

# REFLECTIONS ON ASSUMPTION OF RISK

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Despite calls for the abolition of assumption of risk, and for its merger within comparative fault, the doctrine survives in some jurisdictions, and its spirit endures in most, if not all. The consensual rationale underlying assumption of risk is distinctive, important, and not easily reducible to the paradigm of victim fault. That rationale helps shape many of the no-duty and limited-duty rules in negligence law. Moreover, a similar rationale also underlies consent to an intentional tort. To be sure, whether the victim acted “reasonably” seems to be more relevant when the injurer is a negligent rather than an intentional tortfeasor. But this difference largely reflects only contingent, empirical differences in the typical fact pattern when a victim “consents” to negligence as opposed to an intentional tort.

Whether a formal defense of assumption of risk of an injurer’s negligence should also be retained, however, is a close question. An affirmative answer is most plausible in two narrow categories—when the victim fully prefers the risk, and when the victim insists on a relationship with the injurer. A plaintiff fully prefers a risk if he actually favors the tortious option that a defendant provided, to the nontortious option that the defendant could have provided. (Suppose a passenger encourages a driver to speed.) And a plaintiff insists on a relationship if he requests that a defendant permit him to confront a tortious risk when the defendant could decline a continuing relationship. (Suppose a stranded motorist requests a ride from a drunk driver.)

But the traditional view that a victim should obtain no recovery if he voluntarily and knowingly elects to confront a risk is excessively broad and is not justified by the state’s legitimate interests in furthering or respecting human autonomy.

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## INTRODUCTION

Reports of the death of assumption of risk are slightly exaggerated.

Mark Twain's original quotation carries more punch, I concede. On the other hand, in the spirit of the work of Gary Schwartz, I would rather defend this modest but plausible claim than propound a radical and arresting theory that bears no relation to existing legal doctrine.

To be sure, assumption of risk is *reputed* to be dead. Indeed, the *Restatement (Third) of Torts: Apportionment of Liability*,<sup>1</sup> recently adopted by the American Law Institute, explicitly repudiates the defense, rejecting the provisions of the *Restatement (Second) of Torts*<sup>2</sup> that recognized it.<sup>3</sup> The modern conventional wisdom is that assumption of risk should be completely merged or assimilated within comparative fault and abolished as a distinct doctrine. And this is also the view of many, perhaps most, scholars and treatise writers.<sup>4</sup> For example, Stephen Sugarman has urged that "when we are tempted to say 'assumption of risk' we should instead say something else."<sup>5</sup> These abolitionists must concede that courts still routinely employ the *language* of assumption of risk, recognizing several different versions.<sup>6</sup> However, on the

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1. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).

2. RESTATEMENT (SECOND) OF TORTS (1965).

3. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i, § 3 cmt. c (2000).

4. See, e.g., KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 153 (2d ed. 2002); DAN B. DOBBS, THE LAW OF TORTS 534-46 (2000) (apparently favoring the abolition of a distinct doctrine of assumption of risk, but treating many assumption-of-risk cases under the rubric of "no duty"); 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 21.8 (2d ed. 1986); Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141 (1952); Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 VAL. U. L. REV. 833 (1997); John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961); see also John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991) (favoring the merger of assumption of risk into comparative fault, but supporting comparative apportionment even when a plaintiff has reasonably assumed the risk).

5. Sugarman, *supra* note 4, at 845. A number of courts agree that the language of "assumption of risk" should no longer be used, at least in jury instructions. See, e.g., *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167, 171 (Minn. 1980); *Del Tufo v. Township of Old Bridge*, 685 A.2d 1267, 1279 (N.J. 1996). In an earlier case, the New Jersey Supreme Court was openly exasperated over the issue: "Experience . . . indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it." *McGrath v. Am. Cyanamid Co.*, 196 A.2d 238, 240-41 (N.J. 1963).

6. The predominant terms are "express" assumption of risk, "implied primary" assumption of risk, and "implied secondary" assumption of risk. See *infra* notes 18-21 and accompanying text.

modern view this is a matter of historical accident and conventional usage; the various types of assumption of risk could readily be eliminated and replaced by "contractual waiver," "no duty," "no breach," or "contributory negligence,"<sup>7</sup> as the *Restatement (Third)* indeed proposes.

But the supposed legal irrelevance of "consent" to a risk of harm, celebrated by the modern "merger" approach, is greatly overstated. And the supposition that consensual norms have been completely replaced by norms of reasonableness is also incorrect. A number of courts do continue to recognize assumption of risk as a distinct substantive doctrine (and not simply as a label for other doctrines).<sup>8</sup> Moreover, even abolitionist courts recognize numerous no-duty doctrines that implicitly rely upon a consensual rationale of the sort that underlies many versions of assumption of risk, as we shall see. Furthermore, it is firmly established that consent to an *intentional* tort precludes liability, yet this doctrine appears to rest, not on whether the consenting victim acted "reasonably" or "unreasonably" in choosing to consent, but instead on precisely the type of consensual rationale that many traditional courts emphasized in recognizing assumption of a risk of the defendant's *negligence*. Why should the reasonableness of the victim's decision be irrelevant in the intentional tort context yet (as the modernists claim) critical in determining when a victim of negligence may recover? Advocates of abolishing assumption of risk should find this puzzling.

In exploring these issues, this Article will draw several important conclusions. First, as a normative matter, the abolitionists are indeed correct that *traditional* assumption of risk doctrine was much too broad in its preclusion of victim recovery for all risks that the victim voluntarily and knowingly encountered. However, assumption of risk is defensible if confined to two much narrower categories, which I dub "full preference" and "victim insistence on a relationship." In rough terms, a plaintiff fully prefers a risk if he actually favors the tortious option that a defendant provided to the nontortious option that the defendant could have provided. (An example is where a passenger encourages a driver to speed.) And a plaintiff insists on a relationship if he requests that a defendant permit him to confront a tortious risk when the defendant could decline any further relationship with him.

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7. For further discussion, see *infra* notes 23–33 and accompanying text.

8. See, e.g., *Evans v. Albina Transfer Co., Inc.*, 229 Ariz. Advance Rep. 53 (Ariz. App. Div. 1 1996), available at 1996 WL 650623; *Vaughn v. Pleasant*, 471 S.E.2d 866, 868 (Ga. 1996); *ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997); *Huffman v. Walker Jones Equip. Co.*, 658 So. 2d 871, 873 (Miss. 1995); *Pleiss v. Barnes*, 619 N.W.2d 825, 830 (Neb. 2000); *Imbruglio v. Portsmouth IGA, Inc.*, 747 A.2d 1011, 1012 (R.I. 2000); *Pettry v. Rapid City Area Sch. Dist.*, 630 N.W.2d 705, 708 (S.D. 2001); see also *Tuley v. Kan. City Power & Light Co.*, 843 P.2d 248, 252–53 (Kan. 1992) (retaining assumption of risk only in cases involving employer-employee relationships).

(An example is where a stranded motorist requests a ride from a drunk driver.)

Second, the consensual rationale underlying traditional assumption of risk may continue to carry weight even in abolitionist jurisdictions, especially in certain no-duty, limited-duty, or no-breach categories, although its weight and shape will vary in important respects depending on the doctrinal category.

Third, a careful comparison between assumption of risk and consent to an intentional tort will reveal fundamentally similar underlying rationales. Consent properly plays a role in both contexts, and the apparently greater relevance of the victim's reasonableness when the injurer has been negligent largely reflects only contingent, empirical differences in the typical fact pattern when a victim consents to negligence rather than to an intentional tort.

Part I of this Article clarifies the doctrinal framework for understanding assumption of risk (AR), with attention to the relation between AR and the doctrines of no duty, no breach, and victim negligence. Part II explains that the supposed abolition of AR leaves some important lingering questions. First, does the merger doctrine really abolish AR, or instead merely place traditional AR cases within different doctrinal pigeonholes? Second, should courts recognize a narrower version of traditional AR in two categories of cases, "full preference" and "victim insistence on a relationship"? Third, are AR and consent to an intentional tort essentially analogous legal doctrine? If we recognize the latter, is there any reason not to recognize the former? Fourth, can the distinct consensual rationale behind most versions of AR be accommodated within a more catholic conception of victim "fault"? The conclusion considers the normative perspectives underlying AR.

## I. DOCTRINAL FRAMEWORK

I begin with a detailed exposition of the doctrinal categories that contemporary American courts employ in their analysis of AR, and an explanation of some of the reasons for the modern trend towards officially abolishing AR as a distinct defense.

In order to frame the modern debate about whether AR doctrine should continue to play a distinct role, it is useful to recall briefly the history of the development of the doctrine in American law. The following is an abbreviated and somewhat stylized summary.<sup>9</sup>

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9. For useful accounts, see *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93-97 (N.J. 1959); RICHARD A. EPSTEIN, TORTS § 8.7.1 (1999); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 41-45 (1980); Terence Ingman, *A History of the Defense of Volenti Non Fit Injuria*, 26 JURID. REV. 1 (1981); and Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 939-44 (1981).

When the doctrine of AR originated in the nineteenth century,<sup>10</sup> it was broadly interpreted. Thus, although the doctrine ostensibly required that an actor “voluntarily” encounter a risk, this requirement was not taken very seriously.<sup>11</sup> Moreover, some early cases did not require that the actor subjectively appreciate the risk; rather, it was enough that he should have been aware.<sup>12</sup>

But in the second stage of doctrinal development, the concept of AR was considerably narrowed. Now, some types of choice were not considered sufficiently voluntary. Moreover, subjective awareness of the risk was required, and further, such awareness resulted in a defense only if the actor was subjectively aware of the *specific* risk that the defendant had created. The *Restatement (First) of Torts* and *Restatement (Second) of Torts* embodied this narrower conception, which one might call “traditional assumption of risk.”<sup>13</sup>

Consider the famous case of *Murphy v. Steeplechase Amusement Co.*<sup>14</sup> In *Murphy*, the defendant operated a ride at Coney Island, New York, called “The Flopper,” consisting of an inclined moving belt with padded walls but no hand rail.<sup>15</sup> The ride was, as its name suggests, designed to challenge participants to keep their balance. Many routinely fell. Plaintiff’s fall resulted in a fractured knee cap. In sparkling prose, Chief Judge Benjamin

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10. The doctrine originated in lawsuits by employees over unsafe conditions in the workplace. DOBBS, *supra* note 4, at 537–38. The restrictive effect of assumption of risk (AR) doctrine in this context facilitated the complete replacement of the tort regime for most workplace injuries. *Id.* at 538–39. Now, under statutory worker’s compensation rules, employers are liable without fault for a range of workplace injuries, and the AR defense is eliminated. *Id.*

11. See, e.g., *Lamson v. Am. Ax & Tool Co.*, 58 N.E. 585, 585 (Mass. 1900). In *Lamson*, an employee was barred by AR when he was injured by a hatchet falling from a rack. *Id.* He had complained to the employer about the risk, and the risk was indeed unreasonably dangerous, but the employer’s response that “he would have to use the racks or leave” indicated that the employee’s choice to remain on the job was sufficiently voluntary to bar his recovery. *Id.*

12. See *Meistrich*, 155 A.2d at 94 (citing cases). Indeed, early AR decisions did not even always require that the employee *should* have been aware of the risk that caused injury. See *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 55–59 (1842) (establishing the fellow servant rule, under which an employee was held to have assumed the risk of negligence by a fellow employee, notwithstanding that an employer is ordinarily vicariously liable for its employee’s torts, and notwithstanding lack of proof that the employee either was aware of the risk that injured him, or even should have been aware of that risk).

13. RESTATEMENT OF TORTS § 893 (1934); RESTATEMENT (SECOND) OF TORTS § 496D–§ 496E (1965). In modern parlance, this conception is identified as “secondary assumption of risk,” as we will see.

14. 166 N.E. 173 (N.Y. 1929).

15. For Cardozo’s view of the facts of the case, see *id.* at 174. In research for a book chapter on *Murphy*, I have discovered that Cardozo’s explanation of the facts is somewhat misleading. Among other things, the walls of the Flopper were not actually adjacent to the rider, but were at least six feet to the side of the belt. Also, the belt was extremely narrow (sixteen inches) and moved extremely fast (ten feet per second, or almost seven miles per hour). See Kenneth W. Simons, *The Story of Murphy v. Steeplechase Amusement Co.: While the Timorous Stay at Home, the Adventurous Ride the Flopper*, in TORTS STORIES (Robert Rabin & Stephen Sugarman eds., 2003) (forthcoming). But for purposes of this Article, I assume Cardozo’s version of the facts.

Cardozo reversed the trial and appellate court judgments that had upheld a verdict for the plaintiff.<sup>16</sup>

On one view, *Murphy* involves AR in the narrow (second-stage) sense. The plaintiff voluntarily encountered the risk, because the Flopper was a recreational amusement, and he could readily have declined to participate. Moreover, he was subjectively and specifically aware of a significant risk of falling down, and that is precisely the risk that resulted in his injury.

At both the first and second stages, AR was a defense distinct from contributory negligence. However, because the law at the time treated both AR and contributory negligence as a complete bar to recovery, it did not matter whether a given state of facts was characterized as contributory negligence, AR, or both. Nor was it critical whether the plaintiff lost because defendant was found not to owe a duty (or not to have breached a duty<sup>17</sup>) rather than because his conduct satisfied the defense of contributory negligence or AR. Thus, on another view, *Murphy* is a case in which the defendant breached no duty, that is, was not negligent in the first place in providing the Flopper to willing customers who were aware of the risks. Characterizing *Murphy* in this way, rather than as traditional AR, still precludes plaintiff's recovery.

The third stage in the development of AR was a by-product of the advent of comparative negligence. At this stage, the difference between AR and contributory negligence becomes critical. Now contributory negligence is no longer treated as a bar to recovery. Instead, the fault of the plaintiff and the fault of the defendant are compared, and the plaintiff will often be able to obtain a partial recovery notwithstanding his own negligence. Thus, a crucial question for courts and legislatures adopting comparative fault is whether AR should survive as a separate defense or instead should be merged into comparative fault. Moreover, different courts have endorsed dramatically different versions of a merger approach.

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16. *Murphy*, 166 N.E. at 174. Judge Cardozo wrote:

The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

*Id.*

17. The legal category employed does matter in certain respects, however. Characterizing an issue as a defense rather than a failure to satisfy the prima facie case (of duty or breach) obviously affects burdens of production and persuasion. See Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 241 n.92 (1987). Moreover, insofar as an issue is resolved as a no-duty rule, rather than as no breach or a defense of AR, it is resolved as a matter of law by the judge, rather than as a matter of fact by the fact-finder, with limited judicial review.

It is helpful to begin by considering the less controversial effects of comparative fault on the different varieties of AR. All jurisdictions adopting comparative fault seem to accept the following legal results in the following categories:

1. The plaintiff entered into a valid contractual agreement not to hold the defendant liable for the risk in question. Result: The defendant is not liable. (This is usually termed “express AR.”<sup>18</sup>)
2. The defendant does not owe a duty to the plaintiff or does not breach a duty owed. Result: The defendant is not liable, regardless of the plaintiff’s fault. (This is often denominated “implied primary AR.”<sup>19</sup>)
3. The defendant is negligent, and the plaintiff has *not* assumed the risk within the meaning of traditional AR. Result: The plaintiff is not automatically barred; rather, his fault, if any, is compared to that of the defendant. (Ordinary principles of comparative fault apply.)

Thus, on the facts of *Murphy*, if the defendant had obtained a contractual release from the plaintiff prior to his taking a ride, and if that release was enforceable, then the plaintiff would have recovered nothing (Category 1). Moreover, as we have seen, one possible explanation of the plaintiff’s nonrecovery in *Murphy* is that the defendant breached no duty of care by deciding to offer a somewhat risky recreational activity to the willing public (Category 2). Finally, suppose the defendant had actually breached a duty to the plaintiff—for example, by providing inadequate padding to cushion a

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18. See RESTATEMENT (SECOND) OF TORTS § 496B (1965); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. a (2000). This terminology is misleading. “Contractual” AR would be more accurate, because a contractual agreement can be either express or implied in fact.

Even express contractual agreements are sometimes not enforceable. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmts. d–e, h (2000). Courts are less likely to enforce agreements that involve a “public interest” service, such as medical care, or that immunize actors for reckless or intentional, rather than negligent, acts. *Id.* § 2 cmts. d–e. Even with such limitations, however, many express agreements will be enforceable and will preclude recovery in circumstances where traditional AR would not apply. For example, a plaintiff’s waiver of her right to sue a private health club for negligently created risks can be valid, even if she is unaware when she signs the waiver of the specific risk that causes her injury, but traditional AR would require awareness of the specific risk. See Sugarman, *supra* note 4, at 850–51.

19. See *Meistrich v. Casino Area Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959). As we will see, “primary AR” typically refers only to cases in which the conclusion that the defendant has no duty or has not breached a duty depends in part on the consensual nature of the activity in question.

Primary AR typically includes both cases where the defendant owes no duty, and cases where she owes a duty but does not breach it on the facts. In this Article, I do not address how one identifies which cases fall within “no duty” and which fall within “duty but no breach.” Sometimes, for convenience, I use the phrase “no duty” for both categories.

fall.<sup>20</sup> And suppose the plaintiff was not aware of that condition. Then he will *not* have assumed the risk within the meaning of traditional AR, and whether he recovers in full, or (possibly) in part, depends on whether his own conduct was negligent. This is simply a straightforward application of comparative fault principles.

Consider the following chart, depicting these categories (as well as a fourth to be discussed below):

	a. P acts reasonably	b. P acts unreasonably
<b>1. Express AR</b>  P releases D from liability in a valid contract.	No recovery	No recovery
<b>2. (Implied) Primary AR</b>  D has no duty or does not breach a duty owed.	No recovery	No recovery
<b>3. Ordinary comparative fault</b>  [Where AR is <i>not</i> at issue] D is negligent.	Full recovery	Partial recovery [Depends on comparative fault assessment]
<b>4. (Implied) Secondary AR</b>  D is negligent; P voluntarily and knowingly encounters the negligently created risk. A. Traditional AR approach B. Merger into comparative fault	(See alternatives below)   No recovery Full recovery	(See alternatives below)   No recovery Partial recovery

For a *Murphy* variation exemplifying Category 3, suppose the plaintiff, unaware of the risk of inadequate padding, accidentally inserted his foot beneath the moving belt, resulting in a bad fall. Then, if this conduct was considered unreasonable (3b) (see row 3, column b in the chart), his fault would be compared to the defendant's and he might obtain partial recovery. If his conduct was not considered unreasonable (3a), he would obtain full recovery.

Beyond Categories 1, 2, and 3, however, jurisdictions differ significantly. The overriding question after comparative fault is how to address the following residual category:

4. The defendant is negligent, and the plaintiff satisfies the criteria of traditional AR, i.e., the plaintiff voluntarily and knowingly en-

20. The plaintiff in *Murphy* so argued on appeal, but the court concluded that he did not present this theory to the jury. *Murphy*, 166 N.E. at 175.



counters the negligently created risk. (This is often denominated “implied” AR of the “secondary” form.<sup>21</sup>)

In other words, if the case does not belong in Category 1 (because the plaintiff has not released the defendant from liability) or in Category 2 (because the defendant is negligent), then the case must belong either in Category 3 (no secondary AR) or Category 4 (secondary AR). And as with Category 3, there are two subcategories within Category 4—namely, (4a) plaintiffs who act *reasonably* in voluntarily encountering the known risk, and (4b) plaintiffs who act *unreasonably* in voluntarily encountering the known risk.<sup>22</sup>

The predominant modern position is that Category 4 should be merged into the other categories. That is, conduct that under traditional AR would bar recovery is now assimilated to comparative fault: If the plaintiff *unreasonably* chose to encounter the risk, he was at fault and might be entitled to a partial recovery (4b), while if he *reasonably* chose to encounter the risk, he was not at fault and would receive a full recovery (4a). The recently adopted *Restatement (Third) of Torts: Apportionment of Liability* endorses this approach, abolishing traditional AR.<sup>23</sup>

Thus, the merger approach simply assimilates secondary AR (Category 4) to contributory negligence,<sup>24</sup> treating cases in row 4 precisely like cases in row 3. Merger works two very significant changes relative to traditional AR. First, plaintiffs within 4b are treated like plaintiffs within 3b, often resulting in partial recovery rather than a complete bar to recovery. Second, plaintiffs within 4a are treated *much* more favorably. Now they recover in full, like plaintiffs within 3a, rather than being completely barred by traditional AR. Merger advocates see the main difference between Category 3 and Category 4 as the difference between inadvertent and advertent risk-taking by a po-

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21. See *Meistrich*, 155 A.2d at 93.

22. We can also distinguish the question whether a plaintiff's basic choice to encounter the risk was reasonable or unreasonable, from the question whether other aspects of the plaintiff's conduct (including its “manner”) were reasonable or unreasonable. It might be reasonable for the plaintiff to take the risk of riding even a higher-speed “Superflopper,” but not reasonable for him to take that risk if he decides to jump up and down as high as he can while on the Superflopper. See *infra* notes 31–32 and accompanying text.

23. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i, § 3 cmt. c (2000).

24. This is a bit of an oversimplification. Courts that endorsed traditional AR did not need to distinguish carefully between no duty, no breach, contributory negligence, and secondary AR, because the result in each case would be no liability. Thus, their characterization of a given case as falling within the affirmative defense of secondary AR might have been casual. But with the advent of comparative negligence, the characterization question becomes critical. Insofar as some Category 4 cases might really have been Category 2 cases, it is not accurate to say that all traditional AR cases are now treated simply as contributory negligence (4b) or not (4a). Rather, some Category 4 cases might now, on a more careful assessment, be treated as Category 2.

tential victim,<sup>25</sup> but they consider this distinction insufficient to warrant significantly different legal treatment, much less the radically different treatment that traditional AR provides.<sup>26</sup>

For a straightforward illustration of this merger approach, consider the facts of the prominent New Jersey case *Meistrich v. Casino Arena Attractions, Inc.*<sup>27</sup> In *Meistrich*, the defendant operated a skating rink. "There was evidence that defendant departed from the usual procedure in preparing the ice, with the result that it became too hard and hence too slippery for the patron of average ability using skates sharpened for the usual surface."<sup>28</sup> The plain-

25. Another possible difference is with respect to voluntariness rather than awareness of risk. If a plaintiff is aware of the specific risk and thus would otherwise be considered to have assumed the risk (and within Category 4), he nevertheless falls within Category 3 if he did not voluntarily encounter the risk. Contemporary courts that still recognize traditional AR would treat *Lamson* as such a case. See, e.g., *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978).

26. However, the *Restatement (Third) of Torts: Apportionment of Liability* does provide that the plaintiff's knowledge of the risk is a factor potentially increasing his share of fault and thus decreasing his share of recovery. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. c, § 8 (2000). Thus, it treats Category 4b plaintiffs somewhat less favorably than 3b plaintiffs.

In practice, merger of AR has meant two things: (1) a complete bar to recovery is often now only a partial bar, and (2) only those cases of AR that also amount to contributory negligence will reduce a plaintiff's recovery. However, in theory, a jurisdiction might endorse (1) but not (2). In other words, perhaps even a reasonable voluntary choice to confront a risk (which does not amount to contributory negligence) should somehow be compared to a defendant's negligence, allowing the plaintiff a partial recovery instead of no recovery.

Surprisingly, a few jurisdictions do endorse the incorporation of even reasonable AR by the victim into comparative fault. See, e.g., *Kirk v. Wash. State Univ.*, 746 P.2d 285, 290-91 (Wash. 1987). In a little-remarked-upon portion of its leading opinion in *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992), the California Supreme Court leaves open this possibility:

[A] jury in a "secondary assumption of risk" case would be entitled to take into consideration a plaintiff's voluntary action in choosing to engage in an unusually risky sport, whether or not the plaintiff's decision to encounter the risk should be characterized as unreasonable, in determining whether the plaintiff properly should bear some share of responsibility for the injuries he or she suffered.

*Id.* at 706; see also VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 190, 220 (3d ed. 1994) (endorsing as "logical" the retention of traditional AR, and suggesting that we "let the jury consider that conduct [even if reasonable] in reducing the amount of the plaintiff's damages"); Diamond, *supra* note 4, at 741-50 (endorsing comparative fault consideration of reasonable assumption of risk).

I find it more difficult to justify applying a comparative rule to a consensual rationale than to a fault rationale. See *infra* notes 132-133 and accompanying text; see also *Leyendecker v. Cousins*, 770 P.2d 675 (Wash. Ct. App. 1989). In *Leyendecker*, the court expressed doubts about its supreme court's ruling in *Kirk* that reasonable AR should be compared, noting that the statutory definition of fault refers to "unreasonable assumption of risk." *Id.* at 678. "It thus appears that the Legislature does not consider reasonable assumption of risk as a damage-reducing factor . . . Nor logically should it even factor in to reduce the plaintiff's damages, since his conduct has by definition been free from blame." *Id.* at 678 n.2.

27. 155 A.2d 90 (N.J. 1959). The *Meistrich* decision did not address the effect of comparative fault on assumption of risk, however.

28. *Id.* at 92.

tiff noticed the very slippery conditions but nevertheless continued to skate and suffered injury.<sup>29</sup> Under the merger approach, the question is simply whether either the skater's choice to stay on the ice or his particular manner of skating was negligent. If he was negligent, he might obtain partial recovery. If not, he obtains full recovery. If he is indeed an average skater, he might well be negligent for continuing to skate; but if he is an unusually talented skater who ordinarily has no difficulty with these conditions, he might be free from fault in choosing to continue, in which case he receives a full recovery.<sup>30</sup>

Another illustration of the merger approach is the following variant on *Murphy*. Suppose that the Flopper was malfunctioning in such a way that its speed was twice the speed the manufacturer intended. Nevertheless, some participants continued to ride this "Superflopper." At that high speed, it might well be negligent for the operator to permit customers to continue to use the device.<sup>31</sup> If someone steps on the Superflopper, falls, and is injured, the merger approach permits partial recovery if the fact-finder concludes that he was negligent in choosing to use the malfunctioning device, and full recovery if it concludes that he was not negligent.<sup>32</sup>

A final illustration of the merger approach is a plaintiff's decision to rescue someone injured or endangered by the negligent defendant, a decision that unfortunately leads to the plaintiff's own injury. Under traditional AR, such a rescuer might be barred from recovery even if neither the choice to rescue nor the manner of rescue was unreasonable.<sup>33</sup> By contrast, under

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29. *Id.*

30. Of course, he could still be negligent in paying insufficient attention or in otherwise failing to use due care to exercise the skill of which he is capable. And conversely, an "average" skater might not be able to appreciate the seriousness of the risks from continuing and hence might not be negligent.

31. In his opinion, Cardozo observes:

A different case would be here if the dangers inherent in the sport were . . . so serious as to justify the belief that precautions of some kind must have been taken to avert them. . . . A different case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change.

*Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174-75 (N.Y. 1929).

Alternatively, suppose that the operator's negligence does not consist in permitting people to use the device, because he (reasonably) had not yet discovered the malfunction when the plaintiff decided to step on the Superflopper. He might, nevertheless, be responsible in negligence (for example, for failing to maintain the machine properly). (An alternative theory is strict liability, if the malfunction is due to a manufacturing flaw and if the operator is legally responsible for such a defect. However, in this Article, I do not address the question of how various assumption-of-risk theories would apply to strict liability claims. For a discussion of that question, see Simons, *supra* note 17, at 274-78.)

32. Whether comparative fault is actually the best way to analyze such a case is discussed further below.

33. See *Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla. 1977). In the course of critiquing traditional AR, the court gives this example of reasonable rescue:

merger, a reasonable plaintiff obtains full recovery. Even if the rescue was imprudent to undertake<sup>34</sup> or careless in its manner of execution, the plaintiff might at least obtain partial recovery. In this category of cases, especially, the merger approach appears to provide a far more justifiable resolution than does traditional AR.

In some jurisdictions, however, traditional AR is not merged, but survives comparative fault. Two survival approaches can be distinguished.

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Application of pure or strict assumption of risk is exemplified by the hypothetical situation in which a landlord has negligently permitted his tenant's premises to become highly flammable and a fire ensues. The tenant returns from work to find the premises a blazing inferno with his infant child trapped within. He rushes in to retrieve the child and is injured in so doing. Under the pure doctrine of assumption of risk, the tenant is barred from recovery because it can be said he voluntarily exposed himself to a known risk. Under this view of assumption of risk, the tenant is precluded from recovery notwithstanding the fact that his conduct could be said to be entirely reasonable under the circumstances.

*Id.* The *Blackburn* court goes on to reject the view that such reasonable AR should bar or reduce recovery. See also *HARPER ET AL.*, *supra* note 4, at 208–10.

For an early case finding that a rescuer assumed the risk, see *Blair v. Grand Rapids & Indiana Railroad Co.*, 26 N.W. 855, 858 (Mich. 1886). See also *Cook v. Johnston*, 25 N.W. 388 (Mich. 1885). In *Cook*, a woman who entered a stable to save her horse could not recover. *Id.* at 388. The court's rationale appears to be a mixture of assumption of risk and lack of proximate cause: "The act in which she was engaged may have been such as she may have thought proper and laudable and worth some risk, but defendant's responsibility cannot be created or increased by such independent and voluntary conduct of plaintiff in putting herself in harm's way." *Id.* at 389.

However, since *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y. 1921), courts have routinely applied the "rescue" doctrine, under which an actor who acts reasonably in attempting to rescue (or, in some jurisdictions, one who acts merely negligently, but not rashly or recklessly) is considered neither contributorily negligent nor to have assumed the risk. See, e.g., *Lorie v. Standard Oil Co.*, 368 S.E.2d 765, 767–68 (Ga. Ct. App. 1988); *Boddie v. Scott*, 722 A.2d 407, 410–14 (Md. Ct. Spec. App. 1999); *Drummond v. Mid-West Growers Coop. Corp.*, 542 P.2d 198, 204 (Nev. 1975); *Govich v. N. Am. Sys., Inc.* 814 P.2d 94, 100 (N.M. 1991); *Ouellette v. Carde*, 612 A.2d 687, 689 (R.I. 1992).

Nevertheless, the rescue exception to AR doctrine seems to be an ad hoc exception. For example, treating rescues as involuntary, *RESTATEMENT (SECOND) OF TORTS* § 496E(2)(a) illus. 2–3 (1965), is problematic. See *infra* text accompanying notes 38–40.

Notwithstanding the rescue doctrine, a recent case bars a reasonable rescuer from recovery under the rubric of assumption of risk. In *Fagan v. Atnalta, Inc.*, 376 S.E.2d 204 (Ga. Ct. App. 1988), the plaintiff was a customer in a bar who tried to help the bartender when rowdy customers were in the process of dragging her outside. The customers severely beat the plaintiff. *Id.* at 205. The plaintiff sued the bar for providing inadequate security, because the bar had experienced a history of assaults. *Id.* The Georgia Court of Appeals upheld summary judgment for the bar, reasoning that the plaintiff deliberately and voluntarily confronted a known risk. *Id.* at 206. (However, for some unexplained reason, the court did not characterize the plaintiff as a rescuer.)

34. Suppose a plaintiff foolishly attempts to rescue the original victim in circumstances where success is virtually impossible. Similarly, "[i]t may be one thing to raise the bar [of contributory negligence] as a matter of law if a man entered a blazing structure to retrieve a fedora, but something else thus to bar him if his purpose was to rescue a child." *Meistrich*, 155 A.2d at 95. *Meistrich* was decided when contributory negligence was a complete bar to recovery, but its analysis would permit partial recovery under comparative fault standards even if the decision to rescue was unreasonable. However, I suspect a jury would be more sympathetic to partial recovery if the rescuer had tried to save a valuable painting rather than his hat.

Under the first approach, partial merger, *unreasonable* AR (Category 4b) merges and is now governed by comparative principles, but *reasonable* AR (Category 4a) survives and is a complete bar to recovery.<sup>35</sup> On its face, this approach is perverse: The reasonable plaintiff is treated more harshly than the unreasonable one!<sup>36</sup> (The reasonable rescuer gets no recovery, while the unreasonable one gets a partial recovery.) Under the second survival approach, *all* claims that were barred by traditional AR continue to be barred. This approach might appear to reach anomalous results as well: Although reasonable risk-takers are now not treated worse than unreasonable ones, some unreasonable plaintiffs (Category 3b) obtain partial recovery while *other* unreasonable plaintiffs (Category 4b) obtain none. Thus, for example, if the skater in *Meistrich* did not notice that the ice was especially slippery but should have noticed this, then he obtains partial recovery. But if he did notice the condition yet continued to skate, he is barred, whether or not his decision to continue skating was unreasonable.<sup>37</sup>

One variation of the second survival approach deserves special mention. This variation retains traditional AR as a *theoretical* bar to recovery, but defines most or all reasonable choices to encounter the risk as involuntary and thus permits full recovery in such cases. For example, one who reasonably chooses to rescue a person endangered by a defendant's negligence is considered to have encountered the risk involuntarily.<sup>38</sup>

35. I distinguish the different approaches to secondary AR in the chart below. The partial merger approach is C in the chart. The second survival approach described in the text is A in the chart. The chart also depicts a fourth approach, "Supermerger." This approach applies comparative fault to all traditional AR cases, whether or not P acts reasonably. See *supra* note 26, last three paragraphs.

	a. P acts reasonably	b. P acts unreasonably
<b>4. Secondary AR:</b>		
A. Traditional AR approach	No recovery	No recovery
B. Merger into comparative fault	Full recovery	Partial recovery
C. Partial merger approach	No recovery	Partial recovery
D. "Supermerger" into comparative fault	Partial recovery	Partial recovery

36. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 2 cmt. i reporters' note (2000); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 15.04[B][3][c] (2000) (citing cases). John L. Diamond et al. note an argument for this apparently perverse result—namely, that such plaintiffs often have been compensated for taking the risk, and that is what makes their encountering of the risk reasonable. *Id.*; see also Diamond, *supra* note 4, at 724–25. This rationale, however, can at best account for a small subset of "reasonable AR" cases (such as injuries incurred by firefighters or professionals engaged to repair a negligently created condition).

37. I will later suggest, however, that this second approach does have a principled explanation, if limited to certain categories of assumption of risk.

38. See RESTATEMENT (SECOND) OF TORTS § 496E(2)(a) (1965). In another recent case, the plaintiff chose to park close to a school gymnasium and walk over an icy patch to the gym,

This strategy is clever. Where it applies,<sup>39</sup> it closely resembles the merger approach: Plaintiffs who reasonably choose to encounter a risk obtain full recovery.<sup>40</sup> The approach is superficially attractive, for it retains the consensual rhetoric of traditional AR and yet, like the merger approach, permits reasonable plaintiffs to recover damages. However, I think the approach is intellectually dishonest. A reasonable choice to rescue someone is not involuntary in any ordinary sense of the term. It is also difficult to understand why, if a person's choice to rescue was unreasonable rather than reasonable, it would then lose its involuntary character and become voluntary (as this approach provides). If a court's real justification for allowing recovery when a plaintiff reasonably chooses to rescue is that his actions are perfectly reasonable, then the court should directly endorse the merger of AR into comparative fault.

The various survival approaches do seem problematic. And the conventional wisdom is that the recent ascendance of comparative fault, which can broadly consider all factors relevant to the reasonableness of the victim's conduct, supports eliminating the archaic and rigid doctrine of AR.

## II. ANALYSIS

The conventional wisdom, however, is too simple. In the remainder of this Article, I will address the following lingering questions.

First, does the merger doctrine actually abolish AR? Or does it merely reach the same results as traditional AR but do so by the device of placing

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rather than park at a more remote location from which she might still have to walk over ice. According to the court, whether she "voluntarily" encountered the risk depended on whether her choice to park close to the gym was reasonable. *Pettry v. Rapid City Area Sch. Dist.*, 630 N.W.2d 705, 709 (S.D. 2001).

39. The scope of this approach is unclear. The *Restatement (Second) of Torts* provides:

- (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to
  - (a) avert harm to himself or another, or
  - (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

RESTATEMENT (SECOND) OF TORTS § 496E (1965). The question of scope depends on how broadly courts read clauses (a) and (b). See Simons, *supra* note 17, at 266–69. In *Pettry*, the court interprets these provisions quite broadly. See *supra* note 38.

To be sure, sometimes a plaintiff's decision to encounter a risk is plausibly construed as not fully voluntary and thus as not sufficiently consensual to justifiably bar a recovery. (Suppose a parent suddenly faces an uncertain, but possibly high, risk of injury to a child, and impulsively chooses to rescue.) But the *Restatement (Second)* approach applies much more widely; it is not limited to emergencies where there is little time for careful thought.

40. However, the approach is a little more stingy than the merger approach in cases where the plaintiff *unreasonably* chooses to encounter the risk. Here, the plaintiff is barred by traditional AR, while the merger approach would permit partial recovery under comparative fault.

the traditional AR cases within different doctrinal pigeonholes? The answer, not surprisingly, is located between these extremes.

Second, insofar as the merger approach really does change some substantive results, does it go too far? In two narrow categories of cases, there are strong arguments for recognizing an AR defense to an established breach of duty. The first is the full preference theory, and the second is victim insistence on a relationship. Each is analyzed in detail below.

Third, even modern courts that endorse merger also recognize the defense of consent to an *intentional* tort. So the question arises: How can these courts explain their rejection of traditional AR, which is also justified by the victim's consent? The comparison between consent to a negligently created risk and consent to an intentional tort therefore deserves careful attention. I will conclude that the doctrine of consent to an intentional tort does not entail a commitment to endorsing traditional AR, but it does strongly support either a narrow version of AR or functionally equivalent no-duty rules that take account of consent.

Fourth, is the concept of victim fault capacious enough to include consideration of the consensual rationales underlying traditional AR, or at least the narrower versions that are defended below? Such a broad concept, we will see, is indeed defensible. But it is in tension both with the predominant view that victim fault is the mirror image of injurer fault, and with the understanding that consent vitiates the wrongfulness of the injurer's conduct.

#### A. Does the Merger Doctrine Actually Abolish Assumption of Risk?

The question addressed in this part raises several related issues. Is the merger approach merely designed to eliminate confusion about doctrinal categories, or is it also intended to liberalize recovery to the benefit of plaintiffs? Such liberalization will not occur if, in the end, the merger approach simply relabels all traditional AR cases as cases of "no duty" or "no breach." And even if only some cases that were once treated as AR are now placed within a no-duty category, what difference does the reclassification make? I address these questions in turn.

Part of the rationale of the modern merger approach is to avoid the confusion engendered by use of the term "assumption of risk."<sup>41</sup> The term

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41. See, e.g., *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring). As Justice Frankfurter explains:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

*Id.*

has indeed been used to encompass a remarkable range of legal doctrines, from contractual limitation on a victim's recovery (express AR) to lack of duty (implied primary AR) to advertent contributory negligence (one kind of implied secondary AR) to voluntary encountering of a known risk (what I have called traditional AR). In most of these cases, the term seems to reflect some type of consensual rationale. But sometimes the term is used extremely loosely, encompassing cases in which it is impossible to find even a weak consensual rationale of any sort. Thus, some courts have invoked the term to describe virtually any no-duty rule—for example, “the trespasser assumes the risk of defects unknown to the landowner.”<sup>42</sup>

Clarity might indeed be served by abolishing the term “assumption of risk.”<sup>43</sup> At the very least, courts should carefully qualify the term and distinguish its varying meanings, precisely identifying, for each, the substantive content and legal effect (e.g., contractual AR, consent-based no-duty rule, unreasonable AR). An argument in favor of the second alternative—preserving but qualifying the term—is that most of its various uses at least have a family resemblance. All involve victims who, in one sense or another, have chosen or consented to accept a risk of harm. On the other hand, this family encompasses some very dissimilar offspring. For example, the validity of a contractual release raises issues of policy quite different from the weight given, under a comparative fault regime, to an actor's unreasonable choice to encounter a known, tortiously created risk.

So if clarity were the only issue at stake, abolition of the term “assumption of risk” might be the sensible route. All cases now decided under the rubric of the various AR doctrines would be reallocated to the categories of (1) contractual release, (2) no duty or no breach (all of which result in no recovery), (3b) breach and contributory negligence (possible partial recovery), or (3a) breach but no contributory negligence (full recovery). In other words, cases within Categories 4a and 4b above would be redistributed to one of the other categories.

However, advocates of abolition are not concerned merely with truth in doctrinal labeling. They also want to *change the substantive results* that traditional AR doctrine requires. In particular, they wish to avoid the broad conclusion that every case in which a victim voluntarily and knowingly encountered a risk created by the defendant should result in no liability, even if the defendant had tortiously created the risk. The merger approach is ordinarily intended to facilitate victim recovery.

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42. See, e.g., *Deacy v. McDonnell*, 38 A.2d 181, 183 (Conn. 1944). Another example is the fellow servant rule. See *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 49 (1842).

43. Some courts have done so. See *supra* note 5 and accompanying text.



Does merger actually have this effect of liberalizing recovery? This mainly depends on how judges or legislatures reclassify cases previously evaluated as traditional AR. A jurisdiction that nominally abolishes traditional AR might not change the substantive results achieved by traditional AR at all and could easily replicate traditional AR's broad preclusion of recovery in one of two ways. First, it could require the inference of a contractual waiver in all such cases. Some courts have indeed moved surprisingly far in the "inferred waiver" direction.<sup>44</sup> To its credit, the *Restatement (Third) of Torts: Apportionment of Liability* resists this move, acknowledging that a contractual waiver requires the usual evidence of contractual formation.<sup>45</sup> If, as a matter

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44. An early draft of the *Restatement (Third) of Torts: Apportionment of Liability* employed an example suggesting that such an agreement to waive liability could very easily be inferred from conduct:

A provides B with a hang glider. B knows that hang gliding presents a risk of crashing. B crashes and sues A, claiming that A was negligent for providing B with a hang glider. The conduct of the parties may support a conclusion that they agreed that B absolved A of liability for the inherent risk of hang gliding.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i, illus. 1 (Council Draft No. 1, 1996). Under this approach, quite a few traditional AR cases could support a contractual waiver claim. The final version of the *Restatement (Third) of Torts: Apportionment of Liability* omits this example.

Moreover, some courts interpret the leading *Meistrich* case to support inferring a contractual waiver in a surprisingly large number of cases. Because *Meistrich* seems to treat both express contracts and consent to intentional batteries as express AR, some courts treat such consent as also involving a contractual waiver. See, e.g., *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977) (citing *Meistrich v. Casino Area Attractions, Inc.*, 155 A.2d 90 (N.J. 1959)); *Diamond*, *supra* note 4, at 732–36. Again, however, this is a distortion of ordinary contract principles.

45. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. a, j & illus. 1–2.

However, the *Restatement (Third)* also includes a confusing passage which, if read broadly, suggests that a contractual waiver can quite easily be inferred. *Id.* § 2 cmt. f provides: "Any agreement by words or conduct that would constitute consent to an intentional tort constitutes a defense under the [contractual waiver] rule stated in this Section." The Reporters' Note to comment f states flatly: "Conduct or language that constitutes consent to an intentional tort necessarily constitutes an agreement to absolve the other party of tort liability." *Id.* § 2 cmt. f reporters' note (emphasis added).

Such language could easily be read to require courts to find a contractual waiver in an AR case whenever the type of conduct in question would suffice to demonstrate consent in an intentional tort case. But this reading improperly presumes that consent to intentional torts is itself based on a theory of contractual waiver. If I dare you to punch me in the stomach as hard as you can, my nonrecovery for any resulting injury is premised not on my explicit contractual waiver of any tort claim against you, but upon the legal policy that I should not be entitled to obtain damages when I have consented to the contact that brought them about. Similarly, if I dare you to jump from a tree, and you take up the challenge and suffer injury, then you might not be entitled to recover, under either a no-duty rule or AR, but such evidence does not suffice to show that you waived any tort claim that you would otherwise have had.

Nevertheless, private communications from the Reporters of the *Restatement (Third) of Torts: Apportionment of Liability*, Professor Michael Green and Dean William Powers, to the author suggest that this broad reading was not intended. E-mail from Professor Michael Green, Wake Forest University School of Law, to Professor Kenneth Simons, Boston University School of Law (Mar. 6,

of policy, a court or legislature decides that a victim's choice to confront a risk should disentitle her from recovery, the scope and grounds of the policy should be explicitly defended. But pretending that all or most traditional AR cases really are straightforward contractual waivers and therefore need not be justified by a separate tort defense is an evasion, not an argument.<sup>46</sup>

Relabeling traditional AR as a no-duty rule is the second legal strategy that could achieve essentially the same no-liability effect.<sup>47</sup> Instead of concluding that traditional AR precludes an actor from recovery if she voluntarily and knowingly encounters a risk created by defendant, we could say that such a defendant owes such an actor no duty of reasonable care. For example, suppose a pedestrian sees a speeding car approach and knowingly takes the risk of running across the street, hoping to avert injury. If we believe that the pedestrian's choice to confront the risk should preclude recovery, we might characterize her choice as an instance of either traditional AR or a no-duty rule (that is, speeding drivers have no duty to avoid injuring pedestrians who knowingly and willingly risk injury from such drivers).

This strategy confronts a special doctrinal difficulty, however. Jurisdictions that continue to employ traditional AR (in the sense of voluntarily encountering a known risk) usually understand it as an affirmative defense to an *established breach of duty* rather than as a denial that a defendant has (or has breached) a duty in the first instance. This distinction is critical to many advocates of the merger doctrine. Professor Fleming James, probably the most influential proponent of abolition, was quite willing to recognize a range of no-duty rules, yet he was firmly opposed to traditional AR as an

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2002, 09:14:00 EST); e-mail from Dean William Powers, University of Texas School of Law, to Professor Kenneth Simons, Boston University School of Law (Mar. 6, 2002, 15:14:01 CST). Moreover, a passage in an article by Dean Powers suggests a much narrower reading, consistent with the usual rules of contract interpretation:

A plaintiff's conduct might . . . be evidence of an *actual* agreement to absolve the defendant of liability. For example, one player might make clear that he does not want to play because he might be held liable for his own negligence. If other players nevertheless invite him to play, their conduct might be interpreted to form an implied-in-fact contract.

William Powers, Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 779 (1999).

46. Among other problems, this fictional imputation of contractual waiver ignores the fact that the "contracting" parties might have had no course of dealing; indeed, traditional AR applies even when a plaintiff makes a unilateral choice to confront a risk, without any discussion or even communication with the defendant. See CLERK & LINDSELL ON TORTS §§ 3-74 to 3-77 (Anthony M. Juddale et al. eds., 18th ed. 2000) (analyzing English law); Simons, *supra* note 17, at 224-27.

47. There is, of course, a difference in burden of production or persuasion. See *supra* note 17.

The New York Court of Appeals has recharacterized certain traditional AR cases as "no duty," thus precluding recovery for assumed risks even after the advent of comparative fault, but it has apparently limited this approach to the inherent risks of a sport or recreational activity. See *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 120 (2d Cir. 2000); *Morgan v. New York*, 685 N.E.2d 202, 208 (N.Y. 1997).

affirmative defense.<sup>48</sup> In part, he was concerned about the breadth and generality of such a defense (whether characterized as a defense or as a no-duty rule).<sup>49</sup> But he was also especially upset about the possibility that a defendant who committed a *wrong*—a breach of duty—could nevertheless avoid liability simply because the victim chose to confront the risk.<sup>50</sup> A no-duty rule declares that no wrong was ever committed in the first place, while traditional AR seems to express a far more controversial proposition: Although the defendant did commit a wrong, the victim's choice to confront the risk has the effect of *canceling* that wrong.

Nevertheless, despite the rhetorical flourish of characterizing traditional AR as "consenting to a wrong," the substantive content of the distinction between traditional AR and no duty seems slight. In the end, if we find that the victim's conduct and preferences with regard to the risk are such that the defendant should not be liable, we might say either that the breach of duty to that victim is cancelled or that, as to *that* victim, no duty of care, in the end, exists or was breached. Under either view, the victim has not genuinely been wronged by the defendant.<sup>51</sup>

For an example where the distinction between traditional AR of a wrong and no duty seems insubstantial, return to the Superflopper variation. Suppose that the operator and several prospective customers observe that the belt on the Flopper is traveling at double the usual speed. Nevertheless, the operator lets the ride continue, and the customers decide to step aboard. Under traditional AR, it might be concluded that the operator was negligent for permitting the ride to continue, but that those customers who proceed with awareness of the unusual, additional risk are barred by traditional AR. Alternatively, it might be concluded that, with respect to those who are aware of the extra risks, the operator owes no duty to forbid use of the Superflopper.<sup>52</sup>

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48. See Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185-88 (1968).

49. *Id.* at 194-95.

50. *Id.* at 190-95; HARPER ET AL., *supra* note 4, 193-99.

51. Such a person of course does suffer a harm when the risk reaches fruition in personal injury or property damage. But the harm is not a wrongful one. See 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 100 (1986) [hereinafter *HARM TO SELF*]. Thus, Feinberg explains:

A person may indeed be harmed by what he consents to, in the sense that his interests may be set back, but he cannot be wronged. *Volenti [non fit injuria]* says, in effect, that if I cannot wrong myself by taking my own life quite voluntarily, then I am not wronged by another who kills me at my own request. From the moral point of view my consent to his action makes it as if it were by [sic] own.

*Id.*; see also 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 115-17 (1984) [hereinafter *HARM TO OTHERS*].

52. The insubstantiality of the distinction can also be seen from the perspective of those riders on the Superflopper who are not aware of the risks. They might be permitted to recover,

On the other hand, I do agree that the no-duty conclusion is easier to reach in the case of an actor who clearly owes no duty to any participants or potential victims, than in the case of an actor who, in the end, breaches a duty as to some but not others. Below, I will pursue this point further, suggesting that traditional AR doctrine, and narrow variants of traditional AR that I will defend, could be characterized essentially as *selective* no-duty doctrines.

Notwithstanding the theoretical possibility of simply reclassifying all traditional AR cases as no-duty, abolitionist jurisdictions do not ordinarily do so, for they typically do wish to permit liability in many of the cases where traditional AR would bar it. For example, they want to permit reasonable rescuers to recover. Or, on the facts of *Meistrich*, they want to permit even foolish skaters to obtain at least partial recovery if the skaters proceed to encounter the dangerous condition tortiously created by defendant.

Still, even in abolitionist jurisdictions that seek to liberalize recovery (thus distributing many or most of the Category 4 cases into Category 3), the spirit of traditional AR does not entirely disappear. For such jurisdictions will continue to recognize no-duty or limited-duty rules, and some of these rules give considerable weight to the preferences and choices of participants in an activity.<sup>53</sup> To that extent, the rules reflect principles and policies, and achieve an effect, similar to traditional AR.<sup>54</sup> And to that extent, it is misleading to say that AR has been abolished.

Reconsider *Murphy*. Under the modern assimilationist approach, most courts would treat the defendant in the original case as having breached no duty to the plaintiff. In AR parlance, they would treat the plaintiff as having assumed the risk in the primary sense. Why? Because participants in the activity are sufficiently aware of the magnitude and nature of the risks (of falling down or stumbling into each other), but nevertheless find the activity

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*either* because the defendant still breached a duty but these riders did not assume this extra risk, *or* because the defendant owes them a duty that he does not owe to riders who are aware of the risk—namely, a duty at least to disclose the risks, or perhaps to exclude those customers who will not be able to appreciate the risks adequately, such as minors.

53. DOBBS, *supra* note 4, at 540–41.

54. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 3 cmt. c (2000). The Restatement (Third) provides:

Whether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably. The defendant might reasonably have relied on the plaintiff to avoid the known risk, or other policy considerations may dictate that the defendant has no duty or a limited duty to the plaintiff.

*Id.* Moreover, a plaintiff's knowledge of the risk "may support a conclusion, based on other liability-limiting doctrines, that the defendant is not liable." *Id.* § 2 cmt. j. Examples of such doctrines are the firefighter's rule and the limited duty owed by a participant in a sporting event to other participants. *Id.*

enjoyable notwithstanding, and (for some) even because of, the risk. Judicial decisions in this case and others involving consensual risk-taking express a legal recognition that people vary in their taste for, and willingness to confront, risks. Even unusually dangerous activities will, within limits,<sup>55</sup> often be found reasonable to undertake, in the sense that the operator or organizer has no duty beyond taking reasonable steps to ensure that participants are aware of the relevant risks.

How is such a no-duty approach different from a recognition of traditional AR? In at least four ways. First, the no-duty approach analyzes the risk preference at a wholesale level, while traditional AR analyzes it retail. Suppose it is reasonable to offer a risky activity to willing and knowledgeable participants because a less risky version would deprive most participants of some of the activity's distinctive benefits. This reasonableness judgment is a wholesale determination that the operator or potential injurer is not liable rather than a retail judgment that focuses on an individual victim and concludes that she was a voluntary participant who appreciated the risks.<sup>56</sup> Thus, under the no-duty approach, the operator's nonliability can be firmly established in advance of the activity. An individual participant who turns out to be unaware of the risks—even reasonably unaware—does not recover, so long as protecting her is outside the scope of the operator's duty. For example, almost all spectators at sporting events are aware of the normal risks incident to such events (such as the risk of baseballs or hockey pucks being hit into the stands). A novice sports fan who lacks such awareness obtains no recovery, either for lack of warning or for lack of a direct precaution against the risk itself, because the operator has breached no duty in those respects.<sup>57</sup> By contrast, if a breach of duty could otherwise be shown, traditional AR would not automatically bar recovery, for it would demand an individual inquiry into whether the plaintiff appreciated the risk and voluntarily encountered it.

Second, the no-duty approach can be more complex and subtle than traditional AR. Rather than enunciate a general rule corresponding to the general traditional AR criterion—that whenever participants in any activity knowingly and voluntarily encounter a risk, the creator of the risk owes them no duty of care—courts can and do articulate specific rules tailored to such varied contexts as professional rescuer (the “firefighter’s rule”<sup>58</sup>), professional repair person, spectator of a sport, or participant in a sport. Even

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55. See *infra* note 61 and accompanying text.

56. See *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992).

57. To be sure, a duty to protect does exist if the risks of injury are especially high (behind home plate or right above the ice). And a duty to warn would exist if the risks were not well known. DOBBS, *supra* note 4, at 547–548.

58. DOBBS, *supra* note 4, at 769–79.

more specific subcategories might be recognized—for example, standards might differ for participants in informal recreational sports, in commercially organized amateur sports, and in professional sports.

Third, traditional AR doctrine can create significant problems of proof. Whether a particular plaintiff fully understood the risks, or whether she acted with sufficient freedom of choice or acquiescence such that her encountering of the risk was considered voluntary, are factual determinations that sometimes lack clear evidentiary support, whether affirmative or negative. By contrast, the more wholesale, no-duty approach is often more tractable. This quality helps further both predictability of the law generally and fairer notice to defendants of their potential liability.<sup>59</sup>

Fourth, the no-duty approach can limit what some might view as the libertarian excess of an unqualified traditional AR rule by giving weight to paternalistic and pragmatic concerns in appropriate cases. Consider the general question in tort law whether a warning of specific risks, or the open and obvious nature of a danger even without a warning, is sufficient to discharge a defendant's duty. If the answer were always "yes," then tort law would in effect recognize a broad no-duty rule coterminous with a very broad version of traditional AR.<sup>60</sup> But the answer, justifiably, is often "no." In modern products liability, for example, an explicit warning of a product's risks is not always sufficient. Thus:

In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately

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59. This concern might be overstated, however. Where traditional AR applies, a defendant has breached a duty and therefore is obtaining a benefit from invoking the defense. As to most potential victims, the defendant will remain liable. Accordingly, it might not be unfair to burden the defendant with proving the victim's subjective belief in order to take advantage of the AR defense.

To be sure, where the defendant justifiably relies on the victim's apparent consent, in fairness the victim should not be able to recover. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 3 cmt. c ("Whether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably."). But in many traditional AR cases, there is no such reliance. Often, for example, the defendant sets in motion a risk, but then is out of the picture when the victim is faced with the decision whether or not to confront it.

60. A further complication here is that a duty to warn might extend to disclosing the availability of safer ways of using a product. See, e.g., *Liriano v. Hobart Corp.*, 170 F.3d 264, 270–71 (2d Cir. 1999) (holding that a manufacturer has a duty to warn an employee that the employer might have removed the guard).

reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings.<sup>61</sup>

Despite some differences, however, the no-duty approach bears some very important similarities to traditional AR. In both contexts, the idiosyncratic tastes and preferences of participants in a risky activity are often credited.<sup>62</sup> In both contexts, courts inquire into freedom of choice and awareness of risks. In both contexts, in short, consent in some sense is at least part of the rationale for denying recovery. If in a particular no-duty rule the policies underlying a version of traditional AR actually appear to be highly relevant, even decisive, then notwithstanding the doctrinal label, AR is alive and well.

In the end, there is much to be said for replacing most of the traditional AR cases in which recovery might plausibly be denied with a no-duty approach, an approach that has the flexibility to accommodate the consensual rationale of traditional AR and yet to mitigate or soften results that might appear too harsh to victims. On the other hand, the no-duty category is both opaque and broad, encompassing an enormous range of policies, from “no duty to rescue” to “no duty of care with respect to purely economic harm.” Thus, if certain cases do reflect a pure consensual rationale, submerging them within the “vast sea” of no-duty rules is uninformative or even misleading.<sup>63</sup> So the question arises: Can one develop a narrower version of AR than the traditional conception, a version that distinguishes those cases in which the voluntary choice to encounter a known, tortiously created risk justifiably results in nonrecovery, from those cases in which it permits some recovery? The next two parts address two viable possibilities—full preference and victim insistence on a relationship.

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61. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. 1 (1998); see also *id.* § 2 cmt. d (rejecting the traditional view that precluded design defect claims if the defect was open and obvious); Sugarman, *supra* note 4, at 857–71. Although products liability is sometimes characterized as a strict liability doctrine, liability for design and warning defects is now usually understood (and is understood in the *Restatement (Third) of Torts: Products Liability*) as governed by negligence-like principles.

Of course, traditional AR by definition is inapplicable if a warning does not reach the victim or if the victim is inattentive. In such cases, the victim does not choose to encounter a risk that he subjectively appreciates. However, in contrast to this Restatement provision, traditional AR would bar many victims who are (in the words of the Restatement, just quoted) “insufficiently motivated to . . . heed the warnings.” But it would not bar such victims if they lack a realistic alternative to confronting the risk and thus do not “voluntarily” confront it. Cf. *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978) (describing a case where “a worker must either work on a dangerous machine or leave his job”), cited in RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. 1 reporters’ note (1998).

62. In the no-duty context, to be sure, “idiosyncrasies” is a less apt term, insofar as the preferences are credited at a “wholesale” level. Those who enjoy hang gliding or ski jumping are idiosyncratic only relative to the rest of us (the prudent or cowardly).

63. Simons, *supra* note 17, at 242.

## B. Full Preference (FP): A Defensible Subcategory of Traditional AR

In an earlier article, I argued at length for a narrower conception of traditional AR, the full preference theory (FP).<sup>64</sup> In essence, FP claims that the actual contours of traditional AR are much broader than the legitimate consensual rationale that underlies it. Accordingly, FP molds a much narrower doctrine that does fit the rationale. In this part, I summarize the argument for this approach to AR, address some criticisms of the theory, and consider whether judicial adoption of the narrow FP approach to AR is, on balance, advisable. I conclude that this is a very close question; however, FP remains highly instructive in illuminating the defects of a broad AR defense.

By its terms, traditional AR broadly denies plaintiffs any recovery whenever they voluntarily and knowingly choose the second of the following two options:<sup>65</sup>

Option 1: Don't engage in an activity.

Option 2: Engage in the activity and encounter a tortiously created risk.

What this analysis ignores, however, is that the defendant's tort has wrongfully deprived the plaintiff of a third option:

Option 3: Engage in the activity but don't encounter the tortiously created risk (for example, engage but encounter a lower, reasonable level of risk).

The mere fact that the actor prefers Option 2 to Option 1 should not be dispositive. The actor might well have preferred Option 3 to 2, and it was indeed the defendant's duty to provide Option 3 rather than 2.

For example, the skater in *Meistrich* clearly preferred Option 2, continuing to skate on negligently prepared ice, to Option 1, leaving the rink. But he very likely would have preferred, most of all, that the rink operator had used due care in the first place and not placed him in that predicament. In short, his first preference was for Option 3: continue skating on properly prepared ice, which presents a lower risk.

But this analysis also suggests the contours of a legitimate, though very narrow, version of AR. For suppose that the actor really prefers Option 2 to 3. In that case, in fairness, he should not be able to complain that the defendant wrongfully failed to offer Option 3. For example, imagine that the skater in *Meistrich* was a member of an extreme sports club who had been seeking opportunities to skate on especially slippery ice; he therefore actually prefers Option 2 to 3. Under the FP approach, his decision to encounter the risk presented by Option 2 legitimately bars him from recovery—not because

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64. *Id.* at 218–24.

65. This is a slightly abbreviated version of the original account. See *id.* at 220.



he did choose 2 over 1, but because he would have chosen 2 over 3. Or suppose (once again) that the Flopper had malfunctioned and was operating at twice its normal speed. Observing an even greater rate of falls than usual, someone eagerly steps up to this Superflopper, remarking, "This looks like even more fun!" Under the FP approach, he would be barred from recovery.<sup>66</sup>

The FP theory does not depend on the actor's choice being unreasonable. Like other contexts in which consent has legal significance, the reasonableness vel non of the actor's choice is largely or completely irrelevant.<sup>67</sup> Whatever the plaintiff's reason for preferring the tortious option over the nontortious one, he is not entitled to recover, both as a matter of fairness to the defendant and out of respect for the autonomous choice of the victim.<sup>68</sup>

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66. On the actual *Murphy* facts, if the plaintiff argued that the ride was unreasonably risky simply because it created a risk that participants would fall, then the full preference theory (FP) again could explain nonrecovery: It is very doubtful that the plaintiff or other participants would really prefer a very slow-moving Flopper (a name that would now be a misnomer) that lacked the excitement flowing from that risk.

To be sure, the FP can occasionally be overridden—for example, when the state has an especially strong paternalistic policy against victims consenting to certain types of risks of harm. See Simons, *supra* note 17, at 230 n.57, 247. In products liability, for example, courts often enforce soft paternalism, correctly assuming that impulsive or ill-considered decisions (for example, to disable the safety features of a product) do not reflect the settled, long-term preferences of the user. See Sugarman, *supra* note 4, at 865; *supra* note 61; *infra* note 77. Another example is the attractive nuisance doctrine. Often, children who are attracted to a dangerous condition on the defendant's land fully prefer encountering that risk, relative to encountering a nontortious level of risk, if the latter would provide a less exciting opportunity for play. Their impulsive or immature preferences are properly ignored. See DOBBS, *supra* note 4, at 608–15. Most generally, when the defendant's duty is to protect potential victims from deliberate or accidental self-injury, often neither the fault nor the "consent" of such a victim should affect recovery. See, e.g., *Creasy v. Rusk*, 730 N.E.2d 659, 667–69 (Ind. 2000) (holding that in light of the obligation of a nurse to protect an institutionalized Alzheimer's patient, the patient is not liable for injuring the nurse). See generally DOBBS, *supra* note 4, at 500–03 (contributory negligence is ignored when the defendant is under a duty to protect the plaintiff from her own incapacity or fault).

67. Perhaps "largely" irrelevant is more accurate. If the act is extraordinarily risky and does not further any of the actor's values or preferences, this is some evidence (though not conclusive) that the actor was not sufficiently rational to be capable of consent. See HARM TO OTHERS, *supra* note 51, at 116. A person who enjoys being hit by cars because he believes this will improve the toning of his body would be an example. Moreover, the public policy against *deliberate* self-injury and suicide is another limit upon the legitimacy of consent to risks of harm.

In the domain of contract law, reasonableness is largely irrelevant: Courts enforce the bargains that parties choose to make, even if one might doubt that a reasonable person (on either end of the transaction) would have made that choice. And such qualifications on contract enforcement as minimum capacity to consent and unenforceability of unconscionable terms fall far short of a generalized reasonableness requirement.

68. One might also characterize a victim as fully preferring the risk in the relevant sense when he prefers Option 2 to 1 and when the defendant has no legal duty to offer Option 3. See Simons, *supra* note 17, at 222. However, in this category, it might be more straightforward simply to employ no-duty analysis. Indeed, an inveterate "abolitionist" who nevertheless agrees that fully preferring plaintiffs should not recover might simply recharacterize *all* such cases as involving no duty, as follows. If the victim fully preferred the "tortious" alternative that the injurer provided to Op-

How should a jurisdiction's adoption of comparative fault affect this analysis? Not at all. That is, because FP's rationale for precluding a plaintiff's recovery is not based on—and indeed has nothing to do with—the unreasonableness of his choice, one who fully prefers the risk should still be barred from recovery after comparative fault. Even if it were possible to characterize the actor's full preference as either reasonable or unreasonable, the actor should obtain no recovery. In other words, FP should be treated like the second survival approach noted above. That approach, I remarked earlier, appears somewhat anomalous, insofar as it treats some unreasonable plaintiffs (those in Category 3b, who acted unreasonably but were unaware of or did not voluntarily assume the risk) more favorably than other unreasonable plaintiffs (those in Category 4b, who do knowingly and voluntarily encounter the risk for peculiar reasons that might be deemed unreasonable). The first group might obtain partial recovery; the second group is barred. But this result, we can now see, is not anomalous—so long as the second group is defined narrowly and carefully enough to represent a defensible conception of consent. And FP, I believe, is such a conception.

This symposium is an apt occasion for reconsidering the strengths and weaknesses of the FP theory. Let me turn first to some commentary on the theory.<sup>69</sup> The Reporters to the *Restatement (Third) of Torts: Apportionment of Liability* consider the FP theory and find its analysis attractive, but, in the end, they decline to adopt the approach, adducing two reasons.<sup>70</sup>

First, they state that the approach has no explicit support in the case law. They are correct. Insofar as the approach is recognized, the recognition takes the form of distinct and specialized doctrines in disparate areas of law, and even these doctrines only approximate FP. For example, if a manufacturer of a product provides a safer and less safe version of a product, or if the operator of a recreational activity offers different options with different levels of difficulty and risk, often the defendants will be immunized from

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tion 3, which he did not provide, then, *as to that victim*, the injurer did not, after all, owe a duty to offer Option 3. Once again, however, this characterization seems to relabel rather than explain the FP category.

69. With respect to judicial discussion, Justice Kennard of the California Supreme Court cites the full preference article in support of her position that "the defense of implied assumption of risk is never based on the 'reasonableness' of the plaintiff's conduct, as such, but rather on a recognition that a person generally should be required to accept responsibility for the normal consequences of a freely chosen course of conduct." *Knight v. Jewett*, 834 P.2d 696, 719 (Kennard, J., dissenting); *Ford v. Gouin*, 834 P.2d 724, 739 (Cal. 1992) (Kennard, J., concurring). The cases themselves, however, are not illustrations of the FP theory. In *Knight*, for example, the plaintiff allegedly preferred that the defendant not play the game so aggressively. *Knight*, 834 P.2d at 719.

70. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i reporters' note. See also Powers, *supra* note 45, at 773–74 (providing the same analysis as in the Reporters' Note; Dean Powers was one of the Reporters).

liability—though the doctrinal category will frequently be a no-duty rule, rather than AR.<sup>71</sup>

Another example comes from strict liability doctrine. As set forth in Gary Schwartz's draft *Restatement (Third) of Torts*, "[s]trict liability does not apply to persons who suffer physical harm because they come into contact with or proximity to the defendant's animal or abnormally dangerous activity for the purpose of securing some benefit from that contact or that proximity."<sup>72</sup> A partial explanation for this rule is that such a victim might (depending on the benefit she seeks) fully prefer the risky activity, relative to a less dangerous activity. For example, under this provision, a defendant would not be strictly liable for providing the plaintiff with a horse that has a tendency to bolt.<sup>73</sup> Some riders might fully prefer this risk, because it provides an extra measure of challenge.<sup>74</sup>

Specific illustrations of the FP theory do exist in case law, though they are not justified in these terms. For example, if a passenger encourages a

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71. See Sugarman, *supra* note 4, at 868–69. In these cases, of course, the preferences of potential victims are considered wholesale, not on an individual basis. See *supra* notes 56–57 and accompanying text.

Another example concerns product warnings. If a product manufacturer breaches his duty to provide an adequate warning, a particular plaintiff who would have used the product even with a warning cannot recover. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (explaining that even if a product should contain a warning because some reasonably foreseeable users would, if warned, decline to use or consume the product, nevertheless "if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings is not a legal cause of that plaintiff's harm"). Here, applying the FP framework, Option 1 is not using the product, Option 2 is using a product that lacks a warning, and Option 3 is using a product containing a warning. If the warning would not have affected the plaintiff's decision to use the product (which could easily be the case if the only function of the warning is to advise of risks, not to facilitate the use of the product in a safer manner), then the plaintiff doesn't really prefer Option 3 to 2. More precisely, he would have acted no differently if the nontortious Option 3 had been offered. In effect, the plaintiff claims after the fact that the omission of a warning was negligent; however, because a warning would not actually have made a difference, his conduct reveals that he most likely does not, in the end, prefer that the defendant have used due care by providing a warning. But this analysis deserves the following qualification: A plaintiff might actually prefer a product with a warning even if the warning would not alter his decision to use the product, simply because he would like to have had full knowledge of the risks he was running.

72. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 24(d) (Tentative Draft No. 1, 2001) [hereinafter Draft No. 1].

73. *Id.* § 24(d) cmt d.

74. However, this strict liability category is not completely explained by the FP theory. First, the category includes some who do not fully prefer the risk. (Suppose the rider simply wants to ride an available horse and would prefer that none of the horses have a tendency to bolt.) Second, doctrinally, the effect of finding strict liability inapplicable is to restore the negligence regime, not to bar recovery, as FP would provide. See *id.* § 24(e) cmt d. Even in the example in the text, the fully preferring rider could, in principle, sue for negligence. (Still, considering the actual precautions that a negligence standard would likely entail here—"failing to warn the rider of the horse's special danger or . . . providing the rider with an inappropriate horse," *id.*—a court might well conclude that the defendant was not negligent with respect to this plaintiff. This conclusion would also follow from the FP theory.)

driver to speed<sup>75</sup> and is injured in the resulting accident, the case will fall within traditional AR, but also within FP. (The *Restatement (Second) of Torts* includes as an illustration of AR a passenger on a dangerous "roller-coaster" road who is aware of the risks and encourages the driver's high speed.<sup>76</sup>) Another recurrent pattern involves the user of a product who, while aware of the risks, intentionally removes a guard, because this makes the product easier to use.<sup>77</sup>

Moreover, the spirit of the FP theory seems to animate some no-duty (or no-breach) categories recognized even by abolitionist courts. For example, with risky recreational activities like the Flopper, part of the rationale for a no-duty rule is that most of the participants, once properly warned, fully prefer Option 2<sup>78</sup> (the more risky version, i.e., the actual, fast-moving Flopper) relative not only to Option 1 (not participating in the recreational activity) but also relative to Option 3 (a less risky version, i.e., a very *slow*-moving Flopper). Similarly, part of the rationale for the limited duty to protect spectators at sporting events from flying projectiles<sup>79</sup> is that most spectators seated in less dangerous locations fully prefer unscreened seats, an option that permits a better view of the game and lowers the cost of tickets, relative to full screening (or relative to not attending the game at all). To be sure, these no-duty or limited-duty rules are also quite unlike the FP approach in a critical respect. They do not depend on proof, in any individual case, that the victim fully preferred the risk. Rather, they are wholesale, categorical rules conclusively presuming that adequately warned participants in such an activity sufficiently consent to the risk and therefore should not obtain recovery.

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75. See, e.g., *Monk v. Hess*, 191 S.E.2d 229 (Va. 1972); *Stoner v. Robertson*, 151 S.E.2d 363 (Va. 1966).

76. RESTATEMENT (SECOND) OF TORTS § 496C cmt. i & illus.7.

77. However, although such a user fully prefers the risk, there are good arguments for allowing him at least partial recovery. For one thing, sometimes it is possible to redesign the product to facilitate use while retaining the safety guard. See Sugarman, *supra* note 4, at 855. And in any event, in the products liability context, courts are more inclined to paternalistically protect the plaintiff by allowing recovery of some damages, even if the plaintiff did genuinely assume the risk. Thus, in most jurisdictions, partial recovery will probably be allowed in this scenario as long as the plaintiff's removal of the guard is reasonably foreseeable. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m, § 17 cmt. c & illus. 2 (1998); 1 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY §8.04[7][e] (2002); see also *supra* note 60.

78. Of course, this Option 2 is not a "tortious" option, for we are in the realm of a no-duty rule, but it is analogous to the original Option 2 category in presenting a higher level of risk than Options 1 and 3.

79. The duty is limited in the sense that protection must be provided only for those spectators at relatively high risk of injury, not for all spectators, even if the more extensive precaution is feasible. (A shield or fence *could* be installed in front of all spectators at a baseball or hockey game.)

In the end, however, the Reporters' first concern is valid: Case law does not explicitly rely on the FP theory. Of course, while this is a compelling objection for those purporting to "restate" the law, the question remains whether courts *should* recognize such an approach. On this point, the Reporters identify a second concern: If courts were to recognize the very narrow FP theory, there is a danger that the defense would gradually expand into the overbroad traditional AR doctrine.<sup>80</sup> This danger, though credible, might be countered if appellate courts paid careful attention to the precise rationale for FP and if they reminded lower courts that FP justifies only an extremely narrow rule of nonrecovery. Still, one might well ask whether the benefits in a very small number of cases are worth the risk of precluding some deserving plaintiffs from recovery.

Yet another objection is that FP is an unnecessary doctrine, because the cases in which it justifies nonrecovery are cases that could just as easily be explained on the basis of lack of causation. That is, given the victim's preferences, the injurer's tortious conduct arguably did not really cause him any harm. Stephen Sugarman gives the example of a hang glider that comes in two versions—with and without a safety cage. Although beginner and intermediate gliders prefer the safer version, "some advanced hot shots like the plaintiff [find] the cage unaesthetic and cumbersome."<sup>81</sup> Sugarman agrees that even if the defendant is negligent for not offering the safety cage option, this plaintiff should not be able to recover.<sup>82</sup> However, he asserts that we can explain this result on the straightforward basis that the defendant's negligence has not caused the plaintiff's harm (because the plaintiff would not have chosen the safer option even if it had been offered).<sup>83</sup> Thus, Sugarman implies, the FP theory of AR is unnecessary.

This objection is unconvincing as a general matter (although Sugarman is correct that his specific example can be explained on no-causation grounds). To see why, imagine yet another *Murphy* variation. This time, the defendant operates two Floppers side-by-side. One works normally, while the other (the Superflopper) malfunctions and proceeds at double the intended speed. Most customers stay away from the Superflopper, because they can readily select to ride the properly working Flopper. But the plaintiff, aware of the additional risks, prefers to try out the Superflopper, steps on board, falls, and suffers an injury. Under FP, he is barred from recovery. However, lack of causation cannot explain this result. After all, if the defendant had not negligently permitted the malfunction or had not negli-

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80. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i reporters' note (2000).

81. Sugarman, *supra* note 4, at 870.

82. *Id.*

83. *Id.*

gently permitted people to use the malfunctioning device, the plaintiff never would have had the opportunity to take this extra risk and thus would never have taken it. And it is indeed the tortious aspect of defendant's behavior that literally caused the harm.<sup>84</sup> (Of course, a customer who steps onto the Superflopper *unaware* of its greater risks is also harmed by defendant's negligence, though in her case, FP does not bar recovery.<sup>85</sup>)

Sugarman's hang glider example is somewhat different. Here, if the defendant had not been negligent, he would have offered a safety cage option to all hang gliders; however, by hypothesis, it is not negligent to permit some gliders to decline the option. In this scenario, it is true that the defendant's negligence—which consists in failure to offer the safer option to those who prefer it—did not cause harm to the customer in question. For this plaintiff would not have chosen to use the safer option. Thus, this plaintiff is no worse off because of defendant's negligence.

In short, no causation can indeed explain *some* FP cases (for example, those where it is not negligent to offer both a safer and less safe option, but it is negligent to offer only the less safe option<sup>86</sup>). However, it cannot explain them *all*—for example, cases (such as the twin Floppers) where it is negligent to offer the less safe option even if the safer option is also offered, and also the many cases where the defendant cannot realistically offer the plaintiff the simultaneous choice of a safer and less safe option. (Recall the example of a passenger encouraging a driver to speed.) Most important, a sufficient rationale in all of these cases is that the plaintiff fully prefers the risk.

Another objection to the FP theory is more pragmatic. How would one prove what the actor would have chosen, if a nontortious choice had been available? Such a hypothetical inquiry is unusually difficult to answer. Sim-

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84. Of course, it is insufficient for causation that a defendant's actions *as a whole* worsened the plaintiff's situation; rather, the question is whether the negligent aspect of the defendant's act or omission had that causal effect. (The fact that the defendant's speeding car collided with the plaintiff does not satisfy the causation requirement if, as will only rarely be the case, a nonspeeding car would have caused the same injuries.) So here, the relevant question is whether the plaintiff is worse off because of the tortious behavior of which he complains. But here, he is worse off. The Superflopper is more dangerous than the regular Flopper and, by hypothesis, the extra danger is what caused the fall.

Nor does it matter, on this causal question, that the victim's voluntary decision to encounter the risk is part of the causal chain. Such a decision is perfectly foreseeable and is not normally a supervening cause that cuts off the injurer's liability.

85. Such a plaintiff is harmed because she encountered a risk that she would have chosen to avoid if she had known of the risks. The fully preferring plaintiff, by contrast, is harmed because, in a sense, he was "tempted" to encounter the risk.

86. "No causation" can also explain those FP cases in which the defendant's duty consists only in providing a warning of a product or activity's (unavoidable) dangers, and in which the plaintiff, even if warned, clearly would have used the product or would have engaged in the activity. *But cf. supra* notes 60–61 and accompanying text.

ilar difficulties have bedeviled courts analyzing whether the failure to provide adequate disclosure of medical risks, or the failure to warn of a product defect, caused the harm.<sup>87</sup> A related point is the possible unfairness to a potential injurer of precluding liability based only on the subjective, and possibly unexpressed, preference of the victim. This point is less troubling, however, because by hypothesis, the injurer has breached a duty as to some potential victims; thus, precluding recovery from the rare victim who fully prefers the risk is a boon to the injurer, even if the injurer cannot readily determine the victim's state of mind.<sup>88</sup>

At the end of the day, the difficulties of proof and the risk that a legitimate but narrow defense will actually be applied too broadly might militate against courts' formally adopting FP as an AR defense. Nevertheless, the FP model is, I believe, highly instructive in explaining the defects of a broad traditional AR defense. Indeed, the model's greatest value might be its critical and explanatory power, rather than the possibility of its judicial implementation.

Thus, some of the rhetorical force of traditional AR seems to derive from the legitimate consensual and fairness rationales that actually support only a much narrower defense such as FP. If courts and legislatures better understand this confusion, they should become very hesitant either to adopt the broad traditional AR defense, or to incorporate extremely broad no-duty rules that are the functional equivalent of traditional AR.

To see the value of FP in illuminating the legitimate scope and rationale of AR, consider a famous example from William Prosser. Although he endorses traditional AR and was the Reporter for the *Restatement (Second)* that explicitly approves the traditional AR defense, Prosser objects that some courts and scholars interpret the concept too broadly. A pedestrian carelessly walking into a stream of speeding traffic does not, according to Prosser, assume the risk of negligent drivers injuring him. Such a pedestrian "cannot by any stretch of the imagination be found to *consent that the drivers shall not use care* to watch for him and avoid running him down. On the contrary, he is insisting that they shall."<sup>89</sup> But why isn't this an example of

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87. Some courts have therefore employed an objective test of causation in the informed consent cases, and a heeding presumption in the product warning cases. See DOBBS, *supra* note 4, at 657, 1016–18. But these devices are themselves problematic.

88. On the other hand, if the injurer reasonably relies in his actual conduct on the full preference of a class of victims, then the unfairness objection is persuasive. See *supra* note 59.

89. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 485 (W. Page Keeton ed., 5th ed. 1984) (emphasis added), *noted in* Simons, *supra* note 17, at 225–26. The example comes from an earlier edition of Prosser's hornbook and is repeated in RESTATEMENT (SECOND) OF TORTS § 496C cmt. h (1965).

traditional AR, which is usually defined as a voluntary choice to encounter a known risk.<sup>90</sup>

The key for Prosser seems to be the phrase I have italicized. Yet that phrase can perhaps most readily be interpreted simply as expressing the FP approach. The pedestrian is (in Prosser's hyperbolic prose) "insisting that" the drivers not speed; in terms of the FP theory, he clearly prefers Option 3, the nontortious level of care, to Option 2, their speeding. (Compare a passenger who urges a driver to speed and who therefore does "consent that the driver shall not use care"; such a passenger does fully prefer the risk.) Unfortunately, Prosser elsewhere supports barring claims under the aegis of AR, even where one cannot realistically find consent that the defendant "shall not use care."<sup>91</sup> His confusion seems to derive from the inconsistency of his intentions to (1) endorse the broad traditional AR criterion, and yet (2) limit its scope to something similar to the FP approach. The confusion also reflects his failure to characterize with precision either those risks that the plaintiff must knowingly encounter, or what it means to consent to those risks. By contrast, under the FP approach, each element is transparent: The plaintiff must appreciate the incremental risk created by the defendant's negligence, and he must prefer the option embodying that incremental risk to the option embodying a nontortious risk.

The FP theory also teaches an instructive lesson about the nature of AR doctrines. They are *selective* doctrines in an important sense, for they presuppose that some potential victims have different values, preferences, or tastes than most other potential victims. By contrast, if most or all of the potential victims of a defendant's acts fully preferred the risk, quite often the defendant would be protected by a categorical no-duty rule. Thus, if in the last Superflopper variation, the operator carefully explained the different levels of risk of the two machines, then he might well be protected from liability on the ground that he owed no duty to those who chose to use the Superflopper rather than the Flopper—just as the operator of a ski slope is entitled to offer beginner, intermediate, and advanced trails, so long as he

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90. Prosser does not argue that the hypothetical exemplifies an involuntary choice. See *supra* note 39. Other portions of his discussion suggest that he might interpret the example as an implied contractual waiver, but this is a dubious application of the waiver concept. See Simons, *supra* note 17, at 225–27.

91. Thus, in the very next passage immediately following the pedestrian example just quoted, Prosser asserts:

And if A leaves an automobile stopped at night on the traveled portion of the highway, and his passenger remains sitting in it, it can readily be found that there is consent to the negligence of A, but not to that of B, who runs into the car from the rear.

WILLIAM L. PROSSER, *THE LAW OF TORTS* 445 (4th ed. 1971) (footnote omitted). But it is by no means clear that the passenger has consented that A "shall not use care." If the location where A left the car is unsafe, the passenger might well have preferred that A park in a safer location or not park at all.



clearly marks them as such.<sup>92</sup> (I further discuss the selective nature of AR doctrine in the next part.)

C. Victim Insistence on a Relationship (VIR): Another Defensible Subcategory of Traditional Assumption of Risk

Another category in which victims might properly be barred from recovery for encountering tortiously created risks is where a victim elects, and indeed insists upon, a relationship. (Call this victim insistence on a relationship, or VIR.<sup>93</sup>) Like FP, however, VIR is a significantly narrower category than traditional AR.

Here is a classic example that, in one variation or another, different scholars have offered to support retaining some type of AR defense:

- (1) Plaintiff requests a ride from a drunk driver, aware of the driver's condition. Plaintiff has a compelling reason to take the ride (for example, his car has broken down on a deserted road in bad weather, and he has not been able to find another ride).<sup>94</sup>

Another example is a variation of *Meistrich*:

- (2) Defendant rink operator negligently prepares the ice, creating dangerously slippery conditions. He immediately announces that he will shut down the rink until the conditions can be repaired. A group of skaters who do not want to wait for the rink to reopen urges

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92. In both cases, however, courts might be unwilling to permit the offering of an extremely high level of risk, such as a Hyperflopper operating at six times the speed of the Flopper, or an "extreme" advanced ski slope in which large stones or other dangerous obstacles were deliberately concealed.

93. The phrase I employed for this idea in an earlier article was "voluntary assumption of a relationship." Simons, *supra* note 17, at 244-48.

94. Laurence Eldredge gives the example of a plaintiff who discovers that his family is trapped in a burning building down the road and chooses to take a ride with the first driver who comes by. The driver happens to be drunk. MARSHALL S. SHAPO, *BASIC PRINCIPLES OF TORT LAW* 134-35 (1999) (citing RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 9, 1963) (Laurence Eldredge)). Clarence Morris and C. Robert Morris, Jr. give the following examples:

Borrower accepts from Lender a free loan of a car which Borrower knows has defective brakes. Even though Borrower's need for transportation is urgent and justifies running the risk of driving the defective vehicle, Borrower has no cause of action for negligence against Lender for consequent injuries. Discomforted asks palsied Accommodator to take a cinder out of Discomforted's eye, knowing of Accommodator's unsteady hand. Due to the palsy, Accommodator injures the eye. Discomforted has no negligence action.

CLARENCE MORRIS & C. ROBERT MORRIS JR., *MORRIS ON TORTS* 221 (2d ed. 1980) (footnote omitted).

There are a number of litigated cases involving plaintiffs agreeing to be passengers of intoxicated drivers, and in many of these, the plaintiffs lose on the basis of assumption of risk. See, e.g., *Davis v. Waters*, 436 P.2d 906 (Ariz. 1968); *Bliss v. Wiatrowski*, 724 A.2d 1264 (Md. Ct. Spec. App. 1999). Few of the cases, however, are instances of plaintiffs *reasonably* agreeing to assume the risk.

him to keep the rink open. He permits this group to continue skating with the warning: "I am only willing to keep it open on your understanding that the conditions of the rink are unusually slippery and dangerous."

These examples are especially interesting because, on the one hand, most would probably agree that liability is unwarranted and, on the other hand, the modern approach cannot readily explain this result. Two critical features of the examples make them resistant to analysis under either no duty or merger into contributory negligence: The defendant clearly breached a duty of care to someone,<sup>95</sup> and the plaintiff may well have acted reasonably in choosing to confront the known risk.<sup>96</sup> Under the modern approach, then, the victim should recover in full. Why is the modern approach unable to explain nonrecovery in these cases? Let me first review two possible answers that turn out to be unsatisfactory, then offer an account that might be more persuasive.

First, one might invoke the FP theory. However, FP does not explain nonliability here. For in both cases, the plaintiff really prefers that the defendant had never been negligent. If this had been so in the first case, then the plaintiff could have obtained a safe ride from the defendant, rather than a risky one. (The plaintiff obtains no special benefit from the riskiness of the defendant's driving; his benefit derives from the defendant's ability to offer him a ride, regardless of how risky his driving is.<sup>97</sup>)

Second, one might try to explain nonliability on the ground that VIR cases involve an *implied* contractual agreement to limit liability. The VIR cases are indeed better candidates than many other traditional AR cases for legitimately implying a contractual agreement, because they are cases in which the defendant could simply walk away from any relationship with the victim. Sometimes, then, a defendant will know this and will have intended to limit his legal liability. Still, not all VIR cases can plausibly be understood as implying an actual agreement between the parties that legal liability will be limited.<sup>98</sup>

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95. In the drunk driver example, it is negligent to drive drunk, in light of the risks of injury to pedestrians and other drivers. In the *Meistrich* example, it is negligent to create dangerously slippery conditions in light of the risks of injury to skaters, with respect both to those unaware of the risks and (normally) to those who are aware.

96. In the *Meistrich* example, assume that the skaters who wanted to keep skating would have been very seriously inconvenienced by having to return tomorrow, when the rink reopened, and that the ice was not so slippery that it was unreasonable to continue skating.

97. Similarly, in the second example above, the skaters who insist on continuing to skate would nevertheless prefer that the rink operator had not been negligent in the first instance.

98. For example, the parties might be relatively unsophisticated, with no understanding of the possible contractual implications of their representations.

Why, then, do the plaintiffs in the two examples above not deserve recovery? Two factors seem especially important. First, it surely is relevant that the defendant is a volunteer—in other words, the defendant can take or leave the relationship with the plaintiff without breaching a duty. That feature of the relationship lends some support to a conclusion that the duty the defendant now owes to the plaintiff is limited to disclosing the risk and letting the plaintiff decide whether to take his chances. However, this factor, while necessary, is not sufficient to justify nonrecovery. From the fact that a defendant could refuse any relationship with a plaintiff, it hardly follows that the defendant can place any terms he wishes on the relationship (even if he does so explicitly). The “greater” power (to decline any relationship) does not always include the “lesser” power (to limit the scope of the relationship in any way that the defendant desires).<sup>99</sup> For example, a doctor might have the right to refuse to treat a patient, but it does not follow that she can condition her treatment of him on his agreeing (even explicitly) to accept a negligent standard of care.

Second, it also seems relevant that the plaintiff insists on or requests the relationship and is its primary beneficiary.<sup>100</sup> By analogy, consider the cases in which the defendant hires a professional to repair a dangerous condition negligently created by the defendant. In these cases, courts deny recovery if the professional is injured in the course of the repair because the disclosed danger comes to fruition.<sup>101</sup> In part, this result might be explained by the economic benefit that the professional obtains from offering the service.<sup>102</sup> If, by contrast, the defendant insists upon or encourages the rela-

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99. See Simons, *supra* note 17, at 244–45.

100. In Joel Feinberg’s framework, victim insistence on a relationship (VIR) is an example of “strong” consent (where the consenting party initiates the action by making a request of another party), rather than “weak” consent (where the consenting party expresses willingness to do what the other suggests or requests). HARM TO SELF, *supra* note 51, at 99, 178. For a discussion of the general relevance of nonreciprocity of benefit in tort doctrine, see Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249–75 (David G. Owen ed., 1995).

Should VIR depend on the victim being the exclusive, and not merely the primary, beneficiary? My colleague Mike Harper so suggests, offering a variation on the “hitching a ride with a drunk” example in which the drunk is a cab driver who obtains a commercial benefit from providing the ride.

101. See KEETON ET AL., *supra* note 89, at 426–27; Sugarman, *supra* note 4, at 872–76.

102. To be sure, the professional repair cases typically also involve an implied, if not express, contractual limitation on recovery.

Compare the “firefighter’s rule,” under which firefighters and police officers cannot recover for injuries in the course of their duties from homeowners and others who negligently create the occasion for their intervention. This rule bears some similarity to the rule exculpating those who negligently create risks and hire professionals to alleviate them. However, under the former, the negligent actor does not hire, and need not even affirmatively call for, the assistance of the firefighter or police officer. Instead, the usual policy rationale for the rule is that such public officials are compensated ex ante for confronting such risks. DOBBS, *supra* note 4, at 771–772.

tionship for his own benefit, there is more reason to impose liability even though it is still the victim's decision whether or not to confront the risk. For example, suppose the operator in *Meistrich* would be required by his contract to refund money to the skaters if they could not continue skating on the unusually slippery ice. In that case, his economic interest in their remaining on the ice militates in favor of liability if, after he discloses the risks, they continue to skate and suffer injury.

A third factor might also be relevant. Perhaps the VIR cases depend in part on the defendant having the opportunity to exclude the victim from the dangerous activity, and perhaps on the defendant communicating this to the victim. ("I really should ask you to leave . . .") When the plaintiff then chooses to remain, the defendant is no longer responsible for the negligent condition. Indeed, one might even conclude that the plaintiff's ultimate injury is no longer proximately caused by the defendant's original breach of duty.<sup>103</sup> By contrast, when the defendant has no opportunity to exclude the victim from the dangerous activity—either because the defendant is not yet aware that he has negligently created dangerous risks, or because he is not in a position to exclude the plaintiff or shut down the activity—then arguably the defendant remains potentially liable for breach of duty, and the plaintiff's recovery depends on comparative fault principles. Thus, in *Meistrich*, suppose that a group of skaters, aware of the risks, continued to skate even before the operator recognized the dangers. Arguably, they should not be barred but should obtain partial recovery if their decision to continue was negligent (and full recovery if their decision was not).<sup>104</sup> Still, one might also plausibly conclude that this third factor is unnecessary. If the plaintiff satisfies the first two factors, then even absent the third factor (that is, even though the defendant had no chance to exclude plaintiff), often plaintiff

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103. Consider a more dramatic example of the proximate cause point. Suppose the owner of a car drives carelessly, risking injury to others, but damages only his own car. He then lends the car to a neighbor, explaining specifically how the damage makes the car somewhat dangerous to drive. He is not liable to the neighbor for harm caused by the car's dangerous condition, because his original negligence is not a proximate cause. (I assume that he does not otherwise owe a duty not to lend a car with disclosure of its dangerous condition.)

104. Thus, suppose the skaters could wait twenty minutes for properly prepared ice, or continue to skate on the slippery ice. Consider three variations.

(1) If Albert, a very skilled skater, cannot wait twenty minutes because this is his only chance to practice prior to the high school skating meet later the same day, his decision to continue skating might be reasonable. If so, he would fully recover.

(2) If Boris would rather not wait twenty minutes merely because he prefers to get home a little earlier, his decision to skate might be unreasonable. He would only partially recover.

(3) Finally, compare Clarence, who "fully prefers" the slippery conditions because of the special challenge they pose. Under the FP theory, he would be barred from recovery.

However, a separate question is whether choices by plaintiffs like Albert, even if characterized as reasonable, should result in less than full recovery. See *infra* notes 126–133 and accompanying text.

would have insisted upon confronting the risk and defendant would have relented. Perhaps that should be enough to bar plaintiff's recovery.

Notice that VIR, like FP, is a selective doctrine. This is a distinguishing feature of AR doctrine, especially when it functions as a defense to an established breach of duty. By contrast, if, in some category of cases, *all* potential victims of a defendant's negligence clearly elect or insist upon a relationship with the defendant that the defendant is free to decline, nonrecovery might be analyzed as a no-duty rule, rather than as AR. (This is one possible rationale for the traditional limited duty of landowners to their social guests, who were required to accept the premises more or less "as is."<sup>105</sup>)

However, it is worth reiterating that the VIR cases, like the FP cases, are only a small subset of traditional AR cases. Much more often, when a victim voluntarily and knowingly encounters a risk negligently created by the defendant, the victim neither fully prefers the risk (relative to the non-negligent option) nor insists upon a relationship with the defendant.<sup>106</sup> Consider some straightforward cases *not* falling within the two subcategories. First, suppose a customer sees a dangerous patch of ice directly in front of a store. He decides to take the risk and enter the store, and suffers a fall. Assuming that the store owner was negligent in not clearing the ice properly, this is a classic case for comparative fault.<sup>107</sup> (If because of some emergency the customer has a compelling need to gain entry to the store, he might recover in full.<sup>108</sup>) Second, suppose a buyer of a new car discovers

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105. See RESTATEMENT (SECOND) OF TORTS §§ 341–342 (1965).

106. Of course, the modern approach does permit a no-duty analysis that denies that a breach occurred in the first instance. But the VIR cases are distinguishable: They are, by definition, cases in which a defendant did breach a duty. Thus, when spectators are injured by baseballs hit into the stands, there might be no duty or no breach in failing to protect that portion of the stands with a fence. However, if the fenced portion of the stands collapsed prior to the game, and customers in those seats insisted on remaining despite the risk, then VIR would supply the proper method of analysis.

107. Under the FP theory, however, recovery would not be precluded, for the customer would normally prefer not having to face the predicament of crossing over dangerous ice in order to gain entry.

Compare a case in which the customer sees a safe path to the store, but chooses to slide on an icy patch for his own amusement: The FP theory would bar his recovery. Moreover, the case would fall within the VIR category under this variation of the facts: The store owner put up a sign warning customers not to try to enter, because she was in the process of clearing up the ice, but the customer prevailed upon the owner to let him try to enter, with the customer promising that he would be very careful.

108. But compare *Gulfway General Hospital, Inc. v. Pursley*, 397 S.W.2d 93 (Tex. Ct. App. 1965), where a woman slipped on the icy steps to a hospital emergency room while seeking emergency medical care for a severed fingertip. The court found that she assumed the risk and barred her recovery. Neither FP nor VIR would justify this result, and, under comparative fault, she might well be entitled to a full recovery. (None of the three factors that characterize VIR is satisfied in this case.)

that it has a braking problem but decides it is more convenient to drive it for a few days rather than bring it in immediately (or have it towed) for repairs. He, too, would be judged by comparative fault; his awareness of the risk would not automatically justify a complete bar to recovery. Finally, recall Prosser's example of a pedestrian carelessly walking into a stream of speeding traffic. Neither FP nor VIR applies; instead, comparative fault principles should govern. (Again, if a jury determines that the pedestrian is acting reasonably—for example, running away from an assailant with a gun—he would be entitled to recovery in full.)

#### D. Comparison Between Assumption of Risk and Consent to an Intentional Tort

As we have seen, a crucial issue in the debate over AR is whether the reasonableness of the potential victim's conduct is the only relevant issue, or whether her consent (in any sense) has independent significance. Under the modern approach, only an *unreasonable* assumption of a negligently created risk of harm should limit the victim's recovery. And yet, if a potential victim consents to (what would otherwise be) an *intentional* tort—for example, he agrees to a friendly wrestling match, or he dares someone to punch him hard in the stomach to test the strength of his abdominal muscles—then modern courts would preclude him from recovery for the resulting injuries.<sup>109</sup> We do not examine the reasonableness of his decision to wrestle or play the game. We do not conclude (as the merger approach to AR concludes) that if he was unreasonable in confronting the possible risks of injury from the intentional contact, he obtains partial recovery, while if he was reasonable, he obtains full recovery. Rather, he simply loses. Why? And why, in AR cases, do most courts focus only on the reasonableness of the

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An intriguing question is whether a highly compelling need to confront a danger overrides the VIR approach and warrants recovery. Thus, in the variation in the prior footnote, suppose the customer has an especially compelling need to enter, for example, to obtain supplies for a medical emergency. Does this compelling need justify full recovery, and thus override the VIR approach barring his recovery? The answer is unclear. My tentative view is that unless the need is so compelling that the customer would even have a necessity privilege to trespass and take the goods over the objection of the owner, he may not recover for any injuries from the dangerous condition. Similarly, in the first hypothetical in this part, the stranded passenger's compelling reason for hitching a ride with a drunk driver does not justify requiring the reluctant driver to compensate him for his injuries.

109. This is true so long as the physical contact that results in the injury is of the type agreed to; contrast a case in which the defendant is much stronger than the plaintiff reasonably expected. See RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (1965) ("To be effective, consent must be . . . to the particular conduct, or to substantially the same conduct."). "Minor differences in degree or extent, such as the fact that the force exerted by the actor in delivering a blow is slightly greater than would ordinarily have been contemplated, usually will not be held to exceed the consent, although a much greater force would clearly exceed it." *Id.* § 892A(2)(b) cmt. c.

victim's conduct, permitting full recovery so long as his decision to encounter the risk was reasonable?

This should be an especially troublesome question given the consensual rationale normally offered for traditional AR and other AR doctrines. Consent seems to be at the heart of both the defense of consent to an intentional tort (consent (IT)) and the various versions of AR. Why the dissimilar treatment?<sup>110</sup>

A more careful examination of the analogy between consent (IT) and AR will reveal two basic points. First, in both the intentional tort and negligence contexts, a genuine consensual rationale underlies, or is at least an important part of, certain no-duty rules. Second, in both contexts, we can identify cases in which the injurer breached a duty to someone, but in which the victim consented to that wrong. Thus, we can indeed find a consent (IT) analogy to AR of a breach of duty. As an empirical matter, however, only rarely does a victim consent to conduct by a defendant that *remains* a (nonconsensual) intentional tort as to *others*. Accordingly, the question that seems so pivotal in the AR debate—should a victim be barred for consenting to the injurer's *wrong*?—simply does not arise very often in intentional torts cases. Nevertheless, when it does arise, the question should be answered the same way in both contexts. (The answer, as we will see, is affirmative, so long as “consent” is given an appropriately narrow interpretation.)

To see how and why consent (IT) and AR are in principle analogous, it helps to identify some comparable fact patterns. Let us begin with a simple two-party case:

*Alice and Betty: Two-party case (and alleged intentional tort)*

Alice and Betty decide to play a game: Each will take turns jumping from a low branch of a tree into the other's arms. Both parties understand that there is a small risk of injury, and both have an approximate idea of each other's weight and strength. Betty suffers an injury resulting from the game.

In this case, Betty's consent to the intentional contact will bar her recovery. And this will be so without regard to whether one party's offering of the

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110. One argument for a distinction focuses on the fact that one who assumes a risk at most consents to a possible harm, while one who consents to an intentional tort agrees to an actual physical contact or other actual invasion of his interests. See SCHWARTZ, *supra* note 26, at 219. However, even one who consents to what otherwise would be a battery does not normally consent to the physical injury that results from such a contact. Thus, in both cases, the victim does not consent to the ultimate harm, and in both cases, it is an open question whether the law should treat what the victim does consent to as justifiably barring recovery for that harm.

game, or the other's acceptance of it, is deemed reasonable or unreasonable.<sup>111</sup>

Now consider a second variation:

*Christine and Dinah: Two-party case (and alleged negligence)*

Christine and Dinah play a game of tennis. Again, they understand the rules, their own abilities, and the characteristic risks of injury.

While Dinah is at the net, Christine hits a tennis ball right at her.

Dinah does not lift her racket up in time and suffers an eye injury.<sup>112</sup>

In this scenario, the contact is neither intended nor substantially certain to occur; accordingly, the tort, if any, is negligence, not the intentional tort of battery.<sup>113</sup> Dinah will not recover damages for her injury. Traditionally, a court might explain this by invoking an undifferentiated doctrine of assumption of risk. Under the modern approach, however, a court is likely to characterize this as primary AR, that is, as a case of no duty (or a case of limited duty or no breach). That is, Christine does not breach a duty to Dinah by hitting a tennis ball at her, because such an action, although risky, is within the rules of the game and is done for a competitive purpose.<sup>114</sup>

Neither of these cases presents an actor who has "wronged" anyone, in the sense of breaching a duty—either a duty not to intentionally contact someone without (or beyond the scope of) their consent, or a duty not to negligently create unreasonable risks to others. In both cases, to be sure, absent consent of the right sort, the injurer would have been liable. (Alice would be liable for battery if she had suddenly jumped from the tree onto unknowing bystander Fanny; Christine would be liable for negligence if, during a pause in the game when Dinah was looking away, Christine had spontaneously hit the ball in her general direction and accidentally hit her.) And in both cases, if the injurer had exceeded the consent given, she would have been liable. (Alice would be liable for battery if, instead of jumping into Betty's arms, she deliberately elbowed her in the head; Christine would be liable for negligence if she had promised Dinah never to hit the ball in Dinah's direction at the net and yet did so on this occasion.) But on the original assumed facts, the cases would be analyzed as involving: (1) no tor-

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111. This is so within a very broad range. If the agreed-upon game was illegal, as in certain cases of mutual combat, some jurisdictions invalidate what would otherwise be considered consent and permit recovery. See DOBBS, *supra* note 4, at 246.

112. Hitting a ball directly at an opponent at the net is an accepted part of the game of tennis between experienced players; it is a strategy that sometimes is more effective than attempting a passing shot.

113. Assume that the players are sufficiently experienced that Christine doesn't believe she is likely to hit Dinah in the head, though she recognizes that this is possible. Thus, even though Christine will win the point if she hits Dinah with the ball, Christine need not intend that result or believe it is substantially certain to result.

114. See DOBBS, *supra* note 4, at 547–50.



tious wrong in the first instance, because of the actors' consent, and not (2) a tortious interference or risk that was nevertheless cancelled by consent.

Now consider two multiparty cases:

*Paul and Quinn: Multiparty case (and alleged intentional tort)*

A group of friends plays a game of touch football.<sup>115</sup> After they have been playing for a while, Paul complains that the others are playing too aggressively. The group then agrees not to hit so hard. However, Quinn continues to play very rough and crashes into Paul, causing him injury.

Paul might be able to recover from Quinn for battery, because the intentional contact is more vigorous and dangerous than the level of contact to which Paul and the others had mutually agreed.<sup>116</sup>

Here is a second variation involving multiple parties:

*Sam and Tom: Multiparty case (and alleged negligence)*

Four friends play doubles tennis. After they have been playing for a while, Sam complains that the others are hitting the ball too hard. (Sam explains that he is a beginning player and is afraid that he will not be able to get out of the way of balls hit very hard in his direction.) The others agree to slow down the game. However, when a soft lob floats above his head, Tom cannot resist the temptation to smash the ball very hard in Sam's general direction, causing him injury.

Sam might be able to recover from Tom for negligence,<sup>117</sup> because Tom has exceeded the scope of the risks to which Sam has agreed. Under the modern approach, a court that supports recovery here would likely characterize this

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115. The example is based loosely on *Knight v. Jewett*, 834 P.2d 696, 697 (Cal. 1992).

116. Some courts might also permit recovery here on a negligence theory. After all, the law of battery is mainly concerned with nonconsensual physical contacts, and the friends have agreed to some physical contact, so one might analyze a contact that is beyond that agreement under negligence (if it is unreasonably dangerous). An analogy is informed-consent law. If the doctor informs the patient of the physical nature of the intended medical procedure, but the patient claims that the doctor provided inadequate information about the risks of the procedure, most courts would analyze the adequacy of disclosure under a negligence theory, not a battery theory.

Whether courts should allow a victim in the "Paul and Quinn" case to bring both battery and negligence claims, or instead only one of the two, is beyond the scope of this Article. The purpose of my analysis is simply to consider whether (pure) negligence and (pure) intentional tort cases are analogous in their treatment of consent. For this purpose, the purest example of a battery claim would be a case in which the participants in a game initially agree to physical contact (for example, touch football), and then, after complaints of some participants, agree not to permit any physical contact (for example, a no-touch football game in which a "tackle" occurs once a defensive player is within a yard of the offensive player). Given the artificiality of the latter scenario, I do not employ it in the text, but the reader can make the appropriate factual revisions if she desires a purer scenario. Alternatively, imagine that in the jurisdiction in question, any activities involving intentional contacts are analyzed exclusively under battery doctrine, not under negligence doctrine.

117. Assume that Tom does not believe that his hard shot is *likely* to hit Sam.

as a case in which Tom does have a duty not to impose this type of risk on Sam, a duty that he breached.<sup>118</sup>

Notice that both of these multiparty cases involve breaches of duty for which the victim might obtain recovery. But now we are in a position to develop further variations that arguably involve a participant *consenting* to such a breach. Consider this variant of "Paul and Quinn":

*Quinn and Roger: Multiparty case (and alleged intentional tort)*

Roger, like Quinn, had been playing rough, and he vocally dissented from the suggestion that the players cease being so aggressive. But in the end, he reluctantly agreed. He and Quinn nevertheless continue to play rough, and Quinn injures him.

In this variation, the FP approach justifies barring Roger's recovery (though it does not justify barring Paul's recovery). And a similar variation in "Sam and Tom" would similarly justify barring recovery.<sup>119</sup>

These examples of genuine consent to a breach of duty involve full preference for a higher level of risk. The other type of genuine consent that I have discussed, victim insistence on a relationship, can also justify nonrecovery despite an actual breach of duty. (However, it is more difficult to find instances of VIR in these recreational examples,<sup>120</sup> and indeed it is difficult to identify *any* plausible example of a victim insisting upon a relationship with an injurer who has already committed an *intentional* tort.<sup>121</sup>)

118. Some courts would preclude recovery here based on a special limited-duty rule for athletic and recreational activities, restricting recovery to those harms that were recklessly or intentionally caused. See, e.g., *Knight*, 834 P.2d at 711. But this limited-duty rule is ordinarily based on the public policy of avoiding the threat of lawsuits over mere acts of carelessness, a threat that could deter such activities; the rule does not necessarily reflect a policy of respecting the consent of all participants to the level of risk actually employed. (Consider the facts of *Knight v. Jewett*: The plaintiff clearly expressed her wish that the defendant play the game less vigorously, but when he continued his rough play and caused her injury, she was denied recovery. *Id.* at 697, 712). Also, on the facts of my example, Tom might be considered reckless and thus liable even under the limited-duty rule of *Knight*.

119. Thus, suppose Ulysses dissented from slowing down the game, but reluctantly agreed to do so. He and Tom then exchange very hard volleys over the protests of the other players. One of Tom's volleys strikes Ulysses and causes him injury. Ulysses apparently fully prefers to play the game at this higher level of risk. Like Roger in the preceding example, Ulysses is justifiably barred from recovery.

120. It is difficult to modify the text examples to produce a case of VIR, because the players can easily lower the risks that they are creating simply by acting differently. But imagine that the issue is the adequacy of precautions to protect spectators from injury. Then a VIR case is conceivable. For example, suppose the players are responsible for the precautions. The precautions are inadequate. The players warn spectators to leave, given the risk, but one spectator insists on remaining and suffers injury.

121. Perhaps this is an example: A defendant's fireworks apparatus malfunctions, sending projectiles in all directions at ground level. The defendant disperses the crowd, but the plaintiff insists on remaining (for the thrill of dodging the missiles).

Thus, some of these multiparty cases present a distinctive and perhaps surprising scenario, a scenario in which an actor consents in a similar manner not only to a defendant's negligence but also to an intentional tort. For these are cases in which, on the one hand, (1) the injurer breaches a duty as to some persons (either not to commit an intentional tort, in the form of nonconsensual physical contact, or not to create an unreasonable or negligent risk of harm), and yet, on the other hand, (2) some other persons consent to that breach of duty, under some defensible conception of consent, and thus properly are denied recovery.

To be sure, modernists might deny that this situation is a conceptual possibility and thus might characterize the other persons in (2) as persons as to whom the injurer does not, after all, breach a duty. Rather (the argument might go), no duty is owed to someone who fully prefers the risk in either the intentional tort or negligence context, or to someone who insists upon a relationship with the injurer in the special sense I have described. But again, I think little turns on the labeling here. Instead, the important point is that in an identifiable group of cases, an appropriately defined consent turns what otherwise would have been a clear breach of duty into a case of no recovery for harm.

And there is another significant lesson from these examples, a lesson noted above. When properly invoked, consent or assumption of risk is a *selective* no-duty (or, if you prefer, breach-but-no-recovery) doctrine. It has no application when *all* potential victims appropriately consent to the risks, for in such a situation, the injurer is protected by a categorical no-duty rule. (By "appropriately," I mean to describe those few cases, such as FP and VIR, in which traditional AR properly applies.) But it also has no application when *no* potential victims appropriately consent to the risks, for in this situation, all victims will be entitled to at least partial recovery.

Thus, if all the participants in "Paul and Quinn" changed their mind and agreed to a game under which they would play very vigorously, then none is legally responsible for injuries caused within the informal rules that they have now accepted. (Likewise in "Sam and Tom," if all four tennis players agree to resume the game at the normal speed.) In each case, the language of "consent" or "assumption of risk" might not even be invoked; no-duty doctrine is perfectly adequate to justify the legal result. Conversely, if, in either case, *none* of the participants consented to the higher level of risk in the relevant sense, then all are entitled to at least partial recovery.

AR doctrine has a distinctive function to play, in other words, only when the injurer has breached a duty and is potentially liable with respect to *some* but not *all* potential victims. If we knew for sure that all potential victims of a particular tort would consent to the risk, we could readily employ a no-duty rule instead.

This selective quality of AR doctrine helps explain why "breach-but-consent" cases occur far more frequently with negligence claims than with intentional tort claims. For negligent actors often engage in acts or create products or conditions that create risks to numerous people,<sup>122</sup> while intentional tortfeasors typically engage in distinct acts with a single person at a time. Because intentional tortfeasors only rarely create high probabilities of physical contact with a multitude of potential victims, they only rarely create the opportunity for selective consent from some but not all of those victims. The more common case is an interaction between a potential injurer and a victim in which the victim either does clearly consent to a particular contact (a case not ordinarily understood as breach-but-consent) or does not consent to the contact (a case ordinarily understood as a straightforward battery). On the other hand, a case like "Paul and Quinn" is the exceptional intentional tort case that is more analogous to cases of negligent risk-creation.<sup>123</sup>

In the end, the well-established doctrine of consent to an intentional tort does not entail a commitment to endorsing traditional AR, but it does strongly support either a narrow version of AR or functionally equivalent no-duty rules that take account of consent. For the difference between consenting to an intentional tort and consenting to a negligently created risk largely reflects empirical differences in typical fact patterns, not substantive differences in the kind of consent that should be deemed sufficient to preclude recovery.<sup>124</sup> Indeed, in doctrinal areas at the border of the two categories, courts often do not even focus carefully on the category. In athletic

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122. Is genuine AR to a breach of duty, or the analogous consent (IT), possible in a *two-party* case? Perhaps. Suppose D negligently endangers P, and P alone, and is about to alleviate the risk. If P then insists on confronting the condition immediately, he might be barred under VIR; indeed, he might also fully prefer the risk.

123. This empirical difference also explains why consent to an intentional tort is (properly) not usually conceptualized in terms of the *three* options noted in the full preference discussion in Part II.B. That is, if A permits B to physically contact A, normally B has no legal duty to "offer" a different type of physical contact to A that is less risky or dangerous to A. If A does not want to arm-wrestle in the manner that B offers, A can simply walk away; B has no duty to offer a third option of a less dangerous form of arm-wrestling. See Simons, *supra* note 17, at 255. However, in the "Sam and Tom" example, the third option (hitting the ball less hard) is available, and not offering it is tortious, given the prior agreement of the other parties.

124. Nancy Moore has pointed out to me the following potentially important distinction. Although any intentional touching to which a plaintiff does not consent is a battery, consent fully removes the tortious aspect of the conduct and thus justifiably bars recovery. However, contributory negligence does not remove the unreasonableness of a defendant's negligent risk-creation; accordingly, the plaintiff's fault is properly compared to the defendant's fault.

I agree that intentional torts differ from torts of negligence in important respects. For example, intentional torts provide a brighter-line criterion of unjustifiable conduct. Thus, even though a nonconsensual intentional touching normally is tortious, nonconsensual *risk-creation* is quite often perfectly justifiable. (Prudent drivers may impose risks on pedestrians, for example.) Still, when risk-creation would indeed be unjustifiable but for the actor's consent, again it would seem

injury cases, for example, courts often impose only a limited duty on participants, without carefully examining whether the proper doctrinal category is negligence or battery.<sup>125</sup> Once again, the distinction between intentional torts and negligence is not determinative of whether and when a consensual rationale limits a victim's right to obtain compensation for her injuries.

E. Does Contributory Negligence Encompass Reasonable As Well As Unreasonable Conduct?

I have thus far argued that a narrow version of AR is defensible and that, if recognized, such AR should be a complete defense. But a radically different approach to AR is possible: employing a very capacious version of victim fault or contributory negligence, a version broad enough to include consideration of the consensual rationales underlying traditional AR, or at least FP and VIR. After all, *injurer* fault can consider a wide variety of factors, including the social value of the interests at stake, the benign or reprehensible motive of the actor, and the actor's social role. Reasonable care is not a simple notion.<sup>126</sup> Moreover, as we have seen in the context of no-duty rules, the analysis of the injurer's primary negligence can and does consider preferences and consent. So why cannot the analysis of victim negligence be similarly catholic? And if it is, why cannot a victim who genuinely consents to the injurer's negligence still be considered negligent and thus (somewhat paradoxically) still potentially obtain some recovery under comparative fault?

Furthermore, this whiff of paradox evaporates when we acknowledge that victim fault does not always mean that the victim should have acted

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that the consent fully removes the wrongfulness of the conduct (with respect to the consenting actor).

125. Many courts limit the duty in these cases, absolving participants of liability for simple negligence and permitting liability only for "reckless or intentional" injuries. See, e.g., *Knight v. Jewitt*, 834 P.2d 696, 711 (Cal. 1992). In this context, confusingly enough, "intentional" usually means, not the minimal intent to cause physical contact required for a battery, but the intention to cause physical harm. See *id.* at 710–11.

Of course, quite often, the contact in these cases is intentional, such that the consent rules for intentional torts would ordinarily apply, rather than the AR rules for negligently created risks. But perhaps courts believe that negligence standards presumptively apply (unless displaced by a limited-duty rule) because the actors do agree to *some* contact. Because the relevant legal question is the defendant's duty (and the plaintiff's consent or fault) with respect to the risk of injury from the contact, or even the precise scope of an agreed-to contact, negligence might be a more appropriate framework (just as the negligence framework has largely replaced battery in analyzing whether consent to medical treatment is sufficiently informed).

126. See 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, 906–16 (2001) (critiquing some versions of the Learned Hand test for oversimplifying the analysis of negligence and thus mischaracterizing judicial practice).

differently. In this respect, it is a broader notion than injurer fault (which does imply that the injurer's conduct was deficient). Sometimes, victim fault encompasses cases in which, in fairness, the victim is responsible for some or all of his own harm, even though his conduct cannot genuinely be characterized as unreasonable or deficient.<sup>127</sup>

An example is failure to use a seat belt. This omission is difficult to characterize as either reasonable or unreasonable. (This difficulty is partly due to the fact that the victim's alleged negligence consists in imposing a risk of physical injury only to himself.) And yet, perhaps a victim should not be able to recover in full from a negligent injurer if, because of the victim's particular libertarian or risk-preferring values, he chooses not to wear a seat belt that would have greatly reduced his injuries.<sup>128</sup>

Gary Schwartz, in his important early article on contributory negligence, lucidly explains that victim fault is not simply a mirror image of injurer fault. In cases of advertent victim negligence, Schwartz asks, why would the victim choose to engage in the faulty conduct? One reason, he replies, is as follows:

[O]n the basis of the values that the individual holds, he may conclude that his conduct is reasonable. If the law deems his behavior negligent, it does so because the community (*viz.*, the jury) adheres to a different set of values. Consider the victim who walks into a dark, unknown room because he is unusually curious and places an unusually high value on the satisfaction of his curiosity, or the "risk-preferring" victim who is willing to jaywalk partly because he does not really mind (or even enjoys) dodging cars.<sup>129</sup>

And yet, Schwartz explains, viewing such behavior as faulty is problematic: "[I]n the case of the victim with atypical values, it is hardly clear that his is conduct that society should really want to prevent."<sup>130</sup>

Moreover, on the injurer side, modern comparative fault doctrine does compare apples with oranges (and with other fruit as well): Victim fault is often compared not only with injurer negligence, but also with injurer strict liability and even with intentional torts. So perhaps, on the victim side, genuine AR could justifiably be merged into comparative fault, even if AR is not a species of victim fault.

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127. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1702-07, 1728-33 (1995).

128. See *id.* at 1703-04. Albert, a character in *supra* note 104, is an example of a "not necessarily unreasonable" plaintiff who arguably should nonetheless receive only partial damages.

129. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 715-16 (1978) (footnotes omitted).

130. *Id.* at 716.

Nevertheless, the suggestion that victim fault might be able to embrace a genuinely consensual version of AR is problematic for several reasons. First, the distinctive consensual rationale of AR might best be appreciated if it inhabited a separate doctrinal home. Second, my claim that victim fault actually already includes cases in which the victim did not act unreasonably (which might be termed victim "strict responsibility") departs from the conventional legal view that injurer negligence and victim negligence are judged by the same basic legal standard.<sup>131</sup>

Last but not least, expanding victim fault to encompass genuine AR would, in principle, permit the victim to obtain at least partial recovery. Yet a fundamental characteristic of genuine forms of consent is that they cancel the wrongfulness of the injurer's conduct. And it is not clear why a victim who has not been wronged by an injurer should be entitled to recover any damages from him.<sup>132</sup> Those few jurisdictions that do ostensibly require juries to consider even reasonable assumption of risk in a comparative fault assessment thus have some explaining to do.<sup>133</sup>

### CONCLUSION

Rather than attempt to summarize the analysis of the Article, this conclusion briefly addresses the normative perspectives that underlie AR. Recognizing some form of AR (whether as an affirmative defense or as a no-duty rule) can be justifiable from either a consequentialist or a deontological perspective—as a way either of *furthering* or of *honoring* autonomy values.<sup>134</sup>

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131. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 3 (2000). In his Draft No. 1, *supra* note 72, §3 cmt. b, Gary Schwartz took the same view. In his scholarship, however, Schwartz shared my view that victim and injurer negligence are dissimilar creatures. See Schwartz, *supra* note 129, at 722–23.

132. And conversely, if consent is vitiated by incapacity or lack of knowledge, then presumably consent should have no effect on recovery (and thus should not simply be thrown into the black box of "comparative fault"). Consent should similarly be irrelevant if a paternalistic state interest is overriding.

133. See *supra* note 26. Thus far, these jurisdictions have not articulated how a fact-finder is supposed to compare the victim's reasonable behavior with the injurer's tortious behavior. If a victim suffers injury in a reasonable rescue effort, for example, should her recovery be reduced? If this conclusion is avoided by the device of characterizing the rescuer as acting "involuntarily," see *supra* note 39, then enormous weight is placed on that uncertain characterization.

The analogous "apples and oranges" issue with injurers—that victim fault is often compared to injurer strict liability—is much less problematic, because such "strict liability" is sometimes actually a form of fault (as in product liability for design and warning defects), and because it is coherent to reduce a victim's recovery based on the degree of her own fault (even if the injurer is clearly not at fault).

134. See Philip Pettit, *Consequentialism*, in *A COMPANION TO ETHICS* 230–40 (Peter Singer ed., 1991).

Legal recognition of AR (as either a defense or a no-duty rule) can further autonomy by encouraging organizers to offer risky activities without fear of burdensome legal liability.<sup>135</sup> This is a consequentialist analysis, in which the value being maximized is the intrinsic value of freedom.<sup>136</sup>

But a nonconsequentialist account takes a different perspective: Legal recognition of AR honors or respects the value of autonomy. On this view, even if in some circumstances that legal rule will not affect the offering of an activity on terms desired by participants, it is unfair to the injurer, and perhaps disrespectful of the autonomy of the victim, not to honor his choice to confront or accept a risk (assuming that we are employing a defensible criterion of consent).

Whether a particular jurisdiction's tort law furthers autonomy values, honors them, or does both, depends on the shape of its tort doctrine as a whole. As we have seen, the consensual rationale underlying AR is expressed in a variety of doctrinal categories. Thus, whether a jurisdiction's tort doctrine fails to respect autonomy values, or unfairly burdens risk-providers with financial liability, or has the effect of undermining the ability of individuals to engage in risky activities, depends on the precise mix of doctrines that the jurisdiction employs. For example, if a jurisdiction adopts clear limited-duty rules that provide significant immunity from liability for recreational activities,<sup>137</sup> then the jurisdiction's decision to permit a very narrow AR defense for the residual cases in which the injurer breaches that limited duty need not significantly deter the offering of risky activities.

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Despite calls for the abolition of AR, and for its merger into comparative fault, the doctrine survives in some jurisdictions, and its spirit endures in most, if not all. The consensual rationale underlying AR is distinctive, important, and not easily reducible to the paradigm of victim fault. That rationale helps shape many of the no-duty and limited-duty rules in negligence law and is critical to understanding the scope of intentional torts as well. Whether a formal defense of AR should also be retained, however, is a

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135. Indeed, a number of states have enacted legislation codifying an AR defense for the benefit of such recreational activities as skiing. See, e.g., N.H. REV. STAT. ANN. §225-A:24 (2000), discussed in *Gwyn v. Loon Mountain Corp.*, No. 01-200214-B, 2002 U.S. Dist. LEXIS 9092 (D.N.H. May 15, 2002); VT. STAT. ANN. tit. 12, § 1037 (Supp. 2001), discussed in *SHAPO*, *supra* note 94, at 125-26.

136. Alternatively, on a broader utilitarian account, autonomy might only be instrumentally valuable as a means, and aggregate utility might be the maximand. Cf. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-17 (5th ed. 1998) (distinguishing a narrower idea of efficiency or wealth-maximization from a broader idea of utility).

137. See *supra* note 118.



close question. An affirmative answer is most plausible in two narrow categories—when the victim fully prefers the risk, and when the victim insists on a relationship with the injurer. But the traditional view that a victim should obtain no recovery if he voluntarily and knowingly elects to confront a risk is excessively broad and is not justified by the state's legitimate interests in furthering or respecting human autonomy.

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