of people from such risky categories in driving, jobs, and other activities that are essential to being a part of our society may be as important to the society (and the groups involved) as the lives that such participation may take.").

n377. See *City of Chicago v. Morales*, 119 S. Ct. 1849, 1857 n.19 (1999) ("We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." (quoting Brief for United States as Amicus Curiae)).

n378. *City of Chicago v. Morales*, 687 N.E.2d 53, 65 (Ill. 1997), *aff'd*, 119 S. Ct. 1849 (1999).

n379. See *id.*; see also Toni Massaro, *The Gang's Not Here*, 2 *The Green Bag* 25 (1998) (criticizing the order-maintaining concept of policing that undergirded the Chicago ordinance at issue in *Morales*).

n380. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991).

n381. See Cahn, *supra* note 269, at 1433-35.

n382. See Baker, *supra* note 182, at 614 ("One way of cabining the inevitable disadvantages of allowing too much judicial discretion in an area rife with stereotypes and bias is to require written decisions by judges.").

n383. See *id.* ("Rape may be the one area in which it is important to encourage supervision of the trial process.").

n384. "Children below a certain age are frequently held, as a matter of law, to be incapable of contributory negligence." Calabresi, *supra* note 16, at 25; see also *Zerby v. Warren*, 210 N.W.2d 58, 62 (Minn. 1973) (holding that contributory fault defense was not available against minor).

n385. Neither is this substantive analysis premised on the identity of the plaintiff, whether rape victim or other third party. Cf. Travis Morgan Dodd, Note, Accounting Malpractice and Contributory Negligence: Justifying Disparate Treatment Based upon the Auditor's Unique Role, 80 *Geo. L.J.* 909, 910 (1992) (arguing for strict limitations on the use of contributory negligence defenses in malpractice suits against accountants).

n386. See, e.g., *Cereal Byproducts Co. v. Hall*, 132 *N.E.2d* 27, 29-30 (*Ill. App. Ct.* 1956), *aff'd*, 115 *N.E.2d* 14 (*Ill.* 1958) ("No fact or circumstance is cited contributing in the slightest degree to the negligence of defendants in making the audit.").

n387. See *National Surety Corp. v. Lybrand*, 9 *N.Y.S.2d* 554, 563 (*App. Div.* 1939); cf. *Fullmer v. Wohlfeiler & Beck*, 905 *F.2d* 1394, 1396-99 (*10th Cir.* 1990) (holding comparative fault defense unavailable in accountant liability case where no facts suggested that plaintiff's negligence caused or contributed to defendant's negligence).

n388. For instance, in *Congregation of the Passion v. Touche Ross & Co.*, 636 *N.E.2d* 503 (*Ill.* 1994), a professional malpractice/negligent misrepresentation case, the Illinois Supreme Court barred defendant's proposed comparative negligence defense. In that case, the plaintiff sued its auditors for failure to comply with Generally Accepted Accounting Principles, particularly in regard to its investigation and recording of investments. In response, the defendants sought to present evidence that plaintiff "knowingly employed investment advisors who utilized highly speculative investment strategies." *Id.* at 515. The Illinois Supreme Court concluded that defendant's proffered defense was appropriately rejected. According to the court, evidence concerning the general riskiness of plaintiff's investments did not suggest that plaintiff had caused the defendant's negligent failure to record investments and was therefore irrelevant. See *id.* at 516.

n389. "The better reasoned view, and the view supported by the weight of authorities which have considered the question, is that the negligence of a client in managing his business" should not be a defense in professional malpractice actions. David L. Menzel, The Defense of Contributory Negligence in Accountants' Malpractice Actions, 13 *Seton Hall L. Rev.* 292, 310 (1983).

n390. See, e.g., *Steiner Corp. v. Johnson & Higgins*, 135 *F.3d* 684, 688 (*10th Cir.* 1998) (declining to change rule after shift to comparative fault).

n391. *National Surety*, 9 *N.Y.S.2d.* at 563 (citation omitted). Other commentators have echoed this rationale. See Dodd, *supra* note 385, at 932-33 (comparing auditors to termite inspectors and arguing that it would be "illogical" to allow an inspector to assert the client's contributory fault in creating the conditions that led to the infestation because "the purpose of the inspection is precisely to determine whether termites are present"); Carl S. Hawkins, Professional Negligence Liability of Public Accountants, 12 *Vand. L. Rev.* 797, 811 (1959) ("Contributory negligence is a failure to use reasonable care in looking after one's own interests in the circumstances. And here one of the circumstances is that the plaintiff has engaged defendant to help protect his interests. There can be nothing unreasonable about plaintiff's conducting his affairs on the assumption that defendant is doing his job properly.").

n392. Cf. Martin Luther King, Jr., Letter from Birmingham Jail, in *Why We Can't Wait* 76, 82 (1964) (explaining that it is difficult to wait for racial justice "when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six- year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people").

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