VICTIM FAULT AND VICTIM STRICT RESPONSIBILITY IN ANGLO-AMERICAN TORT LAW

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Kenneth W. Simons

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Victim fault and victim strict responsibility in Anglo-American tort law

Kenneth W. Simons*

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Abstract:

Anglo-American tort doctrine pays considerable attention to the conduct of the victim as well as the conduct of the injurer. A symmetrical standard of care for victims and injurers is also common: just as injurers are liable for failure to use reasonable care, victims frequently have their compensation reduced insofar as they, too, failed to use reasonable care. The advent of comparative fault, replacing the all-or-nothing rule of contributory negligence, has made the symmetrical approach seem inexorable and unremarkable.

But symmetry is usually the wrong perspective for the legal system to take towards victim and injurer conduct. That perspective also misdescribes legal doctrine. Courts often depart from symmetry, even in comparative fault jurisdictions. Thus, courts recognize several categorical doctrines that permit full recovery without regard to the possible fault of the victim (e.g., where the defendant’s duty is to protect the victim from his own vulnerability or incapacity, or where the defendant is engaged to provide medical care or other services to the victim necessitated by the victim’s own prior fault). Courts also recognize categorical doctrines that automatically preclude any recovery despite the supposed presumptive status of comparative fault (e.g., the illegality doctrine, the mitigation of damages doctrine, and the defense of voluntary assumption of risk).

Moreover, even when victim conduct is compared to injurer conduct, the way in which victim conduct is relevant to tort liability is frequently qualitatively different than the way in which injurer conduct is relevant. Often, when we characterize a victim as being “at fault,” we do not mean that the victim should have acted differently, but only that he should be strictly responsible for his choice or action (e.g. because he justifiably forfeited his right to full damages). Indeed, sometimes, even though a victim has a moral or legal right not to take a precaution, it is appropriate to deny him full damages for the harm that the precaution would have averted.

To be sure, symmetry is sometimes appropriate, especially when the actor’s unreasonable conduct creates substantial risks both to others and to himself. But in many other cases, symmetry is much less defensible, at least if one endorses a nonconsequentialist rather than utilitarian account of tort law. The law could do more to address the unjustifiable use of symmetrical criteria—e.g., the fact-finder could be instructed, or the judge could be advised, to treat risk to others as a more serious type of fault than risk to self.

Table of Contents:

I. Introduction
II. A brief overview of doctrine
III. Symmetry: analysis and critique
IV. Victim negligence or victim strict responsibility?
V. When symmetrical treatment is least plausible
VI. When symmetrical treatment is most plausible
VII. Conclusion

* Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. © 2012. All rights reserved. I am grateful to participants at the Shared Responsibility Conference, University of Oxford, September 2012, for their helpful reactions, and especially to James Goudkamp, who provided detailed, insightful comments about the legal analysis and relevant doctrine. I thank Mason Kortz for his extremely valuable research assistance and editorial advice.
I. Introduction

Consider four examples that instantiate the problems addressed in this paper.

1. Distraction (multicar collision)

A, B, and C, while driving in heavy traffic, are distracted thinking about the season-long ineptitude of their favorite baseball team.\(^1\) Their cars collide, causing injuries to each driver. In each driver’s suit against the others, should the driver’s own fault reduce his recovery?

2. Daydreaming (driver and pedestrian)

D, the only driver on the road, is daydreaming about an upcoming music concert. E, the only pedestrian crossing the road, is daydreaming about an upcoming dance concert. Neither notices the other. D’s car strikes E. In E’s lawsuit against D, should E’s own fault reduce his recovery?

3. Religious refusal of blood transfusion

Due to driver F’s negligence, his car strikes pedestrian G. A blood transfusion is needed to save G’s life. With a transfusion, G would be released from the hospital with no lasting injuries. Because of his religious beliefs as a Jehovah’s Witness, G refuses the blood transfusion. He dies. In G’s family’s lawsuit against F for wrongful death, should G’s decision not to permit a blood transfusion reduce the family’s recovery?

4. Choosing to walk on ice

J negligently permits a large patch of ice to accumulate in front of the entrance to his store. K notices that he can access the store by taking a longer route around the ice, but he decides to walk on the ice, for the challenge of seeing if he can keep his balance. K slips and suffers injury. In his lawsuit against J, should K’s decision to walk on the ice reduce or even eliminate his recovery? Should it do so only if that decision was unreasonable?

Anglo-American tort doctrine pays considerable attention to the conduct of the victim as well as the conduct of the injurer. A symmetrical standard of care for victims and injurers is also common: just as injurers are liable for failure to use reasonable care, victims frequently have their compensation reduced insofar as they, too, failed to use reasonable care. The advent of comparative fault, replacing the all-or-nothing rule of contributory negligence, has made the symmetrical approach seem both inexorable and unremarkable.

But symmetry is ordinarily the wrong perspective for the legal system to take towards victim and injurer conduct. That perspective also misdescribes legal doctrine. A careful

\(^1\) At the start of the 2012 season, the Boston Red Sox had the third highest payroll in Major League Baseball. When the season ended, their won-lost record ranked 29th out of 34 teams.
examination of that doctrine reveals a much more complex landscape, in two major respects. First, even in comparative fault jurisdictions, courts often depart from symmetry: they recognize numerous categorical doctrines that either automatically preclude victims from any recovery (despite the supposed presumptive status of comparative fault) or permit full recovery without regard to the possible fault of the victim. Second, even when victim conduct is compared to injurer conduct, the way in which victim conduct is relevant to tort liability is frequently (though not always) qualitatively different than the way in which injurer conduct is relevant. Often, when we characterize a victim as being “at fault,” we do not mean that the victim should have acted differently, but only that he should be strictly responsible for his choice or action and should therefore obtain less than full damages. Indeed, sometimes, even though a victim has a moral or legal right not to take a precaution, it is appropriate to deny him full damages for the harm that the precaution would have averted.

The arguments in the paper about the relevance of victim fault and victim choices are specific to tort law, and to a specific understanding of tort law at that, as affording private redress for wrongs. I presuppose, in other words, a corrective justice or civil recourse approach, not a social insurance or consequentialist approach. In a broadly funded social insurance system such as worker’s compensation or a no-fault compensation scheme, other considerations affect the extent to which victim fault should be considered. Moreover, a deterrence-oriented consequentialist system might justifiably pay very little attention to victim fault in a wide range of cases. In those cases where the victim knows that his conduct creates a significant risk of personal injury to himself, it is quite doubtful that changes in victim conduct doctrines will have much, if any, effect on the victim’s decision whether or not to act prudently or to confront a known risk. Yet the law contains numerous victim conduct doctrines. Optimal deterrence cannot be their explanation.

2 For example, in a worker’s compensation system, a no-fault accident insurance system, or even in a government-funded medical insurance system, we might want to create strong incentives for covered participants to minimize unnecessary costs. Or we might even deny coverage for some culpably caused conditions, as a matter of fairness to those who must fund the system. On the other hand, we might be more generous and entirely ignore victim fault, if this better serves the consequentialist goal of rehabilitating victims. Cf. In re Williams, 205 P.3d 1024 (Wyo. 2009) (considering whether religiously-motivated refusal to accept blood transfusion counts as “refus[ing] to submit to medical or surgical treatment reasonably essential to promote his recovery” and thus disqualifies claimant from worker’s compensation benefits); Wilcut v. Innovative Warehousing, 247 S.W.3d 1 (Mo. Ct. App. 2008) (concluding, in worker’s compensation claim, that religious beliefs that influenced decision not to pursue a course of treatment should be liberally accommodated, and that employee's refusal to accept blood transfusion, based on sincerely-held religious beliefs, was not an unreasonable refusal of medical treatment.).

3 Suppose a pedestrian, deliberately jaywalking in traffic, knows that his jurisdiction will permit him a full tort recovery if he happens to be injured by a driver who is later determined to be negligent and
The paper is organized as follows. Section II provides a brief overview of prevailing
document, which endorses a presumptive symmetry approach but also contains nine doctrines
that depart from symmetry. Section III explains the allure of the symmetry approach and
then addresses its inadequacies. Section IV explores another dimension of the problem—
whether victim “negligence” is genuinely analogous to injurer negligence, or instead is
sometimes better understood as a form of victim strict responsibility. Section V reviews the
nine doctrinal asymmetries and explains why they might be defensible. Section VI identifies
situations in which symmetry is most plausible, and also takes up the question whether risks
to self and to others are properly aggregated for purposes of judging the victim’s fault.
Section VII concludes.

II. A brief overview of doctrine

In Anglo-American jurisdictions, both contributory negligence and assumption of
risk historically served as complete defenses to a lawsuit against an injurer for his negligence.
Since the mid-20th century, the emergence of comparative responsibility has dramatically
increased the victim’s prospects for recovery. Instead of an all-or-nothing doctrine,
contributory negligence is now usually understood as scalar: it reduces recovery in proportion
to a victim’s fault, rather than eliminating recovery. However, under both traditional
contributory negligence and modern comparative fault, a symmetrical understanding of
negligence ordinarily prevails: the same formal legal standard governs both victim negligence
and injurer negligence.

Thus, the injurer is tortiously liable for failure to use reasonable care with respect to
risks he poses to the victim. But the victim is contributorily negligent for failing to use
reasonable care with respect to the risk that he will suffer injury. For example, with respect
to American law, the Restatement Third of Torts, Physical Harm, §3, provides: “A person

who has adequate insurance. If he is still willing to take a serious risk of self-injury in these
circumstances, then it is not very likely that he would act differently if the legal rule about victim fault
were less generous. It is unlikely, that is, that he would decide against running the risk simply because,
under a contributory negligence rule, the jurisdiction would reduce or eliminate his tort recovery.
Given all the uncertainties about whether such a pedestrian’s risky conduct will happen to coincide
with being endangered by a solvent tortfeasor, and given that almost everyone would prefer not to
suffer a serious injury at all than to suffer the injury but receive tort compensation for it, the deterrent
value of a contributory negligence or comparative fault rule eliminating or reducing recovery is quite
doubtful (at least in cases where the plaintiff knowingly risks serious personal injury).

Many American jurisdictions do recognize impure forms of comparative responsibility, under which the
plaintiff recovers nothing if he is more than 50% at fault. And in Australia and the UK, a judge is
permitted to determine that the plaintiff is 100% at fault, resulting in no recovery.
acts negligently if the person does not exercise reasonable care under all the circumstances.”

And comment b states: “The definition of negligence set forth in this Section applies whether the issue is the negligence of the defendant or the contributory negligence of the plaintiff.”

Moreover, the criteria offered by the Restatement Third of Apportionment for determining each party’s comparative fault share do not explicitly distinguish between the conduct of a plaintiff and of a defendant.

The law of England and Wales also employs essentially the same “reasonable person” standard both for negligence and for contributory negligence. The British comparative negligence apportionment statute applies “[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons.” Fault has a single definition for both plaintiffs and defendants: “negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.” The criteria for apportionment do not suggest that victim and injurer negligence be analyzed or weighted differently. Indeed, those criteria are quite spare: the statutory requirements provide only that the apportionment must

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6 Restatement Third of Apportionment = § 8 provides:
   Factors for assigning percentages of responsibility to each person whose legal responsibility
   has been established include
   (a) the nature of the person’s risk-creating conduct, including any awareness or indifference
   with respect to the risks created by the conduct and any intent with respect to the harm created
   by the conduct; and
   (b) the strength of the causal connection between the person’s risk-creating conduct and the
   harm.
7 See Markesinis & Deakin, =, at 897; Jones, =, 3-51 (“The standard of care in contributory negligence
is what is reasonable in the circumstances, which in most cases corresponds to the standard of care in
negligence.”); Glanville Williams, Joint Torts and Contributory Negligence §§ 88 (1951).
   “The principles that are used to ascertain whether a defendant breached a duty of care that he
owed to the claimant are, for the most part, applied also to determine whether the claimant is guilty of
contributory negligence.” John Murphy, Christian Witting, & James Goudkamp, Street on Torts 190
(13th ed. 2012) (citations omitted). These principles include an objective form of fault; a requirement
to avoid only foreseeable risks; measurement of the actor’s conduct against the prevailing standards at
the time of injury, not the time of trial; and, in determining the standard of care, weighing the
probability and severity of injury against the burden of taking precautions against that injury. Id. at
190-191.
   In her illuminating history of the English legislative endorsement of comparative fault,
Professor Steele emphasizes that the change was part of a broader trend in tort law, “the exorcism of
absolutes.” Jenny Steele, Law Reform (Contributory Negligence) Act 1945: Collisions of a Different
Sort, in Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change (Hart
2012) (T T Arvind & Jenny Steele, eds.).
8 Law Reform (Contributory Negligence) Act, 1945, § 1(1).
9 Id. § 4.
be “just and equitable” (in Great Britain and Australia) or “in proportion to the degree to which each person was at fault” (in Canada).

Several Australian states require equivalent standards of care for contributory and injurer negligence by statute, and unifying the two standards was recommended in the 2002 Ipp Report. Canadian law seems to apply similar standards for victims and injurers.

10 The only guideline for apportionment given in the British statute is that it will be “to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.” Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, § 1(1) (Gr. Brit.). Like the British statute, the Australian statutes require a “just and equitable” apportionment based on the plaintiff’s responsibility. See, e.g., Law Reform (Miscellaneous Provisions) Ordinance 1956 (NT) § 16(1)(b).

In the United Kingdom and Australia, both “causal potency” and “blameworthiness,” understood as the degree to which the party deviated from the standard of care, are relevant to apportionment. DEAKIN, at 900-01. See also Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34 para. 10, 59 ALR 529, available at http://www.austlii.edu.au/au/cases/cth/HCA/1985/34.html (“The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man and of the relative importance of the acts of the parties in causing the damage . . . .”). But Canadian courts only consider blameworthiness, and not causal potency, in apportioning liability. Alberta Wheat Pool v. Northwest Pile, 2000 BCCA 505 (CanLII) paras. 45-46, 80 BCLR (3d) 153, available at http://canlii.ca/t/1fnj8.


The Ontario statute use slightly different wording, referring to the parties’ degrees of “fault or negligence,” rather than just “fault.” Negligence Act, R.S.O. 1990, c. N.1. The Manitoba statute states: “if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.” The Tortfeasors and Contributory Negligence Act, C.C.S.M. c. T90 § 4. The Quebec Civil Code simply states that “[w]here an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.” Civil Code of Quebec, S.Q. 1991, c. 64, a. 1478.

12 Civil Liability Act 2002 (NSW) § 5R; Civil Liability Act 2003 (Qld) § 23; Civil Liability Act 1936 (SA) § 44; Civil Liability Act 2002 (Tas) § 23; Wrongs Act 1958 (Vic) § 62; Civil Liability Act 2002 (WA) § 5K.


14 See Fridman, Canadian Tort Law, at 470=:

Contributory negligence, equally with negligence, arises from a failure to take such care as the circumstances require. All the elements of actionable negligence must be established save...
Moreover, the Principles of European Tort Law vigorously endorse symmetry. Article 8:101, “Contributory conduct or activity of the victim,” provides: “Liability can be excluded or reduced to such extent as is considered just having regard to the victim’s contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor.”

At the same time, Anglo-American courts sometimes do recognize differences in the standards they apply to victim and injurer negligence. Consider three such differences.

(1) Courts sometimes apply a more subjective standard of care to victims than to injurers. “Some [American] courts have frankly [taken into account individual shortcomings] for the plaintiff and not for the defendant—notably where the infirmities of youth, old age, or insanity are concerned.” Other courts have also sometimes applied a double standard. For example, a plaintiff’s phobia of being trapped in a car was found to be relevant to whether she was contributorily negligent for not wearing a seatbelt in a motor vehicle accident.

(2) Many American states recognize a “rescue” doctrine, under which a plaintiff who undertakes to rescue another is considered contributorily negligent only if he was “rash or reckless” in that rescue effort and not if he was merely negligent. Similarly, many Anglo-American jurisdictions recognize a rule, the “agony of the moment” rule, that a plaintiff

only the requirement of a duty owed by the party alleged to be guilty of contributory negligence (citations omitted).

15 =cite (emphasis added).
17 According to the Ipp Report, §8.11, describing Australian tort law:

Leading textbook writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same. There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants. In some cases judges have expressly applied a lower standard of care for contributory negligence [footnotes omitted].

18 MURPHY, at 191 (citing Condon v. Condon, [1978] R.T.R. 483 (QBD)). It is doubtful that a comparable phobia by a defendant would be deemed relevant. (Suppose a driver, while proceeding through a large puddle, suffers a phobia about being trapped in his vehicle, and thereupon abandons a young child in the car.).

In Australia, however, courts have rejected this subjectivization. See Ipp Report, Recommendation 30. They employ a lower standard of care for plaintiffs only if they would apply such a lower standard to a similarly-situated defendant, e.g. when the plaintiff or defendant is a child. STEWART, at 257-58. In the United States, the Restatement Third of Apportionment also rejects a more subjective standard for victims.


The rescue doctrine was probably the prevailing rule prior to the advent of comparative fault. After comparative fault, however, some jurisdictions do not categorically exclude consideration of a rescuer’s fault when that fault is less than reckless.
placed in an emergency situation by the defendant’s negligence is held to a more lenient standard of care that accounts for the emergency. This rule extends to plaintiffs who sustain injuries while rescuing a party endangered by the defendant. The agony of the moment rule is essentially an application of the general rule, which applies to injurer negligence as well, that a party is held to a standard of reasonable care given the surrounding circumstances. However, some courts perceive an additional element of equity here: “where the [defendant] had created the danger they ought not to be minutely critical of what the [plaintiff] had done when faced with the danger created by them.”

(3) Another widely recognized relaxation of the standard of care in contributory negligence is the ‘mere inattentiveness’ doctrine, under which a plaintiff may be allowed a momentary lapse of attention that would, for a defendant, constitute negligence. This doctrine is applied most often to workplace scenarios in which the employer breached a safety statute but the employee was also to some extent negligent.

Apart from these three possible differences between the standard of care for injurers and for victims, Anglo-American jurisdictions also recognize some categorical rules that preempt the ordinary comparative fault apportionment that would otherwise apply. Some of the preemptive rules preclude all consideration of victim fault, allowing full recovery of damages; while other rules deny any recovery, because of particular characteristics of the victim’s conduct or choice.

Consider first some preemptive rules that result in full recovery:

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20 See Jones, ¶ 3-63; STEWART, at 258-59; Fridman, at 471; Williams, supra note 7=, at 361.
24 See Jones, ¶ 3-52; STEWART, at 253-54; FRIDMAN, at 470-71. This doctrine does not appear to be recognized in United States jurisdictions, however.
(4) The defendant’s duty is precisely to protect the victim from the risks created by the victim’s own negligent or intentional conduct, conduct that flows from the victim’s vulnerability or incapacity. In such a case, the victim’s own fault is ignored.27 (Suppose defendant has hired a nurse to care for an Alzheimer’s patient, who negligently or even intentionally injures himself.)

(5) The defendant is engaged to provide medical care to the plaintiff for a pre-existing injury, or is employed to repair a pre-existing dangerous physical condition. In such a case, again, courts ignore the victim’s own prior fault (e.g., in causing his own injury by careless driving, or in causing the dangerous physical condition of his house by carelessly starting a fire).28

(6) A special “plaintiff no duty”29 rule precludes a finding that the victim is negligent.30 For example, one has no duty to avoid walking in a dangerous part of a city, in order to avoid the risk of becoming a crime victim.31 Respecting each citizen’s liberty of movement justifies a categorical rule, rather than leaving to the trier of fact the ad hoc judgment whether the victim’s decision to subject herself to some risk of harm was “unreasonable.”

Now consider some preemptive rules that result in no recovery:

(7) The illegality (or ex turpi causa non oritur actio) doctrine bars recovery for harms suffered in the course of the plaintiff’s own illegal or morally reprehensible conduct.32 This

27 =cite UK and US cases. In the United Kingdom, this is denominated “the very thing” doctrine. See Commissioners of Police for the Metropolis v. Reeves, [1999] UKHL 35, [2000] 1 A.C. 360 (several judges reason that it would be illogical to describe the very thing the police were under a duty to prevent, the decedent’s suicide while in custody, as contributory negligence, assumption of risk, or a superseding cause).
28 The medical care scenario is called the “prepresentment negligence” doctrine. =In the contract to repair cases, typically it is the repair person who claims that the homeowner has negligently created a dangerous condition; but in some cases, the homeowner is injured by the failure of the other to make a proper repair, and the question can then arise whether the homeowner’s prior negligence is legally relevant in reducing his recovery. =
29 I put this phrase in quotes because most contributory negligence “duties” are conditional on the victim choosing to sue; they are not, strictly speaking, legally enforceable duties. See discussion infra.
31 This no duty rule should preclude consideration of victim fault, not only in the victim’s lawsuit against an intentional tortfeasor such as a rapist, but also in her lawsuit against a landlord or hotel that failed to take reasonable precautions against a foreseeable intentional wrongdoer. See Bublick, supra note 30=.
“illegality” doctrine seems to be a minority rule in the United States, but more widely accepted in other Anglo-American jurisdictions. Even where the doctrine is recognized, its scope is quite unclear. Most courts recognizing the doctrine would apply it to deny the claim of a burglar who sues a landowner for not keeping the basement stairs in good repair, or the claim of one criminal against another engaged in a joint criminal enterprise such as speeding together to escape from the police. One proffered rationale for the rule is that a criminal should not profit from his own wrong. Another rationale is the difficulty, or impossibility, of defining the standard of care for a “reasonable criminal.” As the High Court of Australia explained, “it would border on the grotesque for the courts to seek to define the content of a duty of care owed by one bank robber to another in blowing up a safe which they were together seeking to rob.”

(8) The victim unreasonably fails to mitigate his damages, e.g. by not following his doctor’s advice after receiving medical treatment for injuries caused by a tortious injurer, thus increasing the severity of those injuries. Surprisingly, many courts preclude any recovery for the additional damages caused by such a failure to mitigate, even though they are a proximate result of the negligence of the defendant as well as of the victim. To be sure, the Restatement Third of Apportionment proposes to treat mitigation cases just like other contributory negligence cases, i.e. apportioning that segment of damages as to which both the injurer’s tort and the victim’s failure to mitigate were necessary causes. However, many courts deny any recovery for that segment, contrary to the usual demand for apportionment. Consider this

34 See Gray v Thames Trains Ltd [2009] UKHL 33; [2009] 1 AC 1339. Recently, some courts have also applied the ex turpi doctrine to grossly immoral, but not criminal, conduct, although this is uncommon. Murphy, at 209. See Nayyar & Ors v. Sapte & Anor, [2009] EWHC 3218 (Q.B.), available at http://www.bailii.org/ew/cases/EWHC/QB/2009/3218.html (holding that an attempted civil law bribe trigger ex turpi, even though there was no clear breach of criminal law).
36 See Deakin, = at 923; Stewart, at 332. This is a dubious rationale, if taken literally: tort damages are designed to compensate plaintiffs, not to afford them a “profit.” See Goudkamp, supra note 32, at 442-443.
38 Restatement (Third) of Torts: Apportionment of Liability § 3 cmt. b (2000): “This Section applies to a plaintiff's unreasonable conduct that aggravates the plaintiff's injuries. No rule about mitigation of damages or avoidable consequences categorically forgives a plaintiff of this type of conduct or categorically excludes recovery.”
example. D negligently runs over P, breaking P’s foot; but P fails to follow his doctor’s advice not to walk on his broken foot for two weeks; his failure to mitigate increases damages from $200,000 to $300,000. Normal apportionment rules would provide that P recovers all of the $200,000 plus a portion of the additional $100,000 in damages, with that portion determined by comparative fault principles. And yet, many courts only permit P to recover the $200,000; they allocate entirely to P the portion of damages that were jointly caused by D’s original negligence and by P’s unreasonable failure to mitigate.

On the other hand, although courts often preclude all recovery for unreasonable failure to mitigate damages, they also tend to impose a forgivingly low standard of care in determining what constitutes a failure to “reasonably” mitigate. As one court explained, “[t]he question whether [the victim] was at fault is one which in principle the trial judge should resolve bearing in mind that it was the wrongful act of the defendant which put the claimant in the position of having to [mitigate] and that therefore she should not be judged too harshly.”

(9) The victim assumed the risk of the injury he suffered. (Recall “Slip on ice,” from the introduction.) Whether assumption of risk should be recognized at all, and if so, whether a narrower or broader version should be applied, are matters of considerable controversy. Most American courts have completely abolished assumption of risk as a defense distinct from contributory negligence, and have instead “merged” the former into the latter. In other words, they simply ask whether the victim acted reasonably or unreasonably; if he acted reasonably, he obtains a full recovery; if not, his recovery might be limited pursuant to

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[Briefly discuss seatbelt cases ==.]

40 By “normal” I mean the rules that would apply if we were comparing the injurer’s fault to a victim’s fault that causally contributed to the accident itself. Suppose bicyclist D2 negligently breaks pedestrian P2’s foot, but P2’s negligent inattention also contributed to the accident. Further suppose that even if P2 had been paying adequate attention, P2 would have suffered a harm valued at $500,000; but P2’s inattention increased the harm to $800,000. Under normal comparative fault rules, P2 would recover all of the $500,000 and some portion of the $300,000, with that portion depending on the factfinder’s assessment of the comparative fault of P2 and D2.


comparative apportionment principles.\textsuperscript{43} Outside of the United States, although assumption of risk is still recognized, it is applied quite sparingly.\textsuperscript{44}

Nevertheless, some courts do continue to recognize assumption of risk, on the theory that consent is a plausible rationale—and a rationale distinct from contributory negligence—for denying a victim full recovery for otherwise tortious conduct.\textsuperscript{45} When a jurisdiction does recognize assumption of risk as a distinct defense, the legal consequence is almost always to preclude recovery entirely, and not simply to apportion damages. Accordingly, assumption of risk is appropriately classified as a preemptive “no recovery” doctrine, for in its absence, the victim perhaps could have obtained at least partial recovery, or even complete recovery, under comparative fault principles.

Consider the “Slip on ice” example from the introduction. Under the American merger doctrine, the pedestrian K obtains full recovery if his decision to walk on the ice was reasonable, and partial recovery (according to the relevant comparative fault criteria) if that behavior was unreasonable. In a jurisdiction that recognizes assumption of risk as a distinct defense, however, he would likely obtain no recovery.

III. Symmetry: analysis and critique

With this brief overview of relevant doctrines in mind, let us take a closer look at the content of those doctrines and at possible rationales.

\textsuperscript{43} See generally Kenneth W. Simons, Reflections on Assumption of Risk, 50 UCLA L. Rev. 481 (2002); Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. Rev. 213 (1987). However, even if a jurisdiction purports to abolish assumption of risk and “merge” it into comparative responsibility, it may achieve a result similar to traditional assumption of risk by recognizing a “primary” assumption of risk category, i.e. a no-duty or limited-duty rule that takes account of the choices and preferences of those who engage in the relevant activity. Thus, a “merger” jurisdiction can still bar recovery from a victim, even when the victim acted reasonably. (Suppose a spectator at a bicycle race through mountain roads is injured by a bicyclist who loses control on the descent.)

\textsuperscript{44} See K. Barker, P. Cane, M. Lunney, & F. Trindade, The Law of Torts in Australia 617 (5\textsuperscript{th} ed. 2012) (“In modern law, very few cases can be found where the defense of \textit{volenti} has succeeded.”); James Goudkamp, Defenses to Negligence, in C. Sappideen & P. Vines eds., Fleming’s The Law of Torts 335-345 (10\textsuperscript{th} ed. 2012); ==Markensinis, 8\textsuperscript{th} ed. or later, UK source; ==Canadian source.

\textsuperscript{45} Some American cases continue to endorse assumption of risk. See Simons, Reflections, supra note 43=, at =. A recent English case illustrates that assumption of risk remains a viable defense. Geary v JD Wetherspoon plc [2011] EWHC 1506 (QB) (plaintiff assumed the risk of injury when she chose to slide down an open banister on a sweeping staircase). As the court in Geary explained: “The claimant had freely chosen to do something which she had known to be dangerous. ... She knew that sliding down the banisters had not been permitted, but she chose to do it anyway. She had therefore been the author of her own misfortune.” Recent Australian legislation is intended to broaden the assumption of risk defense. See Barker et al, at 617. Note also that the Principles of European Tort Law provide a distinct defense of assumption of risk. See Art. 7:101 (1)(d).
As we have seen, courts often treat victim and injurer negligence symmetrically. Indeed, this is the presumptive treatment, absent some special categorical rule. But is it justifiable?\footnote{There are actually two issues here concerning whether victim and injurer negligence should be treated symmetrically. First, should conduct that is just barely culpable or dangerous enough to count as injurer negligence also count as victim negligence, or should the law require more (or less) dangerous conduct of victims to get over the threshold? Second, even if both injurer and victim have engaged in conduct over the threshold and are negligent in a similar way, should the victim’s negligence be weighted less (or more) heavily in a comparative responsibility determination?}

In many cases, this symmetrical standard is quite plausible. Recall the “Distraction” case from the introduction: A, B, and C are all distracted while driving their automobiles. In the ensuing accident, their cars collide, and each is injured. It would be both unworkable and arbitrary to conclude that the standard of care that A owes to B in B’s lawsuit for his injuries should differ from the standard of care applicable to A’s contributory negligence in her lawsuit against B. (And similarly for the lawsuits by and against C.) The very same act or omission by A created risks not only to B and C, but also to A. And it is fortuitous whether daydreaming while driving will cause injury to another, cause injury to oneself in a one-car accident, cause injury to oneself in a multi-car accident in which another was at fault, or cause injury to oneself in a multi-car accident in which another was not at fault.

But in other cases, the symmetrical standard can obscure significant differences. Recall the second example from the introduction: E is a daydreaming pedestrian who crosses a street without looking out for automobiles, while D is a daydreaming driver who pays insufficient attention to the risks on the road. In the ensuing accident in which E is injured, E’s negligence can be taken into account in a comparative responsibility judgment. In this case, and many other contributory negligence cases, the judgment that E is negligent is based on the risks he poses to himself, not the risks he poses to others.\footnote{To be sure, E’s negligence does pose very small risks to others. A driver might need to take evasive action in order to avoid striking E, and the driver might thereby suffer injury. See Simons, Puzzling Doctrine, supra note 19=, at =. But it is doubtful that these risks, by themselves, are sufficient to make E negligent towards others.}

Are self-risk cases really sufficiently similar to risk-to-others cases that the same “reasonable care” standard can and should be applied to both categories?

Granted, if we simply assert the slogan “reasonable care under all the circumstances” (and say it quickly), the formula \textit{seems} adequate to account for both self-risk and risk-to-others cases. Even if we employ a more elaborate balancing formula, such as the Learned
Hand test or one of its variants, the formula might, on first thought, seem adequately general, even if the formula turns only on whether the actor has created risks of harm, but does not explicitly differentiate risks of self-harm from risks imposed on others.\footnote{Consider, for example, the Restatement Third of Torts’ definition of negligence, in §3: \textit{Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.} = cite. \cite[Note some other formulations of balancing risk against benefit.]} What could be objectionable about a general strategy of balancing the risks and benefits of taking a precaution? Consider this argument by the authors of Australia’s Ipp Report (a report that has dramatically affected Australian tort law):

The requirement to apply the same standard of care in dealing with the issue of contributory negligence as is applied in dealing with that of negligence means only that the plaintiff should not be treated differently from the defendant merely because the plaintiff is the person who has suffered harm. It would not, for instance, involve ignoring the fact that of the two parties, the defendant was in the better position to avoid the harm. But the mere fact that a person has suffered harm, rather than inflicted it, says nothing about that person’s ability, relative to that of the inflicter of the harm, to take precautions to avoid it.\footnote{Ipp Report, §8.12.}

On this view, the criteria of negligence should treat risks to self and risks to others in precisely the same manner.

But more must be said before we can justify such neutrality. These criteria, whether of “reasonableness” or of “risk-benefit balancing,” sound straightforward enough, but their simplicity is superficial. What would a “reasonable person” do? The question is notoriously vague. What would a reasonable person do “under all the circumstances”? This hardly cures the vagueness. Which circumstances are relevant, and how are they relevant? These inquiries present difficulties both of fact and value. To be sure, by anthropomorphizing the issues, a “reasonable person” approach seems more grounded and factual than a purely normative question. Yet there is no escaping the normative dimension. Unless a trier of fact is given unlimited discretion to specify what a reasonable person would do, the law will provide some content. And in filling in that content, we cannot avoid the question whether self-risk and risk-to-other should or should not be treated identically. Balancing formulas are less opaque than reasonableness criteria, but they, too, are often ambiguous on the critical normative question.

One reason that neutrality might seem to be the proper approach, at least prima facie, is because we can readily identify traits or characteristics that seem equally relevant to risks-
to-self and risk-to-others. Daydreaming, inattentiveness, lack of skill, forgetfulness, excessive confidence in one’s abilities, excessive discounting of the risks of one’s activities, and exaggeration of the value of those activities, are all traits that are potentially dangerous. So it is tempting to conclude that they reflect the same legal and moral fault, without regard to whether they endanger only the actor or only others. But the conclusion is too quick.

Consider another argument from the Australian Ipp Report, which recommended against a more lenient standard for victim negligence. Some courts, the Report noted, had expressly applied a lower standard of care for victims than for injurers. “This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel’s view, this approach should not be supported.”

The complaint that motorists should not be required to keep a “better lookout” than pedestrians raises two problems. First, often motorists and pedestrians are not in fact similarly situated with respect to the severity and scope of the injuries that their inattentiveness risks. A motorist’s inattention might well endanger numerous pedestrians; a pedestrian’s inattention usually endangers only himself. To compare apples with apples, we should assume a case in which a motorist endangers only a single pedestrian, and a pedestrian endangers only himself, each to exactly the same extent. After all, the effort or burden that we should ask an actor to undertake to avoid a risk should vary according to such circumstances: the care demanded of either a pedestrian or motorist on a deserted road is much less than that demanded at a busy intersection.

But, second, we must also equalize all other factors that could be relevant to a negligence determination, including the social value of the interest served by each actor, the motives of the actor, the extent to which the victim understands and freely accepts the risk, and how the benefits and risks of the actor’s conduct or activity are distributed among all affected persons. Once we try to equalize all these factors, it becomes clear that a simple insistence that both injurers and victims should “keep a reasonable lookout” in order to avoid a risk of harm evades the important normative questions—especially the question whether

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50 Similarly, if one exaggerates the social value of one’s activity, this arguably weighs in favor of finding the activity negligent, either with respect to one’s own interests or with respect to the interests of others. Exceeding the speed limit because of the sensory thrill it confers might seem equally foolish and socially undesirable, whether the risk is only to self or only to others. Again, however, this conclusion is too quick.

51 Ipp report, at 8-11.

52 It might seem that balancing such a range of factors in order to judge whether an actor is negligent presupposes a utilitarian account of negligence. I disagree. Plausible nonconsequentialist accounts of negligence require balancing. See Kenneth W. Simons, Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy, in Symposium on The Frontiers of Tort Law, 41 Loyola of Los Angeles L Rev 1171 (2007-08).
creating a risk of harm to oneself should be on a legal par with creating a risk of harm to another.

So it simply begs the question to insist, as many writers have, that symmetry is a mere implication of what we might call the “moral parity” of a victim and injurer. 53 Thus, writing a century ago, Francis Bohlen explained that contributory negligence doctrine developed because “[i]t was manifestly unfair ... that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection.” 54

Despite its surface appeal, this argument assumes what needs analysis: whether the person subject to the risk (self versus other) is an intrinsically significant feature that should affect a victim’s right to recover in tort law. The moral parity argument is no stronger than this structurally similar argument: we should not care who benefits from a risky act or activity, but should only care (a) that someone benefits and (b) how large the benefit is. Some utilitarians would endorse the latter argument, insofar as they only care about the maximization of total benefits and minimization of total costs; but those who believe that the law should be sensitive to how risks and benefits are distributed certainly would reject it.

One other reason that the symmetry approach seems intuitively plausible is the rhetorical power of a simplified version of the Learned Hand test. 55 Law and economics adherents are especially likely to model injurer negligence and victim negligence in similar cost-benefit terms, producing handsome charts that list numerical values to represent the burden or “cost” of care required to avoid harm either to others or to oneself. 56 Thus, in my example above, a chart might display the “cost” to a pedestrian of keeping a “reasonable” lookout as 50, and the benefit of that precaution in avoiding a harm to himself as 200; 57 and the “cost” to an injurer of keeping a “reasonable” lookout as 50, and the benefit in avoiding a

53 For further discussion of the argument, see Simons, Puzzling Doctrine, supra note 19=, at 1722-1723.
54 Francis H. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 254 (1908).
55 In my view, the Learned Hand test can be used for good as well as evil: it can accommodate more complex forms of balancing and can accommodate distributive values and respect for rights. Although it is typically employed to express a standard of care promoting allocative efficiency, this is not its only plausible use. See Simons, Tort Negligence, supra note 52=; Kenneth W. Simons, The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well as Efficiency Values, 54 Vand. L. Rev. 901 (2001). But for purposes of this paper, I will describe only the oversimplified (evil) version of the test.
57 This would be the expected injury (or injuries) discounted by the probability of the injury (or injuries), e.g. 200 = 20,000 (broken leg) x .01 (marginal reduction in probability of broken leg if actor takes the precaution).
harm to the pedestrian (the only person at risk) as the same 200. In this example, if indeed a simplified Hand test is equivalent to negligence, both actors are negligent, for each has failed to take the cost-justified precaution; and each is equally negligent, because the costs and benefits for each are identical.

Simplifying models certainly can have explanatory value. The problem here, however, is twofold. As already noted, it is quite difficult to be confident that the burden on both victim and injurer really is “equal” with respect to any commensurable value, such as time demanded, psychological or physical effort used, or financial cost. And, more troubling, the use of numerical values in both the self-risk and risk-to-other scenarios obscures the possibility that the scenarios differ intrinsically. Suppose we instead conclude that endangering only yourself is, everything else being equal, much less culpable or undesirable than endangering another. For those attracted to the apparent precision of formulas, we could even formalize this difference, by placing an explicit numerical thumb on the scale: in self-risk cases, we might multiply the burden to the victim of taking care by two. Then the revised cost for the pedestrian is 100, while for the driver it remains 50; and in a comparative fault allocation, the driver would pay 2/3 rather than ½ of the damages to the pedestrian.\footnote{Note that a “thumb on the scale” approach could also result in a finding that a victim is not contributorily negligent for failing to incur a “cost” even when the injurer would be negligent for failing to incur the same cost. This would be the case if the cost in my example was initially 110 for both the victim and the injurer: after the thumb, the victim’s cost is 220, so the pedestrian is not negligent for failing to lookout for negligent drivers. For a discussion of the “thumb” approach as applied to strangers at risk from an activity (in contrast to voluntary participants at risk from the same activity), see Simons, Tort Negligence, supra note 52.}

I do believe that there are powerful reasons to reject symmetry or neutrality as the presumptive approach. First, in self-risk cases, the actor is under no actual legal duty to another person.\footnote{See Jones, ¶ 3-50; Stewart, at 252-53; Fridman, at 470; Dobbs 6th ed. at 272=; =other US cites.} If he fails to act reasonably, the other has no legal claim against him. Rather, the actor’s failure to act reasonably sometimes affects the other’s legal duty to pay full compensatory damages, as follows. If the other has tortiously injured the actor, and if the actor chooses to sue for damages, then the other’s duty to pay full compensatory damages is qualified, because the fact-finder is empowered to reduce the damages in light of the actor’s own fault. At best, then, the self-risking actor has a conditional legal duty to act with

\[^{58}\text{Note that a “thumb on the scale” approach could also result in a finding that a victim is not contributorily negligent for failing to incur a “cost” even when the injurer would be negligent for failing to incur the same cost. This would be the case if the cost in my example was initially 110 for both the victim and the injurer: after the thumb, the victim’s cost is 220, so the pedestrian is not negligent for failing to lookout for negligent drivers. For a discussion of the “thumb” approach as applied to strangers at risk from an activity (in contrast to voluntary participants at risk from the same activity), see Simons, Tort Negligence, supra note 52.}

\[^{59}\text{See Jones, ¶ 3-50; Stewart, at 252-53; Fridman, at 470; Dobbs 6th ed. at 272=; =other US cites.}

However, when the victim creates significant risks both to others and to himself, his legal duty to others can indeed be relevant to whether he is contributorily negligent. Thus, in Mickelberg v Aerodata Holdings Ltd., [2000] WADC 324, available at http://www.austlii.edu.au/au/cases/wa/WADC/2000/324.html, the court noted that the plaintiff pilot’s failure to comply with “statutory and established procedures” reinforced other evidence that he acted unreasonably in not checking the fuel levels of his plane.

Page 17 of 31 Simons, Victim fault & strict responsibility November 21, 2012
reasonable care, if he desires to obtain full compensatory damages for injuries that another has tortiously caused.\footnote{Notice that the subcategory of victim negligence that is frequently denominated by “duty to mitigate damages” is thus a clear misnomer; the duty is at best conditional. No one has a legal claim against the victim if he chooses not to mitigate but also not to sue.}

Second, apart from the “no legal duty” problem, the justifications for denying a full legal remedy to a victim because of the nature of his conduct need not parallel the justifications for recognizing the injurer’s (apparently similar) conduct as tortious. To see why they might differ, we need to take a broader perspective. The remainder of this section first examines purely moral, nonlegal arguments for treating self-risk the same or differently from risk-to-others, and then considers normative arguments about the proper content of tort doctrine that take account of these moral arguments.

The foundation and scope of a moral obligation to take care to avoid harm surely differs, depending on whether the actor has created a risk of harm to herself or to another. Suppose, in other words, that we consider, not the legal question of what remedy a victim is entitled to obtain from an injurer, but instead a purely nonlegal question: How much moral blame properly attaches to unjustifiably risky conduct, either of the self-endangering or other-endangering kind? In this context, equating both types of conduct becomes quite implausible.

Why is such moral symmetry implausible? First, nonconsequentialist morality is properly much less tolerant of interpersonal aggregation of risks and benefits than of comparable intrapersonal aggregation. You may decide that you should take a small risk of death in order to swim into the rough seas and save your favorite hat. It hardly follows that a lifeguard or a stranger should take the same risk to save your hat if you are unable to do so. A doctor may permissibly remove one of my kidneys to save my life. It hardly follows that she may permissibly remove one of your kidneys to save my life.\footnote{See F.M. Kamm, Intricate Ethics=; T.M. Scanlon, Preference and Urgency=; Ashford, Elizabeth and Mulgan, Tim, “Contractualism”, §§3, 8, The Stanford Encyclopedia of Philosophy (Fall 2012 Edition), Edward N. Zalta (ed.), forthcoming URL = http://plato.stanford.edu/archives/fall2012/entries/contractualism/}. When the risks and benefits are located in one individual, it is normally morally permissible for that individual to choose how to weigh their relative value and thus whether or not to risk self-injury for the sake of something else. (And a third party, such as a doctor, may then permissibly act in

\footnote{Whether the relevant actors consent might seem to explain the difference between the two kidney removal cases, but it does not. Even if, in the first case, I am unable to consent (e.g. due to infancy or mental incapacity or unconsciousness), the doctor acts permissibly. (Imagine that all of the patients the doctor is treating in these examples are unconscious.) Moreover, we might find certain organ donations impermissible even if the donor consents—for example, donations that threaten the life of the donor. It would not follow that removal of an organ from a patient for the good of the patient herself is impermissible.}
accordance with that choice.) But when the risks and benefits accrue to different individuals, we have a very different moral problem. Even if the “net” result is the conferral of a benefit that, in some sense, “outweighs” the risk, it surely matters to the permissibility of the risky conduct which of the following is true:

(a) X exclusively benefits from the risky conduct, and X also is exclusively exposed to the risk;
(b) X exclusively benefits, at the expense of Y, who is exclusively exposed to the risk; or
(c) the distribution of benefit and risk is somewhere between these extremes.

Now, it is certainly possible for a particular moral perspective to recognize, not simply a moral permission to balance the risks and benefits of one’s conduct however one desires, but instead a more stringent moral duty to oneself. Many Kantians believe that every person has a duty to preserve his own life, as well as a duty of self-respect.62 A consequentialist can also recognize such a duty to self. For example, if the most defensible theory of the good is not merely a preference-satisfaction theory, if it recognizes some goods or values as objectively higher than others, then one can be morally criticized for leading an indolent life, or one comprised of counting blades of grass, or watching television reality shows—or for taking risks to one’s own health for foolish or frivolous or short-sighted reasons. Nevertheless, the question about symmetry remains: Is the moral obligation not to foolishly endanger yourself as weighty as the moral obligation not to endanger others for similarly foolish or objectively weak reasons?

One moral perspective that might seem to support symmetry focuses on citizens’ legitimate expectations of each other. Perhaps we actually expect others to use as much care for their self-protection as for the protection of others.63 I am dubious of this empirical claim, however. In any case, actual expectations are not determinative; the moral question is what we are entitled to expect of one another.

But there is one moral view that does support symmetry. And perhaps this view is implicit in some judicial and legislative determinations that the same standard of care should apply to victims and injurers. Consider a version of utilitarianism with the following unadorned features: every action that endangers life, and every omission to do an act that

63 See = Ipp report, asserting that citizens expect “risk-neutrality.” at 8.10 =.
could improve life or reduce the risk to life, is morally wrongful if an alternative action would improve human welfare more; and every person has an agent-neutral duty to minimize losses and maximize gains of human welfare, whether to self or others, to family members or strangers, to fellow citizens or foreign citizens. This flattening formula would indeed support symmetry. It is also the moral theory that underlies many law and economics accounts of legal doctrine. But for familiar reasons, the theory is problematic: it does not do justice to how we actually reason about moral questions or to the plurality of moral features that we actually deem relevant.64

Although I find inadequate the various arguments for symmetry, I do believe that a victim’s self-endangering conduct is morally relevant to his right to complain about the wrong of another who unjustifiably endangered him. But it is relevant, not because it amounts to a parallel or closely similar wrong, but because by so acting, the victim is subject to (a different form of) moral criticism, and thus properly forfeits the right to the full remedy that he would otherwise be entitled to.65 Even in the purely moral realm, the “remedy” or “sanction” that it is legitimate to demand of a wrongdoer depends in part on the victim’s own conduct and choices. Suppose you carelessly forgot our lunch date. You need not apologize so profusely if I had promised to remind you that morning but I forgot to do so. Or, suppose you carelessly spilled a drink on my new suit. Your moral duty to pay the dry cleaning costs might be limited to splitting those costs if I rambunctiously waved my hands in your face, contributing to the spill.

Of course, the interpersonal moral norms that apply to risky conduct are not coextensive with the legal norms that should justifiably apply to that conduct. Nevertheless, the legal norms should and do draw upon those underlying moral norms for much of their content. The “forfeiture” argument I just noted is indeed exemplified in a number of legal rules, both inside and outside of tort law. Within tort law, comparative fault principles apply not only when a negligent victim sues a negligent injurer, but also when he sues an injurer whose tortious liability is strict (e.g. when the injurer manufactured a defective product or engaged in an abnormally dangerous activity).66 This practice has been criticized as incoherently comparing apples and oranges,67 but the criticism has been widely rejected, and we can now see one reason why. Even when we are comparing victim negligence with

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64 See the deficiency of such a utilitarian account of tort law, see Gregory Keating, =; Simons, Tort Negligence, supra note 52=, at =; Richard Wright, =?=; Ripstein, =; Weinrib, =.
65 For further discussion of the forfeiture argument, see Simons, Puzzling Doctrine, at 1723-1725.
66 Some jurisdictions also permit comparative apportionment when the injurer committed an intentional tort. =
67 = cites
injurer negligence, often this is not a comparison of apples with apples, since victim negligence frequently involves the creation of risk only to, or principally to, the victim. If comparison in such cases is acceptable—e.g., because forfeiture is the rationale for reducing victim recovery—then comparison in cases where the injurer’s liability is strict may be no less legitimate.

The mitigation of damages doctrine, we have seen, limits the ability of an injured victim to recover from the original wrongdoer. It is noteworthy that the doctrine originated in contract law, suggesting that the forfeiture principle is by no means limited to victims who are enforcing their rights under tort law. Another instance of the forfeiture principle is the illegality doctrine, which provides, not only in tort but also in contract and unjust enrichment law, that an actor is not entitled to pursue otherwise available judicial remedies if the right he seeks to vindicate flows out of his commission of a crime. Various “good faith” and “clean hands” requirements that are imposed as conditions on granting legal relief can also be seen as forfeiture principles. Statutes of limitations also are partly justified by a forfeiture rationale: normally it is feasible for the victim of a tort or other legal wrong to bring a lawsuit in a timely manner, and it is burdensome to the legal system and to the defendant to require someone to defend against a stale claim that could readily have been brought earlier. Both fairness and efficiency values thus support these restrictions on recovery.

Under the forfeiture rationale, then, the criteria for victim and injurer negligence could differ quite dramatically. For example, victim negligence could be judged by a purely subjective test of reasonable care, while injurer negligence would continue to employ an objective test. Victim “negligence” could even be framed in terms other than lack of reasonable care—for example, we might simply ask whether the victim had an understandable reason or explanation for acting as he did. In the conclusion, I briefly consider some reasons why the law has not developed in this way.

IV. Victim negligence or victim strict responsibility?

Another dimension of our problem deserves a closer look. Insofar as the moral and legal norms we are discussing are norms of fault or negligence, they have a particular contour, distinguishable from other norms of personal responsibility. Whether victim “negligence”

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68 = Note contract law and unjust enrichment law versions of doctrine. = check whether it applies in all categories of the law of obligations (Goudkamp).

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truly deserves that appellation depends upon how well it maps onto those contours. The following is, I believe, an apt description of how judges understand the legal idea of negligence as one species of fault, and of how they ordinarily understand strict liability; and also a plausible, normatively defensible conception of legal negligence and strict liability.

An injurer is negligent if her conduct is deficient relative to a standard of reasonable care. “Deficient” in this context means: we wish she had acted differently; and we would enjoin her conduct if that were feasible. Her primary duty is not to create unreasonable risks of harm that might result in harm; and her secondary duty is to pay when those risks eventuate in harm; but we do not view the damage remedy as simply imposing a price on the activity; rather, we view it as a sanction for conduct that should have been avoided.

An injurer is strictly liable if, without regard to whether her conduct is negligent and thus “deficient,” she ought to pay for the harm she has caused. She does not have a primary duty not to cause that harm in the relevant circumstances; rather, her primary duty is to remedy the harm if it occurs. We do not view the damage remedy in this instance as a sanction, because we do not believe that the actor should not have engaged in the underlying conduct that happened to harm the victim.

The question then arises: is victim negligence best analyzed as akin to injurer negligence in these respects, or instead as akin to injurer strict liability? The view that victim negligence is “legally deficient” is initially attractive: in a perfect world, victims would use reasonable care, and if we could costlessly and effectively enjoin them to do so, that would be desirable, and more desirable than simply taking a portion of damages away from victims if they sue in a subsequent lawsuit against a tortious injurer.

On the other hand, in a pure self-risk case, does the law really care whether or not the victim acts with reasonable care for his own safety, so long as he accepts the consequences either way? On reflection, it seems that the victim’s unreasonable conduct is often not

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70 The deficiency view outlined here is, I believe, consistent with a very wide range of conceptions of what counts as negligent conduct.


72 =cites, including Simons = on Coleman; Greg Keating, =new chapter for Oxford Philosophical Foundations of Tort Law. For example, even with reasonable care, some products will have manufacturing flaws; and we do not want product manufacturers to invest unlimited resources to prevent all possibility of such flaws.

An alternative view would treat strict liability as reflecting a duty not to cause harm. See =. I find this view unpersuasive. Among other defects, it cannot account for contexts, such as the incomplete privilege in Vincent =, in which causing harm is, all things considered, socially desirable. But I cannot pursue the question here.
deficient in a sense analogous to an injurer’s unreasonable conduct. Even if the victim’s conduct deserves modest moral criticism, this does not seem enough to justify the conclusion that, from a legal perspective, it would be better if the conduct did not occur. At least, this is true of a significant range of conduct that the law currently characterizes as creating unreasonable risks of self-injury. Legal prohibitions against jaywalking, and legal requirements to wear seat belts or motorcycle helmets, ordinarily do reflect a legal judgment that the relevant conduct is deficient. But, when we move beyond such civil and criminal requirements that victims take care, it is much less clear that victim negligence is considered deficient. An accident victim is lazy or busy and fails to consult a doctor promptly. A pedestrian takes a faster path to his destination by walking over a broken sidewalk. It is not clear that the conduct of either is legally deficient, at least not in a way comparable to the deficiency of the dangerous driver who put the patient in the hospital or the careless city agency that failed to fix the sidewalk. Rather, the moral failure or lapse of the victim in these cases “is only relevant in private law if the victim does bring a lawsuit, for a simple reason: the victim's moral duty does not otherwise affect any other private individual's interest to a sufficient degree to warrant legal intervention.”

Consider in this regard the difficult question whether the religious beliefs and practices of a victim are relevant to whether he acted with reasonable care for his own safety. Recall the third introductory example: a driver negligently runs over a Jehovah’s Witness, who later refuses a blood transfusion that would have saved his life. Is the driver responsible

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73 In narrow circumstances, the criminal law does punish self-destructive behavior, but the rationale is usually the desire to minimize third party effects, such as the social costs of providing emergency medical care to victims. In any case, tort law considers, through victim fault doctrines, a much broader range of self-risking behavior than does criminal law.

74 Even in these cases, a legislature might decide that the statutory duty of the victim to take a particular precaution should not be considered in the victim’s tort suit against an injurer. Seat belt legislation in the United States sometimes so provides. See Markesinis & Deakin, 898–:

A Sikh wearing a turban is exempted from the requirement to comply with the statutory requirement to wear a crash helmet while driving a motorcycle. Whether he would also be able to escape the application of contributory negligence if his failure to do so resulted in him incurring greater injuries in the course of an accident is an open question. (citation omitted)

76 Puzzling Doctrine, supra note =, at 1708–.

By the same token, however, one might argue that the moral deficiency displayed by a negligent injurer who fails to act with reasonable care is also only a conditional deficiency: his negligence only matters legally if the victim chooses to sue the injurer. Still, I believe that the situations of victim and injurer are distinguishable. Although there are good reasons for giving the victim the power to choose whether or not to assert a viable claim against the injurer, he does have a legal entitlement that the injurer not unreasonably endanger his welfare. The injurer does not have a comparable entitlement that the victim act reasonably for his own protection.
to pay full damages for the death? Or should that portion of the damages due to the victim’s decision not to obtain conventional medical care be apportioned according to the comparative fault of the victim and the driver? Of course the victim has a legal right to refuse a blood transfusion, grounded in a general right of autonomy in choosing whether to permit medical treatment, and perhaps also in a right of religious exercise. In that sense, it would be absurd to characterize his decision to refuse a blood transfusion as “deficient” and unreasonable. But, simply because the victim has the right to act in this way, it does not follow that the law should also permit him or his family a full tort recovery for the damages that ensue. If, for religious reasons, a person injured by a negligent driver refuses to see a doctor at all, and the untreated minor injury causes the victim’s death, it is defensible to deny full recovery for the death, even though the victim does have a right to refuse all medical treatment.

This result is best described as a victim strict responsibility doctrine. The victim’s conduct is not necessarily deficient or unreasonable, but still, we have reason to leave the additional loss due to the victim’s conduct on the victim, or at least to apportion that additional loss between the victim and the injurer, rather than require the injurer to pay for it. The most important explicit judicial category of victim strict responsibility is the assumption of risk doctrine. But it should be clear that many other supposed instances of “unreasonable” behavior by victims, including many instances of failure to mitigate damages, actually fall within this category as well.

Whether religious practices should modify the “reasonable person” standard is a question that arises, not just when the practices increase the risk of self-injury, but also when the practices increase the risk of injuring others. But in this context, courts are much less likely to vary the reasonable person standard to accommodate religious practices that create unusual risks of injury. If Doris, while driving her car, wears a headscarf that obscures her

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77 The question is not an easy one. On the one hand, injurers are sometimes properly held responsible for a harm that is unforeseeable in degree, under the “eggshell skull” principle. On the other, injurers should not always be responsible to compensate for the unusually costly preferences of victims. Recall Guido Calabresi’s famous example of a great violinist-composer who chooses to work in a steel mill in order to write a proletarian symphony, despite the risk of damaging his hand. Calabresi plausibly concludes that the violinist should not be able to recover for the special value of his hand, but if the violinist’s hand were injured in an automobile accident, he should recover for that special value. Calabresi reasons that in the latter case but not the former, the activity in question (driving) is essential to full participation in society. Guido Calabresi, Ideas, Beliefs, Attitudes and the Law 24-25 (1985).

78 Another extreme case: P adheres to a religious view under which, if she is touched by someone not of that religious, she must cut off her own hand. D, a stranger, comes up to her and maliciously pinches her. She cuts off her hand. I believe that D should have to pay the usual damages for a nonconsensual pinch, but should not have to pay for the loss of the hand.

79 See Simons, Puzzling Doctrine, supra note 19=, at 1702-1706.

80 See Calabresi, at =.
peripheral vision, or refuses to take her anti-seizure medication, then even if religious motivations fully explain her decision, it is quite unlikely that a court will give those motivations much if any weight in determining whether she acted with reasonable care.\textsuperscript{81} Here, once again, we have reason not to interpret reasonable care symmetrically. Even though, in an abstract sense, the “burden” of violating one’s religious beliefs could be equally serious in both contexts, there is a qualitative difference between requiring someone to accept that burden when endangering others than when only endangering herself.

V. When symmetrical treatment is least plausible

Let us review the nine doctrinal asymmetries noted earlier, in light of this analysis. For reasons of space, I will only briefly suggest reasons why the doctrines are defensible notwithstanding their asymmetrical treatment of victims and injurers.\textsuperscript{82}

A first observation is that these asymmetries typically involve victims who pose risks entirely or largely to themselves. Thus, in a rough and ready way, the asymmetries reflect the idea that there is an intrinsic difference between unreasonably endangering your own welfare and unreasonably endangering the welfare of others, and that the law should consider the second form of fault more serious. The asymmetries are at best crude proxies for this intrinsic difference, however. (For example, a clumsy rescuer might endanger the person in need of rescue as well as himself; or an inattentive worker might also endanger a coworker; and the illegality doctrine often applies to actors who also create serious risks to others.) Moreover, if the only relevant factor in all nine asymmetries was whether the risk was self-imposed or other-imposed, that factor could have been expressed directly. So although I think this factor is quite important, it is not the only explanation of the nine doctrines.\textsuperscript{83}

\footnotesize{81} See Calabresi, at =.  [Perhaps discuss Calabresi’s analysis of Friedman=]  
\footnotesize{82} But note statutory provisions in some child endangerment statutes protecting religiously motivated parents from prosecution when they fail to use conventional medical care, so long as their use of prayer or other unconventional methods of medical treatment does not threaten the life of the child. =  
\footnotesize{83} Victims and injurers are asymmetrical in many other respects, too. For example, tort law recognizes various strict liability doctrines for injurers, but does not always recognize corresponding strict responsibility doctrines for victims. See Simons, Puzzling Doctrine, at =.  
\footnotesize{84} A second observation is that the asymmetrical doctrines to some extent merely reflect contingent factual differences between the situations of most victims and most injurers. Insofar as this is true, one could support symmetrical legal criteria but simply insist that the criteria be applied with sensitivity to the facts, facts that often reveal that a victim is not negligent or is not as negligent as the injurer. I agree that such contingent factual differences help explain some of the doctrinal asymmetries, such as the “agony of the moment” rule (2) and the “mere inattentiveness” doctrine (3). See also Simons, Puzzling Doctrine, supra note 19=, at = (citations omitted):}
Consider the three ways in which some courts modify a symmetrical standard of care for victims and injurers. The first (1) employs a more subjective standard of care for victims—for example, imposing the lower standard of “the care ordinarily exercised by a reasonable person with the victim’s lesser mental capacity.” Is this reconcilable with the more objective standard routinely applied to injurers? Perhaps it is. Norms of reciprocity might justify the latter standard: if one acts in the world, one must respect the freedom and security interests of others that one might infringe. But when a person’s act or omission affects only himself, the reciprocity argument is weaker or absent.

Moreover, the rescue doctrine, the “agony of the moment” rule, and the mere inattentiveness doctrine ((2) and (3)) usually involve a victim exposing only himself to danger.

Now consider the various preemptive doctrines. Some of them (especially (4)) reflect a social judgment that the defendant is in the best position, and can fairly be expected, to protect the victim from his own vulnerability. But why should we shift the entire responsibility to the defendant in these cases, rather than sharing the responsibility through comparative apportionment? As a practical matter, we cannot realistically expect much care from especially vulnerable victims. Their failure to take care is not very culpable, if it is culpable at all. And we legitimately expect a high level of care to be exercised by those who are compensated for taking on a supervisory role over victims who they know are at high risk of endangering themselves.

The “no recovery” preemptive rules can, to some extent, be explained by the forfeiture rationale. One who engages in seriously illegal conduct (7) has a lesser equitable

Under current doctrine, the formal criteria defining plaintiff’s negligence and defendant’s negligence are essentially the same. In many cases, however, the actual legal treatment of victims is more lenient. This is often due to differences in the factual situations of victims and injurers. For example, victims are more likely to face emergencies and thus be excused for their choices. The alleged negligence of victims is more likely to involve an affirmative duty to act, since victims are more often passive in their contribution to harm; thus, judges and juries might be more sympathetic to the victim's unreasonable decision not to rescue himself (i.e., not to prevent the injurer from causing the victim harm). Also, victims might more frequently lack awareness of the unreasonable risks they run, which is often viewed as a lower level of fault than consciously creating such a risk.

85 A variation of this last argument also explains category (5): the defendant has a professional or contractual obligation to address the dangerous condition of the plaintiff’s body or property without regard to plaintiff’s prior negligence in creating that condition.

Category (6) is easily explicable as furthering an overriding social policy such as egalitarian access to public life or respecting liberty of movement.
claim to employ costly judicial machinery to vindicate his right not to be injured by the faulty conduct of another. This is especially so when the actor has created serious risks of harm to others as well as to himself, a feature that characterizes many successful illegality defense claims. But I do concede that the illegality defense is potentially quite far-reaching, and more must be said about its proper scope and limits.

The mitigation of damages doctrine (8) fits comfortably within a forfeiture rationale, as we have seen. The fact that such cases almost always involve only risks to self helps explain why courts often apply an extremely lenient standard of care, a standard under which only highly unreasonable decisions not to mitigate should reduce the victim’s recovery. But if the fact-finder does conclude that the victim should have mitigated his damages, courts should, I believe, apportion the damages that the victim and injurer have jointly contributed to by their default. As we have seen, many courts allocate all of those damages to the victim. That routine practice is difficult to justify.

Let us turn, finally, to the consent-based doctrine of assumption of risk (9). The doctrine is controversial, and properly so. Traditional versions of the doctrine broadly prohibited tort recovery even when the victim had no realistic option but to confront a tortiously-created risk. However, American courts have moved remarkably far in the opposite direction, with most jurisdictions officially eliminating the doctrine. I believe that this development is in part a reflection of the power of the symmetry view. When “unreasonable conduct” is the reigning paradigm for tort liability, and when the phrase is understood to apply equally to injurers and victims, it is understandable that a court would jettison a doctrine that does not fit the paradigm, especially when the doctrine would preclude recovery and not simply allow for comparative apportionment.

But the consensual rationale underlying assumption of risk is a plausible ground for denying victims recovery, and the force of the rationale has nothing to do with whether the

86 Here is one extreme case. A woman engaged in premarital sexual intercourse with a man who knew he had herpes but did not warn her or employ protection. She contracted herpes. The Virginia Supreme Court barred her claim on the ground that she had participated in an illegal act, fornication, even though her conduct did not put the man at risk of harm. Zysk v. Zysk, 404 S.E.2d 721 (Va. 1990), overruled on constitutional grounds in Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005), discussed in Dobbs, 2nd, at 817. =

87 English and Canadian courts have not merged assumption of risk into comparative fault, but they have narrowed assumption of risk considerably, by requiring that the victim’s conduct reflect a decision to waive his legal rights. = I believe that that is an unduly narrow conception. See Simons, Reflections, supra note 43, at =. It seems to mean, for example, that in the common situation where a victim gives no thought to whether his decision to confront a risk will affect his legal right to sue, assumption of risk can never apply. For a good example of the difficulty of applying assumption of risk under these restrictions, see Joe v. Paradis, 2008 BCCA 57.
victim acted reasonably or unreasonably. Under either the separate defense of assumption of risk, or the doctrine of “primary” assumption of risk under which the defendant owes no duty or a limited duty to the plaintiff, the relevant characteristic of the victim’s behavior is not whether it was reasonable or unreasonable, but whether it was sufficiently voluntary and knowing to amount to a consent to the risks.

Moreover, if the consent rationale is persuasive, it should have preemptive force, and should trump the “unreasonable conduct” rationale. For that is how consent functions: it fully transforms the character of an act from a wrong to an act that is permissible (and indeed often highly desirable). Thus, if the same behavior is both unreasonable and an instance of valid consent, the latter characterization should govern, resulting in a complete bar to recovery, rather than partial recovery under comparative fault.

VI. When symmetrical treatment is most plausible

Is there anything to be said for symmetry?

Indeed there is. In a wide range of circumstances, a tort victim creates significant risks of injury to others as well as to himself, and the very same precaution would reduce both sets of risks. Automobile accidents are a standard, and frequently recurring, example. Participants in sporting and recreational activities frequently pose significant risks to others.

88 In some cases, primary assumption of risk is the more plausible theory of nonrecovery. See James Goudkamp, ‘A Taxonomy of Tort Law Defences’ in S Degeling, J Edelman and J Goudkamp (eds), Torts in Commercial Law (Lawbook Co 2011), at 478 (discussing a case in which the victim, age six, could not validly consent to the risk). But in other cases, secondary assumption of risk is the apt category—especially in scenarios where most potential victims are unaware of the risk or do not voluntarily confront it, but a subset of victims do adequately consent. 

89 See Simons, Full Preference, at =. I have defended the view that assumption of risk should be defined narrowly, applying only (a) when the plaintiff actually preferred the risky option that defendant offered to the non-negligent option that defendant failed to offer or (b) when the plaintiff insisted on the relationship with the defendant. Id. at =.


91 Another reason why the consent rationale should trump the victim fault rationale is the paradoxical result that might otherwise ensue. Some jurisdictions have endorsed a partial merger approach, merging unreasonable assumption of risk into comparative fault, but retaining reasonable assumption of risk as a complete defense. See Simons, Reflections on Assumption of Risk, at 493. But this means that the victim who unreasonably assumes a risk may obtain a partial recovery, while the victim who reasonably assumes a risk obtains none. It makes little sense for tort law to treat a reasonable actor more harshly than an unreasonable one.

This paradox has bedeviled American courts that have struggled with the continued role of assumption of risk after the advent of comparative fault, a struggle made more difficult by occasional statutory provisions that specify that “unreasonable assumption of risk” must be merged into comparative fault. See, e.g., Ind. Code §34-6-2-45(b). Such provisions imply that reasonable assumption of risk is not merged, but instead is preserved as a complete defense; the result is to treat reasonable actors more harshly than unreasonable ones.
and also to themselves. Even pedestrians sometimes create risks to others—for example, when the other is an automobile driver or bicyclist and the pedestrian’s interference with the path of the car or bicycle creates a substantial chance that the operator will swerve or stop suddenly and suffer injury.  

In a case where the very same precaution would prevent both risks to others and to self (such as “Distraction,” from the introduction), we usually should apply the same standard of care to the actor, whether he ultimately harms only another, only himself, or both another and himself. In principle, we should, in evaluating the victim’s own fault, also consider the risks that the victim poses to others.  

This seems relatively uncontroversial where the risks the victim poses to others are sufficiently great, considered by themselves, that we can fairly characterize his conduct (qua potential injurer) as negligent.  

The actor’s conduct is clearly “deficient” in the strongest sense of the term; and the additional risks he poses to himself, even if they are discounted, would seem to aggravate the deficiency.

But suppose the risks to others are insufficient, by themselves, to ground a duty to others. And suppose the risks to self are also insufficient, by themselves, to characterize the

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... Keith Carrier was driving a City Council bus along Bowen Bridge Road when John Bonham stepped out in front of it. He applied the brakes but was unable to stop it from hitting Bonham. As a result Bonham sustained some physical injury; but it was Carrier who in the end suffered more. Because of his experience on that occasion he now has an adjustment disorder, which compelled him to give up bus driving. As a result he has sustained both personal injury and economic loss.

93 See Simons, Puzzling Doctrine, at 1725-1728. It is crucial that the same precaution would avoid both sets of risks. If this is not the case, then it makes no sense to aggregate the risks for purposes of evaluating the actor’s negligence or contributory negligence. Thus, if P is driving in close proximity to pedestrians and also not wearing his seat belt, it make no sense, in judging whether his proximity to pedestrians reflects negligence, to also consider the harms he would have avoided by wearing a seat belt.

For analogous reasons, we might also, in determining injurer negligence, consider the risks that the injurer poses to himself. But if we believe that risks to self alone are intrinsically less serious, perhaps they should be discounted and weighted less heavily than in the converse situation where risks to others make the difference in a contributory negligence scenario. Id. at 1727 n. 84.

For an economic argument in favor of aggregating risks to self and risk to others in both scenarios, see Robert Cooter & Ariel Porat, Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict, 29 J. LEGAL STUD. 19, 19-20 (2000); Ariel Porat, Misalignments in Tort Law, 121 Yale L.J. 82, 129-130 (2011). Porat gives this example:

Example 5: Speeding. Driving at 30 mph, John’s car skids and hits Tony’s parked car. Had John driven 25 mph, he would have avoided hitting Tony’s car. If we consider the risk John created for others and himself, the reasonable speed was 25 mph. But if we consider only John’s risk to other people, the reasonable speed was 30 mph. The rule of law is negligence. Should the court find John liable in a suit for damages brought by Tony? Id. at (footnote omitted). See also Jules Coleman, =reply to Porat.

94 This still will be controversial to nonconsequentialists who believe that aggregating these different categories of risk is unjustifiable. See Richard Wright, =. I do not agree, however, that this type of aggregation violates nonconsequentialist principles. See Simons, Puzzling Doctrine, at =.
actor as contributorily negligent. Should the additional risks to others push the actor’s
close to the threshold from “reasonable” to “unreasonable”?

They should, if the aggregate risks to others are sufficiently great. Risks to others should, if anything, be weighted more heavily than risks to self. In some cases, their existence could and should make a difference between a conclusion of no contributory negligence and of contributory negligence. Thus, imagine that a pedestrian is crossing a street containing vehicular traffic, but the level of risk he poses to his own safety is not quite enough to classify his conduct as contributorily negligent. Now contrast two further specifications of this scenario.

(1) In the first, the risk he poses to the drivers is insignificant. (They are all driving giant SUV’s that are far apart from each another.)

(2) In the second, the risk he poses to the drivers is substantial. (They are all driving rickety old minicars in close proximity to each other.)

In principle, we should consider the pedestrian contributorily negligent in scenario two but not in scenario one. Of course, the infrequency of, and difficulty of proving, such fine-tuned differentiations in risk probably justify ignoring these complexities in our actual legal practice.

VII. Conclusion

The common judicial practice of employing symmetrical criteria for victim and injurer negligence is often problematic. But is it seriously problematic?

For two reasons, it may not be. First, the nine doctrinal asymmetries noted above ameliorate the problem to some extent. Second, comparative fault apportionment judgments are quite opaque and almost entirely discretionary. Thus, as a practical matter, the fact-finder is free to analyze victim and injurer negligence differently with little fear of correction by a trial or appellate court.\textsuperscript{95} The criteria for apportionment are often extremely vague. (Recall the standard in Great Britain and Australia that the apportionment be “just and equitable.”). Even when the criteria are more specific, they may contain multiple factors of indeterminate relative weight,\textsuperscript{96} thus permitting a wide range of judgments of relative fault. Although those making these judgments might choose to apply a strict principle of symmetry, they need not.

\textsuperscript{95}For example, in Corr v. IBC, [2008] UKHL 13 [16], [2008] 1 A.C. 884, the majority of their Lordships thought contributory negligence was applicable =, but nevertheless refused to revisit the lower court decision not to apply contributory negligence.

\textsuperscript{96}See Restatement Third of Apportionment §8, supra note 5.
And most observers believe that, as actually applied by judges and juries, the criteria tend to favor victims.97

However, the law could also do more to address the problematic use of symmetrical criteria. For example, the fact-finder could be instructed, or the judge advised, that they should consider whether the actor posed risks mainly to himself or mainly to others, and that they should consider the latter a more serious type of fault.

Finally, more attention should be paid to two underexplored issues. The first is what I have called the forfeiture rationale for reducing damages because of victim negligence. Even though victim negligence is not truly parallel to injurer negligence, it sometimes captures a type of fault or deficiency on the part of the victim, at least in the sense that an actor who behaves in that way is not entitled to a full tort damage remedy. But it is an open question whether that type of fault is even roughly comparable to injurer negligence. And it is worth considering why some forms of victim negligence seem to be instances of a much broader category of victim fault, a category that also limits the rights of those who seek civil remedies other than tort remedies. (Recall that mitigation of damages and illegality are defenses to contract and unjust enrichment claims as well as tort claims.)

The second underexplored question is the proper scope of victim strict responsibility. Assumption of risk is the most important category here, but it is not the only one. Even when it is not the case that the victim failed to take a “reasonable” precaution, we need to consider the possibility that the victim should not be entitled to full damages in light of her peculiar preferences and sensitivities.

97Consider this explanation by the Reporters to the Restatement Third of Apportionment of why they declined to expressly recognize a different standard of care in victim self-risk cases than in injurer risk-to-other cases:

[T]he standard for negligence is flexible. To the extent that a jury is influenced by the fact that a plaintiff imposed risks only on himself or herself, there is ample room for the factfinder to account for this factor in assigning percentages of responsibility. See § 8. Comment d and Illustration 8 specifically permit the jury to do so. Moreover, a plaintiff’s conduct that endangers the plaintiff often also endangers others. The factfinder can take these considerations into account in assigning percentages of responsibility. See § 8. Thus, there is not much need to have rules of law impose a different standard on plaintiffs and defendants.