

“Go Sue Yourself!” Imagining Intrapersonal Liability for Negligently Self-Inflicted Harms

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"GO SUE YOURSELF!" IMAGINING INTRAPERSONAL LIABILITY FOR NEGLIGENTLY SELF-INFLICTED HARMS

Lars Noah*

Abstract

Are "self-inflicted" harms actionable? Courts increasingly have allowed victims to identify other (typically unrelated) parties that may share responsibility for such injuries. Moreover, insofar as judges now also permit lawsuits against closely related parties, they arguably have expanded what it means for a harm to qualify as self-inflicted. Taking these various doctrinal developments to an illogical extreme, this Article asks whether we should just let victims bring tort claims against themselves, understanding that the victims' own liability insurers represent the intended targets. That this idea is not as crazy as it sounds suggests the extent to which tort law has become unhinged.

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* Stephen C. O'Connell Chair, University Term Professor, and Professor of Law, University of Florida. Just to be absolutely clear, I do not advocate allowing injured persons to file lawsuits against themselves; instead, this tongue-in-cheek Article represents something of a riff on the (il)logic and growing dysfunction of American tort law.

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*So take the photographs, and still frames in your mind
 Hang it on a shelf in good health and good time
 Tattoos of memories and dead skin on trial
 For what it's worth it was worth all the while.*
 —GREEN DAY, *Good Riddance*
(Time of Your Life) (1997)

INTRODUCTION

In 2015, an intermediate appellate court in Utah held that a negligent driver could—acting as both the sole heir to and personal representative for her deceased husband who had suffered fatal injuries in the accident while a passenger in the vehicle—file a lawsuit against herself.¹ I first heard about *Bagley v. Bagley* from the nationally syndicated and decidedly off-beat weekly “News of the Weird” feature carried by my local newspaper.² Several months later, the “Obiter Dicta” column in the *ABA Journal* highlighted the decision.³ The following year, the Utah Supreme Court affirmed.⁴ Although this litigation drew its share of ridicule in the popular press,⁵ it hardly defies explanation. In essence, the Utah courts decided that persons can wear more than one hat when participating in tort litigation.⁶

1. See *Bagley v. Bagley*, 344 P.3d 655, 660 (Utah Ct. App. 2015) (reversing the trial court’s dismissal of wrongful death and survival claims given the plain meaning of the pertinent statutes), *aff’d*, 387 P.3d 1000 (Utah 2016).

2. See Chuck Shepherd, *Lead Story—Newest Right*, NEWS OF THE WEIRD, Mar. 1, 2015, www.newsoftheweird.com/archive/nw150301.html; see also Pamela Manson, *Utah Woman Can Sue Herself over Fatal Car Accident, Ruling Says*, SALT LAKE TRIB., Feb. 18, 2015. A few months earlier, a vaguely similar sort of claim had attracted some attention. See James Walsh, *Worker Files Repair Claim for Hitting Own Car*, STAR TRIB. (Minn.), Oct. 10, 2014, at 4B; see also Chuck Shepherd, *Legal Technicalities*, NEWS OF THE WEIRD, Oct. 26, 2014, www.newsoftheweird.com/archive/nw141026.html (ridiculing this claim).

3. See Brian Sullivan, *Note to Self: You’re Gonna Pay*, A.B.A. J., Oct. 2015, at 71 (“Who knew that targeting oneself in a legal action could be such a clever strategy? If this catches on, it could become a whole new category of litigation: a selfie.”).

4. See *Bagley v. Bagley*, 387 P.3d 1000 (Utah 2016).

5. See, e.g., Lamiat Sabin, *Woman Suing Herself for Negligence over Her Own Driving that Caused Death of Husband; Ms Bagley Has Taken Herself to Court to Act as Both Plaintiff and Defendant*, INDEPENDENT (U.K.) Online, Feb. 27, 2015 (calling it “a mind-boggling court case”), available at 2015 WLNR 6014490; see also Pamela Manson, *Should Utahn Be Allowed to Sue Herself over Accident That Killed Her Husband?*, SALT LAKE TRIB., Mar. 3, 2016.

6. See *Bagley*, 347 P.3d at 1007 (“Though the statutes require adverseness, that requirement is met here because of the distinct legal capacities inhabited by Ms. Bagley. A

In a broader sense, the *Bagley* decision also accurately portrays the movement of tort law in this country. Instead of doing so in various round-about ways, however, this Article asks (somewhat facetiously) whether courts should more candidly allow injured persons to file lawsuits against themselves. For instance, if Ms. Bagley properly had standing to represent her husband's estate (whether or not she was the primary beneficiary), then would anything prevent this nominal plaintiff from tacking on a loss of consortium claim in order to recover for her emotional harm? And, if courts would allow such a derivative claim to proceed, then why not a direct claim against herself for any physical injuries or emotional distress as a foreseeable bystander to her husband's tortious injury? And, if such a direct claim might have merit, then why not take her husband completely out of the picture and allow a claim for any physical injuries that she may have suffered during her accident (in other words, what happens if we strip away the procedural quirks that accompany the contrived rights of action created by state statutes in the event of wrongful death)? Lastly, insofar as such extensions would strike courts as increasingly absurd, might they enjoy more traction if a larger time interval separated the tortious conduct and the manifestation of an injury?

This Article attempts to demonstrate that a non-frivolous basis exists for affirmative answers to at least some of these questions. As Part I will elaborate, existing approaches to seemingly unconnected problems in tort law—ranging from the growing recognition of intrafamily negligence claims, and the judicial hesitancy to bar the recoveries of victims who acted irresponsibly or enforce waivers of liability, to allowing culpable trustees and trespassers to visit responsibility for their injuries on to others—provide some support for the possibility of intrapersonal liability. Part II first ventures outside of tort law to consider intertemporal insights from other domains before circling back to address a variety of practical obstacles. To the extent that this Article manages to construct a plausible case for allowing lawsuits against oneself, it does so in hopes

different person acting as plaintiff and defendant is not necessary in this case.”). After agreeing with the lower court's construction of the applicable statutes, *see id.* at 1005–08, the supreme court rejected the defendant's argument that this lead to an absurd result, *see id.* at 1008–11; *id.* at 1010 (“The legislature may well have reasoned that courts should allow an heir or personal representative to sue him or herself for the benefit of creditors or [other] heirs when no other party is willing to maintain suit.”). The court also dismissed the contention that such a reading would offend public policy, *see id.* at 1012–14, concluding that these objections related to questions of what if anything the negligent plaintiff ultimately might recover, which would get aired on remand, rather than to her standing to litigate these claims in the first place, *see id.* at 1005, 1013–14; *see also id.* at 1011 n.37 (finding little merit to concerns expressed in an amicus brief that allowing such a lawsuit would create a concurrent conflict of interest and other difficulties for defense counsel).

of challenging tort law's seemingly relentless preoccupation with ensuring compensation of persons who have suffered injuries at the expense of attention to more traditional goals of righting wrongs and discouraging misconduct.

I. HALF STEPS TOWARD ALLOWING INTRAPERSONAL LIABILITY

Exactly forty years before *Bagley*, the Louisiana Supreme Court took an even more extreme step than had the Utah courts in a factually similar case before recognizing its misstep and reversing course on rehearing. In *Callais v. Allstate Insurance Co.*,⁷ a car accident claimed the lives of Lloyd and Carol Ann Guidry. Mrs. Guidry's mother, Laura Callais, brought wrongful death claims on behalf of her granddaughter—the deceased couple's only child—Roxanne, just an infant at the time of the accident.⁸ Louisiana allowed the filing of a direct action against the liability insurer for a policyholder's covered accident, so Ms. Callais had named Allstate as the sole defendant in the case.⁹

No real dispute arose in connection with the wrongful death claim for Roxanne's mother Carol as she was a passenger in the vehicle and had in no way contributed to causing the accident. The lower courts, however, dismissed the claim for the death involving Roxanne's father Lloyd because he had occupied the driver's seat and the plaintiff conceded that his negligence represented the sole cause of this single-vehicle accident.¹⁰ In a sense, it seems mildly astonishing that the plaintiff's lawyer even thought to try such a gambit, though presumably it would have offered a far greater recovery in the event that Mr. Guidry had represented the sole wage earner in this family.¹¹ Even more remarkably, after the plaintiff appealed the dismissal to the state's highest court, a majority of the justices initially sided with her position; the court read the broad language of Louisiana's wrongful death statute as not limited to deaths caused by someone else's tortious conduct.¹²

7. 334 So. 2d 692 (La. 1976) (on rehearing).

8. *See id.* at 693, 699.

9. *See id.* at 693–94; *see also id.* at 696 (“[W]here, as here, the survivor brings a direct action against the insurer, no procedural bar would apply.”).

10. *See id.* at 694.

11. *Cf. Callais v. Allstate Ins.*, 308 So. 2d 342, 345 (La. Ct. App. 1975) (rejecting the insurer's excessiveness objection to the \$30,000 award for the wrongful death of Roxanne's mother), *aff'd*, 334 So. 2d at 701.

12. *See Callais*, 334 So. 2d at 694–97. The majority initially took the position that a negligent decedent tortiously caused an injury to surviving beneficiaries entitled to assert a wrongful death claim. *See id.* at 694 (“[A]bsent any procedural bar, a child should be able to recover against his father's succession for any damages he incurs when his father deprives him of love, affection, support, and the like, by negligently killing himself.”).

Two members of the court dissented. In a brief opinion, Justice Marcus simply explained that the wrongful death statute “does not permit the beneficiaries designated therein to recover damages whenever a death occurs, but only when such a death is caused by the violation of a duty owed to the decedent by another, not one that is caused, in whole or in part, by the decedent’s own intentional or negligent act.”¹³ Justice Summers offered a more pointed rebuttal to the majority’s analysis: “In this case the child inherits the right to recover the damages to which her father was entitled prior to his death. Obviously, he had no right to recover from anyone, for he was the cause of his damage and injury. He could not recover from himself.”¹⁴ Justice Summers also highlighted the role of the insurer: “The effect is to convert an automobile liability policy into life insurance, insuring the life of the named insured against his own negligence and damage to himself in addition to insuring against claims of third persons.”¹⁵ After a rehearing, the majority acknowledged and corrected its evident mistake.¹⁶

13. *Id.* at 697, 698 (Marcus, J., dissenting). Denying such a claim in cases where the decedent’s tortious behavior represented only a partial cause of the death reflected the state’s position at the time that any contributory negligence by a victim served as a complete defense to liability.

14. *Id.* at 698 (Summers, J., dissenting); *see also id.* (“Any right she has must be based upon the wrongful death of her father. For his death to be wrongful the action of someone else is necessary to constitute a delict, a wrong. The wrong must take place between persons juridically strangers to each other.”); *id.* (“It is stretching logic and principles of statutory interpretation to say that by reason of his unintentional negligence which brought about his own death he gave his surviving child a cause of action for damages, for she was thereby deprived of his support.”).

15. *Id.* (prefacing this point by asking: “does the theory of this case apply only when there is an insurance company involved?”). Lastly, he noted that every other jurisdiction viewed contributory negligence by the decedent as extinguishing a wrongful death claim asserted by a faultless beneficiary, *see id.* at 698–99, though a court would only have to take up such an affirmative defense if another party had breached a duty of care running to the decedent.

16. *See id.* at 699 (majority opinion) (making reference to “convincing allegations that our original decision was erroneous and would produce unfavorable consequences”); *id.* at 700 (“On original hearing, we accepted [plaintiff’s] argument. We now think we erred.”); *see also id.* at 701 (holding that “a child may not recover damages for a parent’s death when the death resulted solely from the deceased parent’s lack of care for his own safety”). Only one member of the court who had joined the original majority opinion chose to register a dissent, though he did so without penning a separate opinion. *Id.* (noting that Justice Dixon dissented). The one commentator to give this decision close attention entirely misunderstood the holding after rehearing as denying the claim because of the decedent’s contributory negligence. *See* H. Alston Johnson III, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 12, 42–45 (1976); *cf. id.* at 46 (discussing still older Louisiana cases that vaguely resemble the posture of *Bagley* from Utah). If he had been correct, then the court would have allowed a claim like Roxanne’s (though reduced by half) after Louisiana replaced the contributory negligence defense with comparative fault. *See* *Bell v. Jet Wheel Blast, Div. Erwin Indus.*, 462 So. 2d 166, 169–70 (La. 1985) (discussing a statute that took effect in 1980); *see also infra* notes 78–81, 183 and accompanying text (elaborating on the operation of this defense).

This Part first elaborates on the growing availability of tort claims between family members, particularly opportunities for children to sue their parents, which may come closest to sanctioning intrapersonal liability in those cases where courts have allowed claims against mothers for prenatal injuries. Then it considers disparate other doctrinal developments that also arguably move in the same direction: weakening affirmative defenses based on the conduct or choices of victims that previously had barred negligence claims against other responsible parties; expanding negligence entrustment claims to allow irresponsible trustees to recover for their injuries; increasingly allowing trespassers to assert negligence claims against landowners; and authorizing shareholders to bring derivative claims on behalf of corporations for mismanagement by corporate officers.

A. *Growing Acceptance of Intrafamily Tort Lawsuits*

Apart from its atypical procedural posture,¹⁷ the *Bagley* case from Utah represented an otherwise unremarkable interspousal tort claim.¹⁸ More than a century ago, such lawsuits routinely foundered: given the common law's view that marriage created unity between husband and wife,¹⁹ allowing an interspousal claim would illogically permit a person

17. The only other court to confront precisely such a lawsuit dismissed it. *See Tanski v. Tanski*, 820 P.2d 1143, 1145 (Colo. App. 1991) (concluding that “the public policy of Colorado prohibits a plaintiff from recovering damages for a wrongful death he or she has negligently caused”); *see also Aetna Cas. & Sur. Co. v. Curley*, 585 A.2d 640, 644–45 (R.I. 1991) (answering questions certified by a federal court in a case where a jury had awarded \$250,000 after a man died in a fire caused by his adult daughter's negligent disposal of a cigarette in her home, explaining that it would offend public policy to allow his estate such a recovery because the defendant represented the sole heir); *id.* at 643 (“Curley was in all respects, absent name only, both defendant and plaintiff. She is the only person with any financial interest in the jury award. It was actually to her benefit to lose the wrongful death suit. Such a situation cannot be tolerated.”).

18. *See Bagley v. Bagley*, 387 P.3d 1000 (Utah 2016) (making no remarks about the interspousal liability aspect of the case); *see also Asplin v. Amica Mut. Ins.*, 394 A.2d 1353, 1355 (R.I. 1978) (“[T]he defense of interspousal immunity is no longer available in an action based on an interspousal tort where one or both spouses is dead.”); *Surratt v. Thompson*, 183 S.E.2d 200, 202 (Va. 1971) (allowing an unrelated administrator of a deceased woman's estate to pursue a wrongful death claim against her husband for negligent driving); *supra* notes 9–11 and accompanying text (explaining that the Louisiana courts in *Callais* affirmed the plaintiff's judgment for wrongful death of the negligent driver's wife).

19. *See* Glanville L. Williams, *The Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16, 16–17 (1947); Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 485–88 (1997); *see also* Hoepfer v. Tax Comm'n, 284 U.S. 206, 219 (1931) (Holmes, J., dissenting) (“The [state tax] statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one . . .”).

to sue themselves.²⁰ Even after state legislatures gradually disavowed this position,²¹ courts often invoked various policy arguments to justify the retention of interspousal immunity.²² With time, these rationales lost much of their persuasive force as well, so that today most jurisdictions allow spouses to assert tort claims against each other in at least some circumstances.²³ No one, however, thought to question the seemingly self-evident proposition affiliated with the antiquated conception of spousal unity—namely, the logical impossibility of lodging a lawsuit against oneself. Nowadays, negligence claims brought by children against their parents come closer to countenancing intrapersonal liability.

20. See *Broadbent v. Broadbent*, 907 P.2d 43, 45 (Ariz. 1995) (“[A]t common law the courts merged the identity of husband and wife; therefore, spousal immunity prohibited any action by a wife against her husband because to do so would have been to sue herself.”); *Ritter v. Ritter*, 31 Pa. 396, 398 (1858) (calling this unity “one of the favourite maxims of the common law,” and adding that “of course it excludes the possibility of a civil suit between them”); *Davis v. Davis*, 657 S.W.2d 753, 753 (Tenn. 1983) (“The formalistic legal foundations that originally lent support to the doctrine of interspousal immunity have long ago crumbled away. . . . [I]ts early existence can be traced to a concept that only imposed legal disability on the wife; that concept is unity.”); see also C.G. Haglund, *Tort Actions Between Husband and Wife*, 27 GEO. L.J. 697, 704 (1939) (referencing the “fiction of unity” and the “impossibility of the same person being both plaintiff and defendant in the same suit”); William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1033 (1930) (noting “the procedural difficulty that the husband would be both plaintiff and defendant”); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 363–72 (1989) (elaborating on this early history); *id.* at 385–86 (noting the persistence of this notion: “[I]t is difficult today to appreciate the almost mystical authority that the merger notion exerted over jurists during this [pre-WWI] period. Unity was a ‘metaphor of enormous power’ and resilience that exercised ‘linguistic hegemony.’”); Elizabeth Katz, Note, *How Automobile Accidents Stalled the Development of Interspousal Liability*, 94 VA. L. REV. 1213, 1220 (2008) (“Because husband and wife were considered one person under the law, it was nonsensical for a wife to sue her husband as doing so would be equivalent to suing herself.”).

21. See Tobias, *supra* note 20, at 373–83 (discussing the impact of various Married Women’s Property Acts passed at the state level during the nineteenth century).

22. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 616–19 (1910) (declining to construe congressional passage of a Married Women’s Property Act for the District of Columbia as abrogating interspousal tort immunity); see also *Byrd v. Byrd*, 657 F.2d 615, 618, 621 (4th Cir. 1981) (canvassing the history of interspousal immunity in the course of declining to recognize any such limitation under federal admiralty law); Tobias, *supra* note 20, at 383–98, 419–22; Katz, *supra* note 20, at 1245–53 (explaining that growing concerns about insurance fraud troubled courts during the period between the world wars).

23. See, e.g., *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993); see also *Bozman v. Bozman*, 830 A.2d 450, 466 (Md. 2003) (counting 46 states as having “abrogated the doctrine, either fully or partially”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. o (AM. LAW INST. 2012); Benjamin Shmueli, *Tort Litigation Between Spouses: Let’s Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 214–17 (2010) (explaining that the doctrinal landscape in this country remains uneven); Tobias, *supra* note 20, at 435–78 (evaluating at length the competing policy arguments and forecasting the eventual demise of all remnants of this immunity).

1. The Movement away from Parental Immunity

Although lawsuits by children against their parents never foundered on the fiction of a unity (and the logical impossibility of suing oneself), they presented some of the same policy concerns, including fears that the parental defendant often might come to enjoy the spoils of litigation nominally brought by their children.²⁴ Parental immunity enjoyed widespread recognition until the 1960s.²⁵ To the extent that courts presented with such tort claims increasingly have decided to abrogate this limitation on liability,²⁶ they may effectively allow lawsuits lodged against oneself.

A 1995 decision of the Arizona Supreme Court is emblematic of this tendency. In *Broadbent v. Broadbent*,²⁷ a mother had run inside the family's home in order to answer the telephone, leaving her two-and-a-half-year-old son Christopher beside their pool.²⁸ The unattended toddler nearly drowned, suffering serious brain damage from the sustained lack of oxygen and lost all motor skills.²⁹ Christopher's father Phillip brought a negligence claim on behalf of the child against his wife Laura, but everyone understood that they thereby hoped to tap into the couple's liability insurance policy.³⁰

The trial judge rejected the lawsuit on grounds of parental immunity, but the state's highest court reversed and remanded. After discussing the birth of complete immunity late in the nineteenth century (and only in the United States), the court explained that it would abandon newer precedent that had limited claims to those cases where a parent's act or omission breached a duty owed broadly to any member of the community as opposed to a duty that ran solely to their child.³¹ The opinion identified

24. See, e.g., *Roller v. Roller*, 79 P. 788, 789 (Wash. 1905), *overruled by* *Borst v. Borst*, 251 P.2d 149 (Wash. 1952); see also William E. McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1961).

25. See RESTATEMENT (SECOND) OF TORTS § 895G cmt. a (AM. LAW INST. 1979).

26. See, e.g., *Bentley v. Bentley*, 172 S.W.3d 375, 378 (Ky. 2005); *Butterworth v. Butterworth*, 154 S.W.3d 79, 81 (Tenn. 2005); see also Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1164–74 (1991) (surveying the landscape).

27. 907 P.2d 43 (Ariz. 1995).

28. *Id.* at 44.

29. *Id.*

30. Because their homeowner's insurance policy had excluded coverage of intrafamily suits, any judgment for the plaintiff would get paid by the Broadbents' umbrella liability policy issued by Northbrook Indemnity. See *id.* (explaining that this justified granting the insurer's motion to intervene on appeal as the real party in interest).

31. See *id.* at 45–48; *id.* at 49–50 (overruling *Sandoval v. Sandoval*, 623 P.2d 800 (Ariz. 1981)). In contrast, and in common with several other jurisdictions, New York abides by such a distinction, which means that it effectively retains partial immunity for parents. See *Holodook v. Spencer*, 324 N.E.2d 338, 346 (N.Y. 1974).

and rejected a series of arguments thought to favor retaining complete or partial immunity,³² though it did so in a way that reflected a preoccupation with the particular facts in the case before it rather than assessing the broader policy ramifications in a categorical fashion.³³

First, the *Broadbent* court doubted that allowing such claims would threaten to disrupt family tranquility.³⁴ In particular, it found such a concern fanciful because the nominal defendant typically would have had some say in the choice to initiate such a lawsuit.³⁵ Insofar as it represents a waivable defense,³⁶ however, courts already could have entertained such cases without having to abrogate the immunity. More importantly, this assumption reflects a decidedly nostalgic view of the family, and it starts to break down when considering non-traditional arrangements.³⁷ In cases of divorce, for instance, one parent might use the threat of a

32. See *Broadbent*, 907 P.2d at 48 (summarizing); see also Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 573–83 (2013) (same, in the course of urging abrogation of immunity).

33. Cf. *Cabral v. Ralphs Grocery Store*, 248 P.3d 1170, 1175 (Cal. 2011) (“[T]he court’s task in determining duty ‘is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed’” (quoting *Ballard v. Uribe*, 715 P.2d 624, 628 n.6 (Cal. 1986))); *B.R. ex rel. Jeffs v. West*, 275 P.3d 228, 234–36 (Utah 2012) (same); *W. Jonathan Cardi & Michael D. Green, Duty Wars*, 81 S. CAL. L. REV. 671, 723 & n.278, 725 (2008).

34. See *Broadbent*, 907 P.2d at 48 (“The injury to the child, more than the lawsuit, disrupts the family tranquility. In fact, if the child is not compensated for the tortious injury, then peace in the family is even less likely.”).

35. See *id.* (“This fear of upsetting the family tranquility also seems unrealistic when we consider how such a lawsuit is initiated. The parent most often makes the decision to sue himself, and the parent is in effect prepared to say that he was negligent.”); see also *Cates v. Cates*, 619 N.E.2d 715, 727 (Ill. 1993) (“It is now generally recognized that the existence of liability insurance eliminates the actual adversity of parent and child in negligence actions.”); *id.* at 730 (“[W]here insurance coverage does not exist, there is little motivation to sue.”).

36. See *Shoemaker v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 1992). Of course, because a liability insurer typically represents the real party in interest, such a defense would not get waived except through inadvertence. Cf. *Sorensen v. Sorensen*, 339 N.E.2d 907, 915 (Mass. 1975) (“The parent is usually represented by counsel provided by the insurance company. Such counsel is ever alert to protect the interests of the insurance company”).

37. In theory, moreover, a relative or friend might petition to serve as a guardian in order to bring claims on behalf of a child against the parents’ wishes. See Eric T. Lanham, *Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian Ad Litem?*, 61 UMKC L. REV. 101, 116–17 (1992). See generally FED. R. CIV. P. 17(c). Alternatively, a disgruntled teenager might find his or her own lawyer for purposes of bringing a parental malpractice claim, or a young adult could do so for a long-ago injury thanks to the tolling of statutes of limitation during minority. Questions about picking appropriate parties can arise in public litigation as well. See Lars Noah, *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*, 85 GEO. WASH. L. REV. 1462, 1478–81 (2017).

negligence claim against the other parent in an attempt to wrest away custody rights.³⁸ In other situations, perhaps involving second marriages, one spouse may have accumulated (and sought to protect) substantial premarital assets and resist a lawsuit that attempts to access (and might drain) these segregated funds.

Parents might unwittingly get drawn into litigation in another way. The filing of a lawsuit on behalf of a child against a third-party tortfeasor may prompt that defendant to try impleading the parent for contribution.³⁹ Of course, the retention of immunity in such cases would not only allow a tortious parent partially responsible for a child's injury to escape sharing the financial burden, putting aside the possibility that they had liability insurance to pick up the tab, but it also indirectly rewards that parent financially for their wrongdoing at the expense of the third-party tortfeasor.⁴⁰ In any event, insofar as the Arizona Supreme Court favorably emphasized both parents' participation in the decision to lodge a negligence claim on behalf of their injured child, it understood this category of intrafamily claims as amounting to allowable lawsuits against one's self broadly conceived.

38. See *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1081 (Fla. 2001) (Wells, C.J., dissenting) (“I am concerned that this decision will be used to foster litigation involving children in stances [sic] in which the real battle is between the two parents.”); *Anderson v. Stream*, 295 N.W.2d 595, 602–03 (Minn. 1980) (Rogosheske, J., dissenting); see also *Cates*, 619 N.E.2d at 728 (dismissing this fear); Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 852 n.120 (2006) (noting “the possibility of an action brought on behalf of a minor by a custodial parent against a non-custodial parent (or vice versa)”); *id.* at 899 (highlighting the fact that the three most recent decisions of the Tennessee Supreme Court “involved a complainant bringing an action on behalf of their child against the child’s other parent, from whom the complaining parent was divorced,” and adding that the vague standards used in these cases “run the risk of becoming a feud between former spouses as to whether the act was one of parental discretion”); cf. John Wisely, *Vaccines Go on Trial Again in Oakland County as Parents Fight in Divorce Court*, DETROIT FREE PRESS, Oct. 13, 2017, at A17.

39. See, e.g., *Crotta v. Home Depot, Inc.*, 732 A.2d 767, 770–74 (Conn. 1999) (holding that parental immunity barred impleader); *Shoemaker*, 826 S.W.2d at 936–38 (holding that the owners of an apartment building could not seek contribution from the mother of a child who drowned in their pool); see also *Holodook v. Spencer*, 324 N.E.2d 338, 344 (N.Y. 1974) (limiting parental duty in part out of fear that the prospect of an impleader might discourage the parent in pursuing a meritorious claim on behalf of his child against a stranger).

40. See Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 522 (1982) (“[T]he requirement that the third party [barred from seeking contribution] pay the total damages means that the compensatory funds directly enrich the family treasury of the wrongdoing parent, a result which violates the prohibition against a tortfeasor benefitting from his wrong.”). This assumes, of course, that the claim would not otherwise have failed on proximate cause grounds. See *O’Clair v. Dumelle*, 735 F. Supp. 1344, 1351 (N.D. Ill. 1990) (rejecting a claim against a homeowner brought on behalf of a child who had drowned because the mother’s failure to supervise was deemed to be so unforeseeable that it amounted to the superseding cause of the death), *aff’d mem.*, 919 F.2d 143 (7th Cir. 1990).

Second, the *Broadbent* court discounted the risk of insurance fraud, noting that this sort of thing can happen in any number of cases and that other mechanisms exist to guard against collusion.⁴¹ The adversarial process represents the primary mechanism for ferreting out such fraud, however, and the skewed incentives to concede negligence in intrafamily cases (at least in those sorts of families envisioned by the court) would make it a good deal harder to ensure genuine adversariness.⁴² Indeed, if one imagines a different sort of non-nuclear family, then a single parent with sole custody (and acting on behalf of their injured child) might end up filing a lawsuit naming themselves as the defendant.⁴³ No matter who initiates the litigation in the child's name, and putting aside contractual obligations to cooperate with one's liability insurer,⁴⁴ the nominal

41. See *Broadbent*, 907 P.2d at 48 ("The system can ferret out fraudulent and collusive behavior in suits brought by children against their parents just as the system detects such behavior in other contexts."). Although Laura Broadbent had conceded negligence, her trial counsel (supplied, of course, by their liability insurer) did move for summary judgment on grounds of parental immunity. See *id.* at 44. Strangely, the supreme court later concluded that the previously uncontested question of breach would still require resolution on remand. See *id.* at 50 ("In this case, the trier of fact may find that the mother . . . did not act as a reasonable and prudent parent would have in this situation. The finder of fact must determine whether leaving a two-and-a-half-year-old child unattended next to a swimming pool is reasonable or prudent."). Other jurisdictions take the concern about insurance fraud more seriously. See, e.g., *Renko v. McLean*, 697 A.2d 468, 475 (Md. 1997), *superseded by statute*, MD. CODE ANN., CTS. & JUD. PROC. § 5-806 (2001), *as recognized in* *Allstate Ins. v. Kim*, 829 A.2d 611, 615 (Md. 2003); see also *Verdier v. Verdier*, 219 S.W.3d 143, 145 (Ark. 2005) ("Broadening the [automobile insurance] exception to the parental-immunity doctrine to cases where a parent is covered by liability insurance through an existing homeowner's policy leads to a dangerous slippery slope."); *Squeglia v. Squeglia*, 661 A.2d 1007, 1112 (Conn. 1995).

42. See *Siruta v. Siruta*, 348 P.3d 549, 555 (Kan. 2015) ("[T]he parties' positions on whether negligence should be found was 'not entirely adversarial,' as Duskin and Missy remained married, and Missy went so far as to say that she did not want the jury to determine no fault [by her for the wrongful death of her child]."); *Hastings v. Hastings*, 163 A.2d 147, 150 (N.J. 1960) ("The decision for the child to sue will be determined within the family circle and obviously the proposed defendant is going to participate in making it, quite an unorthodox situation under our basic concept of adversary litigation, to say the least."), *overruled by* *France v. A.P.A. Transp. Corp.*, 267 A.2d 490, 494 (N.J. 1970). If they had not consented to getting sued, see *supra* notes 37–39 and accompanying text, the parent presumably would have every reason to put up a real fight.

43. See, e.g., *Glaskox v. Glaskox*, 614 So. 2d 906, 908, 912 (Miss. 1992) (allowing a claim where daughter, "by and through her mother . . . , filed a complaint in which she alleged that her mother's negligent operation of a car" caused harm). Similarly, if the tortfeasor dies after injuring his or her child, and the surviving spouse acts as the representative for the decedent's estate, then the now single parent may find him- or herself on both sides of the litigation. See, e.g., *Karam v. Allstate Ins.*, 436 N.E.2d 1014, 1015, 1019 (Ohio 1982) (retaining parental immunity given the risk of collusion in a lawsuit having such a posture), *overruled by* *Dorsey v. State Farm Mut. Auto. Ins.*, 457 N.E.2d 1169, 1171 (Ohio 1984).

44. See *Nocktonick v. Nocktonick*, 611 P.2d 135, 142 (Kan. 1980); see also *Bagley v. Bagley*, 387 P.3d 1000, 1007 (Utah 2016) ("[A] failure to cooperate with her insurer in mounting

defendant in these cases cannot, of course, testify too favorably for the victim without risking self-incrimination for child endangerment and perhaps inviting prosecution.⁴⁵

Third, the *Broadbent* court rejected fears that allowing claims against parents would dissipate family resources (skimming support from any siblings) because such lawsuits were unlikely absent insurance and asset dissipation was more likely to occur if no one compensated for the injury.⁴⁶ Again, however, in the case of divorce, such a lawsuit may shift assets from one household (and siblings or half-siblings) to another; even without divorce, liability insurance coverage may not exist.⁴⁷ Moreover, the court seemed to view insurance as an essentially free pot of money, failing to appreciate that someone—namely, other policyholders—ultimately would have to foot the bill through increased premiums.⁴⁸ It also disregarded the fact that first-party insurance typically offers more efficient loss spreading insofar as these forms of coverage avoid the steep transaction costs associated with fixing liability through tort litigation.⁴⁹

a defense would breach the insurance agreement and absolve her insurer of any obligation to pay insurance money as damages in this suit.”); Nicholas J. Giles, Comment, *Rethinking the Cooperation Clause in Standard Liability Insurance Contracts*, 161 U. PA. L. REV. 585 (2013).

45. Cf. *State v. Massey*, 715 N.E.2d 235, 238–39 (Ohio Ct. App. 1998) (rejecting a child neglect prosecution where a toddler nearly drowned after her mother briefly left her unattended in a bathtub). See generally David Pimentel, *Criminal Child Neglect and the “Free Range Kid”*: *Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 967–99.

46. See *Broadbent*, 907 P.2d at 48 (“If a child has been seriously injured and needs expensive medical care, then a successful lawsuit against the parent and subsequent recovery from the insurance company could ease the financial burden on the family.”); cf. Shmueli, *supra* note 23, at 231–32 (regarding interspousal negligence claims designed to access money from a liability insurer as among the most clearly acceptable); Tobias, *supra* note 20, at 471 (“[J]udges who subscribe to the compensation rationale [for abrogating interspousal immunity] on the basis of the prevalence of insurance give credence to the fraud contention.”).

47. Some courts finessed this concern by allowing the claims only up to any coverage limits. See, e.g., *Ard v. Ard*, 414 So. 2d 1066, 1067 (Fla. 1982); see also *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1077–79 (Fla. 2001) (declining to apply this limitation in a case of sexual abuse); *Allstate Ins. v. Kim*, 829 A.2d 611, 615–16 (Md. 2003) (applying legislation that made immunity inapplicable in automobile cases only up to the minimum insurance-coverage limits).

48. Cf. *Horace Mann Ins. v. Fore*, 785 F. Supp. 947, 956 (M.D. Ala. 1992) (“Any other result [than applying the coverage exclusion for intentional torts] subsidizes the episodes of child sexual abuse of which its victims complain, at the ultimate expense of other insureds to whom the added costs of indemnifying child molesters will be passed.”); Carolyn L. Mueller, Comment, *Ohio Homeowners Beware: Your Homeowner’s Insurance Premium May Be Subsidizing Child Sexual Abuse*, 20 U. DAYTON L. REV. 341, 378 (1994) (“The cost of homeowner’s insurance would increase if companies are required to defend and indemnify child sexual abusers.”). See generally Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1 (2005).

49. See Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1653 (1994) (“[I]nsureds would be better off if everyone took the money spent to overinsure liability and invested it in first-party health, life, or disability insurance.”); see also Deborah R.

Fourth, the *Broadbent* court dismissed objections that parental defendants would enjoy a windfall as beneficiaries of their children's estates, thinking that this "remote" chance should not provide a basis for rejecting legitimate claims for compensation and that it represented a matter better handled by modifications in the rules of intestate succession.⁵⁰ Nonetheless, this would represent the only real context where tortfeasors might enjoy the insurance proceeds of their wrongful conduct, and the court never suggested that—in the event a victim died from his or her injuries immediately (which almost happened in this tragic case) or at some other point before trial—it would have barred a survival or wrongful death action based on allegations of parental negligence.⁵¹

Fifth, while it conceded that this represented the strongest rationale for retaining immunity, the *Broadbent* court did not believe that allowing such claims would interfere with the exercise of parental discretion.⁵² The court already allowed intentional tort claims and criminal prosecution in extreme cases of parents disciplining their children, and it feared the difficulty of distinguishing cases that involved the exercise of such

Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 492 (1987) (finding that plaintiffs receive approximately 50% of the monies expended in tort litigation). Then again, first-party insurers would not cover pain and suffering, emotional distress, or other intangible losses allowed in wrongful death claims, but those types of harms also would in no sense otherwise threaten to drain a family's savings.

50. See *Broadbent*, 907 P.2d at 48–49.

51. When contributory negligence operated as a complete defense, wrongful death lawsuits against third parties typically failed if the tortious conduct of plaintiff-beneficiaries played a role in causing the injury. See *Hall v. United States*, 381 F. Supp. 224, 226–27 (D.S.C. 1974); see also *DeLozier v. Smith*, 524 P.2d 970, 973–74 (Ariz. Ct. App. 1974) (doing so where surviving spouse was deemed partly at fault in wife's death); cf. *Haft v. Lone Palm Hotel*, 478 P.2d 465, 474 n.15 (Cal. 1970) ("When the negligent spouse dies in the accident and thus will in no way benefit from any recovery received with respect to the child's injuries, however, no logical basis can support the application of the 'imputed contributory negligence' rule to a wrongful death action maintained by the surviving non-negligent spouse . . ."). Retaining parental immunity could, however, magnify this problem in certain cases. See *Hollister*, *supra* note 40, at 522 ("The ultimate injustice occurs when a negligently supervised child is killed by a third party [barred from impleading the immune parent for contribution]. In that case, a wrongful death recovery would go directly to the parents whose carelessness contributed to the child's death."). Other courts that have abrogated parental immunity in whole or in part allow survival or wrongful death actions. See, e.g., *Hartman ex rel. Hartman v. Hartman*, 821 S.W.2d 852, 858 (Mo. 1991); *Carver v. Carver*, 314 S.E.2d 739, 742, 746 (N.C. 1984) (though only allowing damages suffered by the non-negligent parent because of the child's death); see also *infra* notes 62–67 and accompanying text (discussing a recent decision from Kansas); cf. *Newman v. Cole*, 872 So. 2d 138, 145–46 (Ala. 2003) (*per curiam*) (declining to abrogate immunity except when an intentional tort causes death).

52. See *Broadbent*, 907 P.2d at 49 ("Parents do not possess unfettered discretion in raising their children.").

discretion.⁵³ The court concluded that parents owed their children a general duty of care to act as a reasonable parent would under the circumstances, though it hastened to add that trial judges should continue to feel free to dismiss plainly frivolous claims.⁵⁴ In contrast, recognizing, as have other courts, the often wide-ranging and fiercely debated approaches to parenting in this country,⁵⁵ a concurring opinion favored a more forgiving standard applicable to the exercise of parental discretion that would impose liability only when a choice was “palpably unreasonable.”⁵⁶

Apart from disparaging the arguments commonly raised against recognizing this duty, the *Broadbent* court never offered anything apart from compensation in favor of doing so.⁵⁷ Presumably adequate

53. See *id.* at 49–50. Although not mentioned by the court, another retort along the same lines would point out that negligent supervision claims against parents generally remain available when a child injures a third party notwithstanding the fact that it also invites courts to scrutinize the exercise of parental discretion. See, e.g., *Nolecchek v. Gesuale*, 385 N.E.2d 1268, 1272–74 (N.Y. 1978); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 41(b)(1) & cmt. d (AM. LAW INST. 2012); Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877 (2002). But cf. *Buono v. Scalia*, 843 A.2d 1120, 1126–28 (N.J. 2004) (declining to impose such a duty); Porter, *supra* note 32, at 558–64 (explaining that such claims routinely fail because courts conclude that parents lacked either knowledge of a child’s dangerous propensities or the opportunity to exercise control).

54. See *Broadbent*, 907 P.2d at 50 (“Children are certainly accident prone, . . . and trial courts should feel free to dismiss frivolous cases on the ground that the parent has acted as a reasonable and prudent parent in a similar situation would.”). This caveat suggests that the court harbored some misgivings about its decision.

55. See, e.g., *Holodook v. Spencer*, 324 N.E.2d 338, 346 (N.Y. 1974) (“Considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, . . . parents have always had the right to determine how much independence, supervision and control a child should have, and to best judge the character and extent of development of their child.” (quoting lower court’s opinion)); see also Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1266–69 (2011) (elaborating on cultural and ethnic differences). On occasion, the “parenting wars” flare up and attract media attention. See, e.g., Jane E. Brody, *Giving Children Roots, and Wings*, N.Y. TIMES, Jan. 20, 2015, at D7; Donna St. George & Brigid Schulte, *No Shortage of Opinions on “Free-Range” Parents*, WASH. POST, Apr. 16, 2015, at B1; Clemens Wergin, Op-ed., *The Case for Free-Range Parenting*, N.Y. TIMES, Mar. 20, 2015, at A29; see also Donna St. George, *Neglect Cases Encroach on Parental Role, Report Says*, WASH. POST, Aug. 7, 2015, at B1.

56. See *Broadbent*, 907 P.2d at 51 (Feldman, C.J., concurring) (“Thus, the parent who decides to enroll a two-year-old child in swimming lessons at a neighborhood pool operates within the [somewhat more insulated] realm of parent-child decision-making.”).

57. For an earlier commentator recognizing (and praising) the almost exclusively compensatory focus of older decisions allowing tort lawsuits between family members, see Gerald G. Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 248–53, 259–60 (1974).

incentives for taking care already exist,⁵⁸ which helps respond to the court's concern about a seemingly paradoxical distinction in the duties owed to your own child and to someone else's child.⁵⁹ Along similar lines, the insurable-interest doctrine allows a person to take out a life insurance policy on her own child but not on someone else's child.⁶⁰ Indeed, the lack of any need to encourage loss avoidance in this context may suggest still another argument against recognizing such a duty: doing so could create a perverse incentive to harm one's kids. News stories occasionally describe parents who pretend that their children suffer from a serious disease, in some instances even subjecting them to deprivations in an effort to facilitate the ruse, all in an effort to get charitable contributions.⁶¹ The prospect of a sizeable award from the parent's

58. Cf. *Beaudette v. Frana*, 173 N.W.2d 416, 419 (Minn. 1969) (offering as "[t]he favored rationale for abrogating any one of the family immunities . . . the social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect"); Jennifer Tiller, Recent Development, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 275 (1994) ("No valid deterrence rationale exists for allowing these [parental contribution] claims because parents already have an incentive to prevent their children from being poisoned by lead.").

59. See *Broadbent*, 907 P.2d at 50 ("We fail to see why parents should not be held liable for negligence in failing to supervise their own children near the pool, when their liability would be clear had the children not been their own."). To be sure, rampant child abuse and neglect demonstrate that some parents fail miserably in their role as caretakers, see, e.g., Karen Kaplan, *Child Abuse, by the Numbers; A Study Finds 1 in 8 U.S. Kids Will Become a Victim of Serious Mistreatment*, L.A. TIMES, June 9, 2014, at A12, but it seems entirely unlikely that adding the prospect of tort liability will incentivize these parents to try harder.

60. See *Conn. Mut. Life Ins. v. Schaefer*, 94 U.S. 457, 460 (1876) ("A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him."); Peter Nash Swisher, *Wagering on the Lives of Strangers: The Insurable Interest Requirement in the Life Insurance Secondary Market*, 50 TORT TRIAL & INS. PRAC. L.J. 703, 710 (2015) (explaining that "today—by case law, statutory law, or both—an insurable interest at the inception of a life insurance contract appears to be required in every state"); *id.* at 715 ("[T]his 'love and affection' insurable interest [recognized between spouses] applies with equal force to a parent and child relationship."); see also Jacob Loshina, Note, *Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement*, 117 YALE L.J. 474 (2007) (critiquing the doctrine). In one tragic drowning case, the decedent's mother brought a wrongful death claim against the child's step-father whom she later divorced. See *Zellmer v. Zellmer*, 188 P.3d 497, 498 (Wash. 2008). The defendant in that tort case ultimately got convicted of murder. See Jennifer Sullivan, *Stepfather Guilty in Drowning: 3-Year-Old Died While Mother Away*, SEATTLE TIMES, Apr. 29, 2010, at B3 (reporting that he had drowned his step-daughter shortly after taking out a life insurance policy on her); see also Editorial, *Too Many Children Are Killed for Insurance*, WASH. POST, May 15, 2017, at A16 (referencing this incident among others).

61. See, e.g., Fernanda Santos, *Abuse Charge Filed Against Father Who Claimed His Son Had Cystic Fibrosis*, N.Y. TIMES, Sept. 22, 2006, at B5; *Mom Faked Son's Illness*, TORONTO SUN, Dec. 22, 2017, at A26; *Ohio Mother Allegedly Faked Son's Cancer*, BOS. GLOBE, Sept. 13, 2013, at A2. See generally Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse,"* 50 UC DAVIS L. REV. 205 (2016).

liability insurer may prove to be just too tempting for some. In short, the opinion in *Broadbent* offers a snapshot of what can happen when courts become excessively preoccupied with ensuring compensation for undoubted victims.

Twenty years after *Broadbent*, the Supreme Court of Kansas confronted an even starker intrafamily claim. In *Siruta v. Siruta*,⁶² the father of a child who died in a single-vehicle rollover accident brought a wrongful death claim against his wife for negligently falling asleep behind the wheel during a family road trip.⁶³ In a cross-appeal from the trial judge's denial of the defendant's motion for summary judgment, counsel supplied by their liability insurer argued that, because Mrs. Siruta qualified as an heir to her son's estate, allowing the tort action would impermissibly make her both a plaintiff and the defendant.⁶⁴ Although it recognized the peculiar posture of the case,⁶⁵ the court explained that the mother would not necessarily recover anything as an heir.⁶⁶ Technically, and in contrast to the Utah case *Bagley*, she did not appear before the court in a dual capacity,⁶⁷ but that lost sight of the fact that these still-married parents presumably shared an economic unity so that the nominal defendant effectively would get to share in the proceeds received by the father.⁶⁸

62. 348 P.3d 549 (Kan. 2015).

63. *See id.* at 554–55, 559.

64. *See id.* at 556.

65. *See id.* at 555 (noting that the defendant's testimony at trial reflected a lack of adversariness); *id.* at 554 (“Here a bereaved father sues his wife, the bereaved mother; the two parties are the sole heirs at law of a decedent child; and, to add one more wrinkle, both parties are potential tortfeasors.”). The court reversed the judgment that the trial judge had entered for the defendant, based on a finding by the jury of 50% negligence by the plaintiff for falling asleep while occupying the front passenger seat, because this provided no basis for invoking the comparative-fault defense. *See id.* at 563–65.

66. *See id.* at 556–57 (explaining that, after an estate secures wrongful death damages, the judge in a separate apportionment proceeding among the heirs could tailor an award based on the defendant's actions in causing her loss); *id.* at 557 (“Accordingly, we do not believe that [the defendant] would necessarily receive, merely because of her status as an heir at law, any portion of the damages she was ordered to pay as a defendant.”); *see also id.* at 570 (rejecting the defendant's efforts to invoke parental and spousal immunities); *cf.* *Commercial Union Ins. v. Pelchat*, 727 A.2d 676, 681–82 (R.I. 1999) (allowing the decedent's elderly parents to recover the proceeds from a wrongful death lawsuit because her negligent husband could not do so).

67. *See Siruta*, 348 P.3d at 556 (“[W]e decline to view [the mother] as a ‘plaintiff’ in the instant action such that she would necessarily recover damages from herself as the defendant. We do not address what would have happened had [she] sought to join [her husband]’s action outright as a party plaintiff . . .”).

68. *See Chamness v. Fairtrace*, 511 N.E.2d 839, 841 (Ill. App. Ct. 1987) (“To allow this cause of action to proceed [for the stillbirth of their child] in spite of the defendant-beneficiary's negligence on the basis that the husband-father, as an innocent beneficiary, should be allowed to

2. Extending Parental Liability to Prenatal Injuries

When parental negligence lawsuits allege prenatal injuries, the victim and maternal tortfeasor shared a connection at the time of the wrongdoing entirely unlike the fictional unity once thought to make spouses largely indistinguishable from one another. In the nineteenth century, when resolving tort claims brought against strangers for causing *in utero* injuries, courts held that the biological unity during pregnancy barred any separate claim for a later-born child.⁶⁹ In the middle of the twentieth century, courts began allowing such claims, though at first limited to viable fetuses because they could have existed apart from the mother from that juncture.⁷⁰ Nonetheless, when contemporary lawsuits for *in utero* injuries instead name the mother as the defendant, a few courts have rejected these claims in part by reference to the biological unity of the parties,⁷¹ while other courts have allowed such claims and do not appear

recover for pecuniary loss, even though defendant is barred from such recovery, ignores the reality that any recovery will inure to defendant through the husband-wife relationship.”).

69. See *Allaire v. St. Luke’s Hosp.*, 56 N.E. 638, 640 (Ill. 1900) (per curiam) (“[A] child before birth is, in fact, a part of the mother, and is only severed from her at birth If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it.”), *overruled by Amann v. Faigy*, 114 N.E.2d 412, 417–18 (Ill. 1953); *Dietrich v. Northampton*, 138 Mass. 14, 16–17 (1884) (Holmes, J.) (declining to allow a wrongful death claim, noting that “the unborn child was a part of the mother at the time of the injury”), *overruled by Torigian v. Watertown News Co.*, 225 N.E.2d 926, 927 (Mass. 1967); see also Lars Noah, *A Postmodernist Take on the Human Embryo Research Debate*, 36 CONN. L. REV. 1133, 1136–38 & n.20 (2004) (noting the common law’s earlier focus on “quickening” as well as the still-accepted view that an unborn child does not qualify as a “person” for purposes of constitutional law); *id.* at 1139 (asking in jest whether an embryo has “the same moral status as an inflamed appendix”).

70. See, e.g., *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946) (rejecting the view that a viable fetus was nothing more than a part of its mother). Subsequently, several courts allowed claims for tortious injuries to a fetus even before it reached viability so long as it was later born alive. See, e.g., *Smith v. Brennan*, 157 A.2d 497, 504–05 (N.J. 1960); *Delgado v. Yandell*, 468 S.W.2d 475, 478 (Tex. 1971); *Kalafut v. Gruver*, 389 S.E.2d 681, 683–85 (Va. 1990).

71. See, e.g., *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988) (“Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus. . . . The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant.”); *Remy v. MacDonald*, 801 N.E.2d 260, 263–67 (Mass. 2004); *id.* at 267 (“We conclude that there are inherent and important differences between a fetus, in utero, and a child already born, that permits a bright line to be drawn around the zone of potential tort liability of one who is still biologically joined to an injured plaintiff.”); *Chenault v. Huie*, 989 S.W.2d 474, 475–76 (Tex. Ct. App. 1999) (emphasizing “[t]he unique symbiotic relationship between a mother and her unborn child” in the course of declining to impose a “duty on a person biologically joined to the injured party”); *id.* at 476 (“Although the law wisely no longer treats a fetus as *only* a part of the mother, the law would ignore the equally important physical realities of pregnancy if it treated the fetus as an individual entirely separate from his mother.”); *id.* at 476–78 (elaborating). In cases of *in vitro* fertilization (IVF), however, injurious parental choices could occur before the implantation of an embryo results in any biological unity

to worry about this unusual feature.⁷²

Of course, the harm experienced in these prenatal-injury cases typically does not manifest itself until after birth severs the biological unity that previously had bound mother and her unborn child, and that also represents the point where the primary victim would enjoy standing to assert a claim.⁷³ The old spousal immunity, however, had attached at the time of the tortious act, even if a subsequent divorce would later have given the ex-wife standing to sue.⁷⁴ Thus, insofar as some courts allow tort claims against mothers for prenatal injuries to their children, they effectively have recognized in the victim an intertemporal distinction between the time of exposure and the time of a lawsuit.

B. *Conflating Victims and Culprits in Other Ways*

Although the judiciary's growing acceptance of negligence claims by children against their parents comes close to allowing intrapersonal liability, other doctrinal developments further buttress the idea that

with the mother. See Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 326 (2008) (“[P]reimplantation decisions are being made in a space that exists, by definition, outside of the woman’s body.”); cf. Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 633–46 & n.174 (2003) (discussing the prospect for tort claims against fertility specialists, and explaining that efforts to implead the parents likely would not limit medical malpractice recoveries).

72. See, e.g., Nat'l Cas. Co. v. N. Tr. Bank of Fla., N.A., 807 So. 2d 86, 87 (Fla. Dist. Ct. App. 2001) (holding that a child could sue her mother for driving negligently while pregnant up to the limits of her automobile liability insurance coverage); Bonte v. Bonte, 616 A.2d 464, 466 (N.H. 1992) (plurality) (jaywalking while pregnant); Tesar v. Anderson, 789 N.W.2d 351, 361–63 (Wis. Ct. App. 2010) (driving negligently while pregnant).

73. See RESTATEMENT (SECOND) OF TORTS § 869 & cmt. a (AM. LAW INST. 1965). In the event of a wrongful death action after a stillbirth, most courts continue to insist that the fetus have reached the stage of viability at the time of tortious injury. See Jill D. Washburn Helbling, Note, *To Recover or Not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363, 366 (1996) (noting that a few states allow such recoveries even for a nonviable fetus); Douglas E. Rushton, Comment, *The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice*, 61 S.C. L. REV. 915, 920–23 (2010) (same); cf. Smith v. Borello, 804 A.2d 1151, 1158–63 (Md. 2002) (allowing the formerly pregnant woman to assert a claim for the emotional distress triggered by the tortious loss of what amounts to one of her “body parts”).

74. See McKelvey v. McKelvey, 77 S.W. 664, 665 (Tenn. 1903) (recognizing parental immunity, and citing by way of analogy a pair of decisions from other jurisdictions for the proposition that “a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture”), *overruled by* Broadwell v. Holmes, 871 S.W.2d 471, 477 (Tenn. 1994); cf. Furey v. Furey, 71 S.E.2d 191, 192 (Va. 1952) (following “the rule of the common law that all liability for antenuptial torts is extinguished by marriage”), *overruled by* Surratt v. Thompson, 183 S.E.2d 200, 202 (Va. 1971). *But cf.* Windauer v. O'Connor, 477 P.2d 561, 562–65 (Ariz. Ct. App. 1970) (allowing a claim by ex-wife against former husband for shooting her while still married).

someone could sue themselves in tort. Affirmative defenses of contributory negligence and express assumption of risk no longer erect insurmountable obstacles for blameworthy or consenting victims. After contributory negligence as a complete defense largely became a relic of history, negligent entrustment claims increasingly offer potential recourse for irresponsible trustees as well as innocent third parties, and trespassers might enjoy expanded opportunities to assail landowners for breaching duties of care owed even to uninvited entrants. Finally, shareholder derivative lawsuits arguably countenance a form of intrapersonal liability for corporate entities.

1. Softening Defenses Related to Victims' Choices

Breaching a duty of care running to oneself generally gets recognized as an aspect of the comparative negligence defense,⁷⁵ though occasionally these come into play when a bystander suffers an injury while attempting to effectuate a rescue.⁷⁶ In either of those situations, however, the actual or potential victims get punished rather than rewarded for their tortious behavior.⁷⁷ As the old (generally complete) contributory negligence

75. See RESTATEMENT (SECOND) OF TORTS § 463 (1965); Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 984–88, 1029–34 (2003); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1747 (1995).

76. See, e.g., *Talbert v. Talbert*, 199 N.Y.S.2d 212, 214–16 (Sup. Ct. 1960) (adult son injured while preventing his father's suicide attempt); see also *Sears v. Morrison*, 90 Cal. Rptr. 2d 528, 532–34 (Ct. App. 1999) (surveying the case law); *id.* at 530 (explaining that "the majority of jurisdictions extend the rescue doctrine to first-party cases"). In a few bizarre recent cases, primary wrongdoers have filed negligent infliction of emotional distress counterclaims by alleging irresponsible behavior by the primary victim caused an accident that left the tortfeasor upset about what had happened. See Jane Gerster, *Lawsuit Against Dead Teen "Cruel"*; *More than \$1 Million Being Sought by Driver Who Struck and Killed Teen Riding His Bike*, TORONTO STAR, Apr. 26, 2014, at GT2; Tracy McLaughlin, *New Twist in "Twisted" Case; Lawyer: Driver Suing Family over Fatal Crash Was Texting*, TORONTO SUN, Jan. 9, 2017, at A7 ("Despite public outrage across the nation, Simon has refused to drop her lawsuit, claiming \$1.3 million for her own emotional pain and suffering."); Mitch Smith, *Chicago Officer, Citing Emotional Trauma, Sues Estate of Teenager He Fatally Shot*, N.Y. TIMES, Feb. 8, 2016, at A10 (reporting that the attorney who filed a \$10 million counterclaim to a wrongful death lawsuit "acknowledged that it was rare for a police officer to sue the estate of a person he killed" but alleged that the decedent's threatening behavior had caused his client severe distress); see also Simons, *supra* note 75, at 1734 (mentioning without elaboration that "sometimes the plaintiff causes the defendant emotional harm by implicating her in the injury").

77. Cf. Bublick, *supra* note 75, at 1037 n.334 ("[A] provision [in an earlier draft of the *Third Restatement of Torts*] seems to permit a plaintiff who negligently causes physical harm to herself to sue herself. Although a plaintiff would not ordinarily be expected to sue herself for negligence, such a possibility could come to fruition if the plaintiff had insurance that might cover such suits . . ."). It appears from the surrounding context that this commentator sought only to make the semantic point that recognizing an obligation of self-care never technically operated as a "duty" in tort because no one could have sued the plaintiff for breaching such an obligation, which

defense has given way to the (generally only partial) comparative negligence defense, courts have visited less of a punishment on blameworthy victims. Nonetheless, this doctrinal modification does not reward irresponsible victims; instead, at best they get to recover from the primary wrongdoer only the latter's share of responsibility for the injury.

The extent to which a victim's irresponsible conduct may limit recovery varies across the country.⁷⁸ At the extremes, five jurisdictions continue to treat any contributory negligence as a complete defense,⁷⁹ while a dozen states have shifted to a "pure" or fully proportional form of the comparative negligence defense.⁸⁰ Most jurisdictions, however, use a "modified" version of comparative negligence that also allows for a proportional recovery but operates as a complete defense if the victim's assigned share exceeds a threshold relative to the share assigned to the named defendant(s): typically, the former can be "no greater than" the latter, but, in a dozen or so states, the former must be "less than" the latter.⁸¹ All told, then, approximately two-thirds of jurisdictions in the United States would allow plaintiffs to recover half of their damages in cases where victims and tortfeasors get assigned equal shares of responsibility.

means that recognizing categorical limits on such an obligation technically would not count as a "no duty" rule. *See id.* ("In one circumstance the plaintiff might truly be said to have no duty. . . . A rule that would prevent a plaintiff from suing herself for her own negligently created risks to self would be, in earnest, a plaintiff no-duty rule."); *see also* Simons, *supra* note 75, at 1738 n.109 ("[T]he plaintiff's 'duty to rescue himself, for the benefit of the defendant' means the same [forfeiture of some right of recovery], since plaintiff is hardly in the position to sue himself.").

78. *See generally* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (5th ed. 2010).

79. *See, e.g.,* *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1156–58 (Md. 2013); *id.* at 1158, 1169 (Harrell, J., dissenting) (counting Alabama, North Carolina, Virginia, and the District of Columbia as the only other holdouts). Courts in such jurisdictions may, however, use various ameliorative doctrines (e.g., last clear chance) that allow claims by irresponsible victims to proceed. *See* David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 188–89 (1998); *see also* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1612–18, 1641–42 (2001) (discussing the judicial willingness to let juries ignore their instructions).

80. *See, e.g.,* *Wassell v. Adams*, 865 F.2d 849, 852–56 (7th Cir. 1989) (upholding damage award reduced by 97% to reflect comparative negligence under Illinois law); *Sutton v. Piasecki Trucking, Inc.*, 451 N.E.2d 481, 482 (N.Y. 1983) (99% reduction); *see also* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 7 & cmt. a (AM. LAW INST. 2000) (favoring this version of the defense). Courts in such jurisdictions may, however, bar claims by irresponsible victims on other grounds. *See, e.g.,* *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837–39 (1996) (treating the extraordinary negligence of the plaintiff's agent in an admiralty case as a superseding cause instead of grounds for a partial comparative negligence defense); *see also* Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 944–46 (2000) (defending such decisions).

81. *See* *Coleman*, 69 A.3d at 1176 nn.20–21 (Harrell, J., dissenting).

Whatever the form of this defense, principles of proximate causation may entirely vitiate the consequences of a victim's contributory misconduct. In medical malpractice cases, courts routinely disregard what brought the victim to see the physician, including plainly irresponsible behaviors, because all patients deserve non-negligent care.⁸² Of course, if we assume that the bad outcome arose after non-negligent care, then the malpractice defendant has lost a powerful mechanism for otherwise escaping frivolous litigation, which thereby tends to reward the irresponsible victim upon settlement even if a jury or reviewing court ultimately would have seen the injustice of awarding damages. Separately, in medical malpractice as well as other types of tort cases, post-injury but pre-trial suicide attempts may get charged to the original tortfeasor.⁸³

Express assumption of risk represents another affirmative defense that has become somewhat harder to invoke. When enforced, exculpatory agreements operate to release defendants from their liability for negligence.⁸⁴ Such waivers amount to consent by potential victims that allows defendants to conduct themselves in ways that otherwise might qualify as tortious. Insofar as judges increasingly permit injured parties to disregard such hold-harmless agreements, they have decided to give force to subsequent expressions of regret about earlier choices by

82. See, e.g., *Harvey v. Mid-Coast Hosp.*, 36 F. Supp. 2d 32, 38 (D. Me. 1999) (barring the defendant from asserting a contributory negligence defense against a claim alleging substandard care of an attempted suicide victim); *Rowe v. Sisters of Pallotine Missionary Soc'y*, 560 S.E.2d 491, 497 (W. Va. 2001); see also Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-a-Chance Doctrine*, 24 REV. LITIG. 369, 390–91 (2005) ("Courts allow recovery for medical malpractice that occurs during treatment of an injury—whether that injury was entirely accidental, caused by another party's negligence, or self-inflicted—without asking what occasioned the patient's visit to the health care professional.").

83. See, e.g., *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 306–10 (Mo. 2011) (reversing summary judgment granted to an allegedly negligent surgeon on a wrongful death claim where a patient committed suicide more than one year after a back operation left him in unbearable pain); see also *Maloney v. Badman*, 938 A.2d 883, 886–91 (N.H. 2007) (explaining that, subject to only a pair of narrow exceptions, courts usually treat suicide as a superseding cause, and affirming summary judgment granted to a family physician notwithstanding his allegedly negligent prescribing of narcotic analgesics and sedatives to a patient with Crohn's disease who later used the drugs to take her own life). When a suicide attempt succeeds and does not get treated as breaking the chain of causation in a wrongful death action, the estate rather than the original victim would enjoy the enhanced damages award. Cf. *Bagley v. Bagley*, 387 P.3d 1000, 1006–07 & n.15 (Utah 2016) (interpreting the state's wrongful death and survival statutes as not allowing the heirs to recover when the decedent's actions represented the sole cause of death).

84. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 (AM. LAW INST. 2000).

potential victims to take their chances.⁸⁵ Courts may refuse to enforce waivers of liability for any number of reasons, and a few jurisdictions view essentially all such agreements as offensive to public policy.⁸⁶

For example, in *Hanks v. Powder Ridge Restaurant Corp.*,⁸⁷ a closely divided Connecticut Supreme Court refused to enforce a waiver of liability secured by the operators of a snowtubing facility.⁸⁸ An adult patron suffered a serious injury when his foot got stuck between his snowtube and the bank of a run, and the plaintiff asserted a number of negligent acts and omissions by the defendants.⁸⁹ After conceding that the exculpatory agreement signed by the plaintiff lacked any ambiguity,⁹⁰ the majority held that it offended public policy.⁹¹ It did so in part because of a repeated concern that relieving facilities of an obligation to take precautions would disappoint the reasonable expectations of patrons,⁹² which seems at least mildly perplexing in light of its earlier conclusion that the waiver suffered from no ambiguity.

85. Cf. Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 236–37 (1987) (“It is possible, consistent with this theory, to acknowledge plaintiff’s regret and measure his preference by his current desires. However, the purposes of tort liability . . . militate in favor of the foresight measure.”); *id.* at 278–79 & n.237 (wondering whether such a hindsight approach to judging the victim’s risk preferences would have a place in connection with claims founded on strict liability).

86. See, e.g., *Dalury v. S–K–I, Ltd.*, 670 A.2d 795, 797–800 (Vt. 1995); *Hiett v. Lake Barcroft Cmty. Ass’n*, 418 S.E.2d 894, 896–97 (Va. 1992); see also *Applbaum v. Golden Acres Farm & Ranch*, 333 F. Supp. 2d 31, 36–37 (N.D.N.Y. 2004) (applying a state statute that voided releases secured by recreational facilities); *Coughlin v. T.M.H. Int’l Attractions, Inc.*, 895 F. Supp. 159, 161–62 (W.D. Ky. 1995) (explaining that Kentucky courts rarely enforce releases); cf. *Provoncha v. Vt. Motocross Ass’n*, 974 A.2d 1261, 1265–67 (Vt. 2009) (distinguishing *Dalury* in the course of enforcing a waiver for participation in a motocross race).

87. 885 A.2d 734 (Conn. 2005). The court split 4–3 on the public policy analysis.

88. See *id.* at 748 (reversing summary judgment granted to the defendants).

89. See *id.* at 736.

90. See *id.* at 739–41; *id.* at 740 (“[T]he agreement refers to the negligence of the defendants three times and uses capital letters to emphasize the term ‘negligence.’”). Indeed, the plaintiff’s deposition testimony revealed that he (as well as his twelve-year-old son) fully understood the import of what he had signed. See *id.* at 741 n.6.

91. See *id.* at 741–48; *id.* at 745 n.9 (offering a concise summary of its seven reasons for doing so).

92. See *id.* at 744 (“Given the virtually unrestricted access of the public to Powder Ridge, a reasonable person would presume that the defendants were offering a recreational activity that the whole family could enjoy safely.”); *id.* (“[T]he plaintiff voluntarily relinquished control to the defendants with the reasonable expectation of an exciting, but reasonably safe, snowtubing experience.”); *id.* at 746 n.10 (“[I]t was reasonable for the plaintiff to presume that the defendants, who are in the business of supplying snowtubing services, provide the safest snowtubing alternative.”).

The majority in *Hanks* recognized that its decision represented a distinctly minority position in this country.⁹³ Nonetheless, it emphasized that the facility served the general public, that patrons relied on the choices of those operating the facility, and that the waiver amounted to a contract of adhesion because patrons enjoyed no opportunity to bargain over these terms.⁹⁴ Even though the majority explained that it sought to promote both the compensatory and deterrent purposes of tort law,⁹⁵ it seemed to emphasize the former when it expressed the fear that a contrary holding would force health insurers and public assistance programs to pick up the tab for injuries, which ultimately would mean spreading costs to insured populations and taxpayers as opposed to the operators and patrons of these facilities.⁹⁶

The dissent in *Hanks* began by emphasizing the freedom of parties to enter into contracts.⁹⁷ Moreover, because purely recreational activities differ from essential public services such as medical treatment and child care, the dissent noted that customers opposed to signing a waiver could simply decline to participate.⁹⁸ It also questioned the majority's view that, like hospital patients, participants turn themselves over to those operating or sponsoring a recreational activity.⁹⁹ The dissent added that "the vast majority" of jurisdictions have upheld waivers of liability in comparable settings.¹⁰⁰ Even so, courts in those states may decline to enforce

93. See *id.* at 747 ("We acknowledge that most states uphold adhesion contracts releasing recreational operators from prospective liability for personal injuries caused by their own negligent conduct.").

94. See *id.* at 744–47.

95. See *id.* at 742.

96. See *id.* at 745 n.8. In effect, it preferred to force persons wanting to enjoy snow tubing to purchase special insurance even if it duplicated first-party coverage that they already carried. Cf. *id.* at 745 ("[I]t is illogical to permit snowtubers, and the public generally, to bear the costs of risks that they have no ability or right to control."). For an even more extreme expression of this position, seemingly oblivious to the ready availability of first-party insurance, see *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995) ("[Defendants] alone can insure against risks and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, . . . cannot insure against the ski area's negligence.").

97. See *Hanks*, 885 A.2d at 748 (Norcott, J., dissenting). In effect, it would honor private ordering that departed from the default duties of tort law.

98. See *id.* at 751; *id.* at 754 ("Private, nonessential industries, while often very popular, wield no indomitable influence over the public. The average person is capable of reading a release agreement and deciding not to snowtube because of the risks that he or she is asked to assume.").

99. See *id.* at 751–52; see also *id.* at 752 ("In fact, the attraction of snow tubing and other recreational activities often is the lack of control associated with participating.").

100. See *id.* at 752–53 (cataloging these decisions); *id.* at 754 (describing the majority's public policy analysis as "the distinct minority view"); see also *McGrath v. SNH Dev., Inc.*, 969 A.2d 392, 396–99 (N.H. 2009) (enforcing a release secured by a ski resort against a snowboarder's negligence claim).

exculpatory agreements for any number of other reasons,¹⁰¹ and outside of recreational contexts they may do so on public policy grounds as well.¹⁰²

2. Negligent Entrustment Claims by Ungrateful Trustees

Theories of “negligent entrustment” have gravitated toward protecting primary wrongdoers from their own unreasonable behavior. At their base, such tort claims involve an owner transferring control over a dangerous instrumentality to someone whom they know lacks the competence to use it safely.¹⁰³ For instance, a parent might face liability for loaning a car to their unemancipated child if they knew that the child did not have the skill to operate the vehicle safely.¹⁰⁴ This recurring fact pattern hardly exhausts the range of plausible claims: an trustee may be a grown child, a more distant relative, or entirely unrelated to the entrustor,¹⁰⁵ and other products may qualify as dangerous instrumentalities.¹⁰⁶ Typically, a third party suffered an injury and then could assert a tort claim against both the

101. See Robert H. Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. RICH. L. REV. 381, 390–92 (2004); *id.* at 383 (“Currently too many courts refuse to enforce these exculpatory agreements, also known as releases.”); Patricia C. Kussmann, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R.6th 147, §§ 6, 9–10, 13, 15, 17 (2011 & Supp. 2017); Randy J. Sutton, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Amusement Facility from Liability for Personal Injury or Death of Patron*, 54 A.L.R.5th 513, §§ 4–5[a], 6[b]–8 (1997 & Supp. 2017).

102. See, e.g., Noah, *supra* note 71, at 643 n.165 (“Courts generally refuse to enforce waivers of liability in the health care context.”).

103. See, e.g., *Stallings v. Werner Enter., Inc.*, 598 F. Supp. 2d 1203, 1207 (D. Kan. 2009); *Weaver v. Stewart*, 151 A.3d 70, 75 (N.H. 2016); see also *Douglass v. Hartford Ins.*, 602 F.2d 934, 936 (10th Cir. 1979) (noting that such claims are “recognized in virtually every state”); RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (AM. LAW INST. 1965).

104. See, e.g., *Pierce v. Standow*, 329 P.2d 44 (Cal. Ct. App. 1958); *Hasegawa v. Day*, 684 P.2d 936, 939 (Colo. App. 1983); *McCart v. Muir*, 641 P.2d 384, 387–88 (Kan. 1982); see also *Zugel v. Miller*, 688 P.2d 310, 312–13 (Nev. 1984) (motorcycle); *Honea v. Bradford*, 251 S.E.2d 720, 722–23 (N.C. Ct. App. 1979) (motor bike).

105. See, e.g., *Edwards v. Valentine*, 926 So. 2d 315, 321 (Ala. 2005) (adult brother-in-law); *Tart v. Martin*, 540 S.E.2d 332, 333 (N.C. 2000) (18-year-old son); *Sheffer v. Carolina Forge Co., L.L.C.*, 306 P.3d 544, 548–50 (Okla. 2013) (employees); *Vince v. Wilson*, 561 A.2d 103, 106 (Vt. 1989) (grandnephew).

106. See, e.g., *White v. Inbound Aviation*, 82 Cal. Rptr. 2d 71, 77–78 (Ct. App. 1999) (small aircraft rented to an inexperienced pilot); *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1208 (Fla. 1997) (rifle sold to a visibly intoxicated customer); *Long v. Turk*, 962 P.2d 1093, 1098–100 (Kan. 1998) (powerful handgun allegedly given to 17-year-old son); *Moning v. Alfono*, 254 N.W.2d 759, 767–70 (Mich. 1977) (slingshot sold to child); *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 556 (Tenn. 2005) (gasoline sold to a visibly intoxicated driver).

primary (though often judgment-proof) wrongdoer and the owner of the dangerous instrumentality for entrusting it to the primary wrongdoer.

A handful of courts also have entertained so-called "first-party" negligent entrustment claims: an injured trustee seeks damages from the entrustor.¹⁰⁷ The trustee, of course, typically acted negligently, and the traditional contributory negligence defense would defeat any recovery.¹⁰⁸ With the advent of comparative fault as a partial defense,¹⁰⁹ such lawsuits became plausible. Jurisdictions following modified comparative negligence rules might continue to balk on the view that the tortious victim shouldered at least as much of the blame as the owner of the dangerous instrumentality.¹¹⁰ Nonetheless, in at least some cases, a reasonable jury might assign less blame to the victim,¹¹¹ and even that would not matter in a jurisdiction following the pure form of the defense.¹¹²

107. See, e.g., *Herland v. Izatt*, 345 P.3d 661, 671–72 (Utah 2015) (noting a division among the courts that have considered the issue, and deciding to recognize such claims, though adding that the modified comparative negligence defense will often serve to defeat liability); see also *Allstate Ins. v. Reliance Ins.*, 380 N.Y.S.2d 923, 930–32 (App. Div. 1976) (holding that a minor could assert a negligent entrustment claim against her mother notwithstanding the state's rejection of a duty of parental supervision); cf. *Rozewski v. Rozewski*, 46 N.Y.S.2d 743, 745 (Sup. Ct. 1944) (allowing a widower to assert such a claim against his brother even though the plaintiff's negligent driving represented the primary cause of his wife's death). See generally Ward Miller, Annotation, *Negligent Entrustment: Bailor's Liability to Bailee Injured Through His Own Negligence or Incompetence*, 12 A.L.R.4th 1062 (1982 & Supp. 2017).

108. See, e.g., *Perez v. G&W Chevrolet, Inc.*, 79 Cal. Rptr. 287, 289–90 (Ct. App. 1969); *Meachum v. Faw*, 436 S.E.2d 141, 144–45 (N.C. Ct. App. 1993). Only very young or profoundly impaired trustees might have avoided the defense, see *Frain v. State Farm Ins.*, 421 So. 2d 1169, 1173–74 (La. Ct. App. 1982) (involving a car entrusted to an institutionalized mental patient), but minors engaging in adult activities such as operating a motor vehicle typically would get no special dispensation, see *Keller v. Kiedinger*, 389 So. 2d 129, 131–33 (Ala. 1980).

109. See *supra* notes 78–81 and accompanying text (discussing this development and the various forms of the defense).

110. See, e.g., *Lydia v. Horton*, 583 S.E.2d 750, 752 (S.C. 2003) ("We cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself."); *Herland v. Izatt*, 345 P.3d 661, 665 (Utah 2015) ("[T]hose who are inebriated and seek to sue another for injuries brought on by their own actions may find it difficult to ultimately prevail in a negligence action, for to do so they must establish under Utah's comparative negligence framework that the negligence of the gun owner was greater than their own.").

111. See, e.g., *Axelson v. Williamson*, 324 N.W.2d 241, 245 (Minn. 1982); see also *Lyons v. Nasby*, 770 P.2d 1250, 1259–60 (Colo. 1989) (holding that a reasonable jury could apportion less responsibility to an inebriated adult who died while driving than to the tavern that had continued to serve him alcohol even after he became visibly intoxicated), *superseded by statute*, COLO. REV. STAT. § 12–47–801 (2014), as recognized in *LLC v. Groh*, 347 P.3d 606, 614 (Colo. 2015).

112. See, e.g., *Blake v. Moore*, 208 Cal. Rptr. 703, 708 (Ct. App. 1984); *Gorday v. Faris*, 523 So. 2d 1215, 1219 (Fla. Dist. Ct. App. 1988); *King v. Petefish*, 541 N.E.2d 847, 852–53 (Ill.

For instance, in 2012 an intermediate appellate court in Missouri decided that a trial judge should not have dismissed a first-party negligent entrustment claim.¹¹³ According to the allegations in this wrongful death action, the four named defendants had allowed an adult employee to drive their company van even though they knew of his serious drinking problems.¹¹⁴ Scott Hays took the van, stopped at a bar where he became intoxicated, and then on his way home died in a single-vehicle accident.¹¹⁵ Preliminarily, the court explained that comparative fault posed no obstacle to a first-party negligent entrustment claim because Missouri had adopted the pure form of that defense.¹¹⁶ After reviewing the available case law as well as the relevant commentary appearing in the *Second Restatement of Torts*, it could discern no reason for allowing only third parties to assert entrustment claims and remanded the case.¹¹⁷

App. Ct. 1989); *Snyder v Bergeron*, 501 So. 2d 291, 297–98 (La. Ct. App. 1986) (holding that the trial judge should have awarded the estate of the trustee 20% of wrongful death damages after apportioning 80% blame to the victim); *Stehlik v. Rhoads*, 645 N.W.2d 889, 892, 894–96, 904 (Wis. 2002) (reversing a judgment in favor of an adult plaintiff injured after driving the defendants’ ATV while drunk, where the jury had apportioned responsibility to the defendants both for causing the accident and for the plaintiff’s failure to wear a helmet, and remanding for a new trial).

113. See *Hays v. Royer*, 384 S.W.3d 330, 331, 338 (Mo. Ct. App. 2012).

114. See *id.* at 332; *id.* at 336 n.5 (noting that the complaint “alleges that Hays *habitually* drove the company van while intoxicated”). The complaint had identified Hays as an employee of the defendants—a pair of individuals and a pair of businesses that they owned—as well as a “part owner” of one of the businesses named as a defendant, see *id.* at 332, which presumably meant that he also enjoyed some sort of an ownership interest in the vehicle, but the court concluded that this would not necessarily bar a negligent entrustment claim, see *id.* at 337–38.

115. See *id.* at 331–32. If the accident had injured innocent third parties, then they might have had difficulty asserting a vicarious liability claim insofar as Mr. Hays did not appear to be acting within the scope of his employment. Moreover, even in the event that his use of the van had occurred while on the job (and putting aside the likely bar of workers’ compensation exclusivity), his estate presumably could not use *respondeat superior* in order to impute the decedent’s negligence to his employer (that would amount to suing yourself in the employment context), which explains the need to assert a direct rather than a vicarious liability claim against the employer. Cf. *Armenta v. A.S. Horner, Inc.*, 356 P.3d 17, 21–26 (N.M. Ct. App. 2015) (rejecting a workers’ compensation exclusivity defense, and allowing the estate of an employee responsible for a fatal single-vehicle accident in a company car driven after work while intoxicated to pursue a negligent entrustment claim against the employer).

116. See *Hays*, 384 S.W.3d at 336–37 (“[U]nder a pure comparative fault system (like Missouri’s), a plaintiff will not be barred from recovery, even if his own negligence greatly outweighed that of the defendant.”).

117. See *id.* at 333–36. The Missouri statute defining the liability of commercial establishments that supply alcohol had, among other things, barred adult patrons from asserting first-party claims, but the court did not understand this as expressing a broader public policy applicable beyond “dram shop” cases. See *id.* at 337. For a comparable outcome in a factually similar case, see *Casebolt v. Cowan*, 829 P.2d 352, 361–62 (Colo. 1992) (4–3 decision); *id.* at 363 (Rovira, J., dissenting) (“While the majority recognizes that voluntary intoxication is socially

One year later, in *Martell v. Driscoll*,¹¹⁸ the Kansas Supreme Court decided to allow first-party negligent entrustment claims notwithstanding that state's modified form of the comparative fault defense. The opinion left some ambiguity about the relationship between the parties, though it appears that the defendant had lent a car to his adult son.¹¹⁹ Leroy Driscoll allegedly knew that Travis suffered from a drinking problem, had a suspended license after multiple citations for DUI, and otherwise engaged in reckless driving.¹²⁰ While driving Leroy's car, Travis Driscoll failed to yield the right-of-way at an intersection and collided with another vehicle, suffering serious injuries.¹²¹

In reversing the trial court's dismissal of the first-party negligent entrustment claim, the majority in *Martell* relied even more heavily than had the Missouri court on the *Second Restatement's* evident endorsement of this theory.¹²² After reviewing the approaches used in other jurisdictions, the court also concluded that the comparative negligence defense in such cases would present a question of fact not amenable to resolution on a motion to dismiss.¹²³ Lastly, the court did not regard the recognition of such claims as inconsistent with public policy.¹²⁴

undesirable conduct, . . . it nevertheless rewards such conduct by permitting the person who drinks to excess to recover money from another for injuries sustained while intoxicated."); *id.* at 367–68 (explaining that the legislature had limited dram shop liability).

118. 302 P.3d 375 (Kan. 2013).

119. *See id.* at 378; *id.* at 387 (Johnson, J., dissenting). Alternatively (and assuming that the shared last name was not simply coincidental), the defendant may have been the victim's son, brother, or uncle. Kim "Travis" Driscoll later died, so his estate (represented by Jerry Martell) pressed the claim against Leroy Driscoll and related defendants; somewhat confusingly, the majority opted to use the decedent's last name whenever referring to the plaintiff while referring to this defendant only by his first name. *See id.* at 378 (majority opinion).

120. *See id.*

121. *See id.* Although turning into traffic plainly represented negligence while driving, the court made no mention of any allegation that Travis had consumed alcohol before his accident. *Cf. id.* at 382 ("Though Driscoll failed to specifically identify in his petition what caused him not to yield the right-of-way, it can be reasonably inferred from the facts in the petition that his failure to yield resulted from his alleged general incompetence as a driver."); *id.* at 389 (Johnson, J., dissenting) (explaining that a commercial vendor of alcohol would escape liability in this case even if it had served Travis past the point of intoxication).

122. *See id.* at 380–82 (majority opinion).

123. *See id.* at 382–86. Indeed, notwithstanding the modified comparative fault rules used in Kansas, which would allow a partial recovery for the plaintiff only if the victim shouldered less than half of the blame, the majority suggested that a reasonable jury could find the trustee less blameworthy than the negligent entrustor on the facts alleged in this case—namely, simply committing a traffic infraction compared with lending a car in spite of extensive knowledge of the driver's incompetence. *See id.* at 386. Perhaps the majority would have felt otherwise if Travis had failed to yield because of another instance of DUI.

124. *See id.* at 386–87.

Justice Lee Johnson dissented in *Martell*, accusing the majority of “being an enabler for persons who blame others for their own shortcomings.”¹²⁵ “The fact that an adult is known to have frequently exercised bad judgment in the past should not create a duty . . . to protect that careless person from himself or herself.”¹²⁶ The dissent also highlighted the entrustees’ ingratitude:

Leroy should not be held to be [Travis] Driscoll’s insurer just because Leroy tried to help Driscoll with the loan of a car. By expanding the law of negligent entrustment, the majority provides the mechanism to guarantee that no good deed shall go unpunished and that no imprudent act shall go unrewarded.¹²⁷

Rhetorical flourishes aside, Justice Johnson saw profound differences between third-party and first-party negligent entrustment claims, with the former victims lacking the culpability of the latter.¹²⁸ Finally, he drew attention to a striking inconsistency, noting that the Kansas legislature had rejected so-called “dram shop” liability, which meant that the establishment supplying alcohol to the victim in this case owed no tort duty, while the majority would visit liability on the more remote cause.¹²⁹

125. *Id.* at 387 (Johnson, J., dissenting). The dissent wondered whether a defendant in such a case would then have a right to seek indemnification from the successful plaintiff (or, worse yet, his liability insurer?) insofar as the victim’s negligence triggered the judgment against the defendant. *See id.* at 388; *cf. id.* at 389 (“Driscoll was the *only* person that could have completely avoided the risk of this accident, because if Leroy had not loaned Driscoll a vehicle, Driscoll might well have obtained one from another source and caused the accident anyway.”). The indemnification objection assumes incorrectly that the injury had a single tortious cause (in effect, that the defendant faces what amounts to vicarious liability); instead, negligent entrustment claims routinely involve a pair of tortious actions proximately causing a single injury (unless the incompetent trustee gets held to a lower standard of care), which in the third-party variant should result in some apportionment between the two wrongdoers, *see Ali v. Fisher*, 145 S.W.3d 557, 561–64 (Tenn. 2004) (citing decisions from Kansas and elsewhere), and in the first-party variant should mean a substantially reduced award to reflect the plaintiff’s comparative fault.

126. *Martell*, 302 P.3d at 387 (Johnson, J., dissenting) (“I believe that adults have to accept sole responsibility for their own poor choices or careless conduct.”).

127. *Id.*; *see also id.* at 388 (understanding the plaintiff as arguing that the defendant “should not have been kind enough to permit Driscoll to use the vehicle”).

128. *See id.* at 389 (“[A]s between the unknowing and innocent third party and the knowing entrustor of the chattel, it is acceptable to impose a duty on that entrustor to protect the public However, the superior knowledge and risk-avoidance rationales do not exist in the first-party scenario.”). He also went to some lengths in distinguishing the one older precedent that the majority had viewed as endorsing a first-party entrustment theory. *See id.* at 388–89.

129. *See id.* at 389 (“[T]he person who provided the *reason* for the accident is free from liability, while the person who simply provided the instrumentality of the accident is liable all around. That simply should not be, and the majority cannot avoid that silliness by blaming the legislature.”). The dissent had nonetheless defended the recognition of third-party negligent

As it happens, Kansas represented something of an outlier when it comes to the liability of those serving alcohol to underage or already inebriated guests. Although often limited to commercial establishments and imposed pursuant to statutes that create a right of action, many jurisdictions allow such lawsuits,¹³⁰ which share certain similarities with negligent entrustment claims. Typically, innocent third parties injured by an intoxicated driver pursue dram shop liability actions, but some courts also have allowed persons who got drunk and suffered an injury while driving to bring such claims.¹³¹ No doubt the victims in these latter sorts of cases need protection from their own poor choices, and imposing liability on those facilitating the behavior may serve to protect irresponsible drinkers from themselves, but it offers another illustration

entrustment claims, and first-party variants do not invariably involve voluntary intoxication. Other courts have rejected such claims, at least when brought by a voluntarily intoxicated adult trustee, as against public policy even if not barred on grounds of comparative negligence. See *Bailey v. State Farm Mut. Auto. Ins.*, 881 N.E.2d 996, 1003 & n.5 (Ind. Ct. App. 2008); *Anderson v. Miller*, 559 N.W.2d 29, 33–34 (Iowa 1997); *Lydia v. Horton*, 583 S.E.2d 750, 753–54 (S.C. 2003); see also Kayce H. McCall, Note, *Lydia v. Horton: You No Longer Have to Protect Me from Myself*, 55 S.C. L. REV. 681, 694 (2004) (applauding the court for holding “that it is against state public policy to allow a person to sue someone because the defendant did not protect the person from himself”).

130. See *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987) (counting 41 states that imposed dram shop liability as a matter of common law), *superseded by statute*, TEX. ALCOHOLIC BEV. CODE ANN. § 2.03 (West 2003), as recognized in *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 684–85 (Tex. 2007); see also Richard Smith, Note, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 557–74 (2000); cf. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993) (recognizing that only a couple of jurisdictions extend liability to social hosts).

131. See, e.g., *Farrington v. Houston’s, Inc.*, 750 F.2d 492, 493–94 (5th Cir. 1985); *Nunez v. Carrabba’s Italian Grill, Inc.*, 859 N.E.2d 801, 805 (Mass. 2007); *Smith v. Sewell*, 858 S.W.2d 350, 355–56 (Tex. 1993); *Estate of Kelley v. Moguls, Inc.*, 632 A.2d 360, 363 (Vt. 1993); *Bailey v. Black*, 394 S.E.2d 58, 61 (W. Va. 1990); see also Julia A. Harden, Comment, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 242–45 (1987) (arguing in favor of allowing such claims). *But see Bertelmann v. Taas Assocs.*, 735 P.2d 930, 933 (Haw. 1987) (“emphatically reject[ing] the contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol”); *Tobias v. Sports Club, Inc.*, 504 S.E.2d 318, 319–20 (S.C. 1998) (refusing to extend dram shop liability to intoxicated patrons of lawful age who injured only themselves); see also Smith, *supra* note 130, at 563–66 (explaining that legislative modifications have generally barred claims by or on behalf of adult patrons). Minors who injure themselves after getting drunk have a better chance of success in pursuing claims against suppliers. See, e.g., *Marcum v. Bowden*, 643 S.E.2d 85, 88–90 (S.C. 2007) (imposing a new duty on social hosts when they intentionally serve an underage guest, noting that commercial vendors already faced liability when an underage patron injured themselves or others); *Hansen v. Friend*, 824 P.2d 483, 485–87 (Wash. 1992).

of the judiciary's willingness to shunt at least partial responsibility for self-inflicted harms on to more remote parties with deeper pockets.¹³²

3. Landowner Duties to Protect Even Trespassers

The duties of landowners have evolved in comparable ways.¹³³ Although many jurisdictions insist on retaining the traditional distinctions based on the status of entrants on the land,¹³⁴ a majority now have dropped the line separating “invitees” and “licensees,”¹³⁵ and a handful of those would recognize comparable duties running to trespassers as well.¹³⁶ Some commentators have questioned extending a duty of ordinary care to persons not lawfully on a landowner's property.¹³⁷ Although the traditional rules may have led to unjust results

132. See *Smith v. 10th Inning, Inc.*, 551 N.E.2d 1296, 1298 (Ohio 1990); *Sewell*, 858 S.W.2d at 356–59 (Gonzalez, J., dissenting); *Kelly ex rel. Kelly v. Falin*, 896 P.2d 1245, 1249–50 (Wash. 1995); see also Sean A. O'Connor, Comment, *Last Call: The South Carolina Supreme Court Turns Out the Lights on First-Party Plaintiffs' Causes of Action Against Tavern Owners*, 50 S.C. L. REV. 1095, 1118–20 (1999); cf. Madeleine E. Kelly, *Liquor Liability and Blame-Shifting Defenses: Do They Mix?*, 69 MARQ. L. REV. 217, 223–34 (1986) (arguing that contributory negligence defenses should play a reduced role in such cases).

133. See generally GLEN WEISSEBERGER & BARBARA B. MCFARLAND, *THE LAW OF PREMISES LIABILITY* (4th ed. 2017); Robert S. Driscoll, Note, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881, 883–91 (2006); Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294 (1983 & Supp. 2017).

134. See, e.g., *Doe v. Jameson Inn, Inc.*, 56 So. 3d 549, 556 (Miss. 2011); *Carter v. Kinney*, 896 S.W.2d 926, 929–30 (Mo. 1995); see also RESTATEMENT (SECOND) OF TORTS §§ 330–341 (AM. LAW INST. 1965).

135. See, e.g., *Koenig v. Koenig*, 766 N.W.2d 635, 638–40, 643–46 (Iowa 2009); *Demag v. Better Power Equip., Inc.*, 102 A.3d 1101, 1106–10 (Vt. 2014).

136. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 566–68 (Cal. 1968); *Basso v. Miller*, 352 N.E.2d 868, 871–72 (N.Y. 1976); see also *Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74, 78 (Iowa 2002) (“[P]resently six states use a negligence standard to govern trespasser liability; twenty-nine states have declined the opportunity to change their rule in such cases; and two state legislatures have reinstated the common law trespasser rule after it had been abolished by court decision.”); *id.* at 79–80 (following the majority position that retains a lower standard of care for trespassers). The “attractive nuisance” rule has long existed to extend special protections to trespassing children under limited circumstances. See RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965); Evelyn Atkinson, *Creating the Reasonable Child: Risk, Responsibility, and the Attractive Nuisance Doctrine*, 42 L. & SOC. INQUIRY 1122 (2017); Driscoll, *supra* note 133, at 899–904; cf. *Lohrenz v. Lane*, 787 P.2d 1274, 1277–78 (Okla. 1990) (declining to extend the doctrine where a two-year-old nearly drowned in a pond while trespassing on a neighbor's farm land).

137. See Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1066–67 (2009) (arguing that the “cheapest-cost-avoider” rationale offers one justification for this distinction); William L. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 427–28 (1959) (“[W]hen an adult trespasses upon land which is not his own, . . . [h]e is a

in the case of victims deemed trespassers in a seemingly trivial sense,¹³⁸ the unitary duty imposed by more liberal jurisdictions also may result in dubious outcomes.¹³⁹

For example, in *Lee v. Chicago Transit Authority*,¹⁴⁰ the Illinois Supreme Court affirmed a sizeable plaintiffs' judgment in a wrongful death case even though the decedent had trespassed on the defendant's property. Sang Yeul Lee, a 46-year-old man, had entered a right-of-way owned by the Chicago Transit Authority (CTA), evidently in order to urinate after a night of heavy drinking, and he died upon making contact with the electrified third rail.¹⁴¹ The jury awarded his estate \$3 million in damages, which the judge cut in half under the state's pure comparative

wrongdoer, who has no great standing before the law, and no right to demand that he be provided with a safe place in which to trespass."); Driscoll, *supra* note 133, at 898 ("A landowner cannot have a duty to someone who has no right. To say otherwise would be to give wrongdoers a veto over the use of land by the owner and thus harm his right to own, possess, and use real property."); *id.* at 905 ("[T]he trespasser distinction was not only useful for feudal society . . . [It] helps maintain a healthy system of private property rights."). *But see* Graham Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation* [sic], 68 YALE L.J. 633, 648–49 (1959) (critiquing the endorsement of this distinction in the *First Restatement of Torts*); *id.* at 686–704 (elaborating); *id.* at 691 ("An increase in the number of verdicts favoring trespassing plaintiffs would necessitate only a very slight inflation of insurance premiums."); *id.* at 704 ("Where national insurance does not exist, private insurance must be incited to cover as wide a field as possible.").

138. *See, e.g.*, *Bennett v. Napolitano*, 746 A.2d 138, 141–42 (R.I. 2000) (affirming summary judgment against a plaintiff injured when a large tree branch fell while he walked his dogs in a city park long after it had closed for the night). The latest *Restatement* would constrict landowner duties only in the case of so-called "flagrant" trespassers. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 52 (AM. LAW INST. 2012); *see also* David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448, 1468–80, 1483–84 (2011) (elaborating on this novel formulation and the criticisms leveled against it); Ann Fievet, Comment, *Breaking the Law and Getting Paid for It: How the Third Restatement of Torts Synthesizes Two Distinct Standards of Care Owed to Trespassers*, 44 WAKE FOREST L. REV. 239, 246–48, 262 (2009) (defending this blended approach for accurately capturing the typical outcomes under the seemingly varied standards applied by different jurisdictions).

139. *See* *Ouellette v. Blanchard*, 364 A.2d 631, 637 (N.H. 1976) (Grimes, J., dissenting) ("A burglar who is injured while scaling a fence in a high-crime area where burglars are not unexpected would be able to put the owner to the risk of a jury decision on the question if he had used reasonable care toward the burglar."); Don G. Campbell, *Property Law May Add Insult to Injury*, L.A. TIMES, May 16, 1985, § 5, at 12 (reporting, among other cases, that a burglar who fell through a skylight settled his claim for nearly \$500,000). Such concerns prompted the California legislature to exclude certain criminal trespassers from the unitary standard. *See* *Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 71–73, 80–82 (Cal. 1998) (applying this statute to a claim asserted by someone seriously injured after trying to rob a convenience store, but concluding that the trial judge erred in granting summary judgment to the defendants), *abrogated by* *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 513 (Cal. 2001).

140. 605 N.E.2d 493 (Ill. 1992).

141. *See id.* at 497.

fault defense—the decedent had failed to notice several warning signs that the defendant had posted, which came as no surprise in light of the fact that his blood–alcohol content registered over 0.34 (a level known as “stupor”).¹⁴²

Although the rules of premises liability in Illinois continued to differentiate between adult trespassers and lawful entrants on land, and the case came within none of the exceptions previously recognized in the state, the court in *Lee* crafted an exception to protect adults foreseeably trespassing in a place of great danger.¹⁴³ It relied heavily on section 337 of the *Second Restatement* (“Artificial Conditions Highly Dangerous to Known Trespassers”), which covered instances where the possessor “has reason to know of their presence in dangerous proximity to the condition.”¹⁴⁴ As the first comment to this section made clear, however, the rule contemplated situations where the landowner should have realized that a particular trespasser faced imminent danger and needed to get alerted.¹⁴⁵ The court instead decided that CTA owed a duty to all trespassers because it could “reasonably anticipate” that at some point someone might make contact with the third rail—CTA actually knew of occasional trespassers and similar injuries, and it could anticipate more

142. *See id.* For an arguably more sympathetic wrongful death claim involving an electrocuted trespasser, see *Mark v. Pac. Gas & Elec. Co.*, 496 P.2d 1276, 1278–81 (Cal. 1972) (reversing a directed verdict against such a claim after a college student, frustrated by the utility company’s failure to repair a street lamp shining brightly just outside of his apartment bedroom window, attempted to unscrew the bulb himself as his roommates had done previously while unaware of the high voltage connection).

143. *See Lee*, 605 N.E.2d at 498–99. The court expressed support for the plaintiff’s argument that it should entirely eliminate the separate treatment of trespassers, but it deferred to the legislature’s judgment to retain this distinction. *See id.* at 499. The broad new exception that it recognized may have rendered the distinction largely meaningless. Conversely, even in jurisdictions that have adopted a unitary standard of care, genuinely unforeseeable trespassers will remain largely unprotected. *See, e.g., Winfrey v. GGP Ala Moana LLC*, 308 P.3d 891, 901–03 (Haw. 2013) (affirming summary judgment for defendants on a wrongful death claim—where a deranged young adult had accessed the rooftop of a shopping mall and crawled into an exhaust duct—except insofar as they allegedly failed to get sources of heat and smoke in the food court shut off promptly upon discovering her trapped in the ventilation system).

144. RESTATEMENT (SECOND) OF TORTS § 337(a) (AM. LAW INST. 1965).

145. *See id.* cmt. a (explaining that “a possessor of land is subject to liability to a trespasser whom he knows to be about to come in contact with a highly dangerous artificial condition”). The majority took comfort in the fact that the Arizona Supreme Court also had applied § 337 more broadly than suggested by this comment, *see Lee*, 605 N.E.2d at 500–01, but the decision in that case seemed better captured by an exception already recognized in Illinois for “frequent trespassers.” *See id.* at 498–99; *see also id.* at 511–12 (Moran, J., dissenting). In *Webster v. Culbertson*, 761 P.2d 1063 (Ariz. 1988), the landowner had erected a length of nearly invisible barbed wire across a pathway regularly used by trespassers, and the court held that she could face liability for failing to post any sort of a warning. *See id.* at 1064–65, 1067.

given the proximity of the site to a public sidewalk.¹⁴⁶ As one of the dissenting opinions pointed out, however, the prior incidents hardly gave the defendant reason to know that trespassers might encounter the third rail at this site.¹⁴⁷

Even if this broad exception makes some sense, its application to the record in this case hardly inspired confidence. First, the majority equivocated on the scope of this new-found duty: was it simply an obligation to warn or might it also require landowners to adopt still more cumbersome safeguards? Section 337 plainly only called for a warning, and the court framed its holding in those terms,¹⁴⁸ but in other places it suggested imposing a broader obligation to protect trespassers.¹⁴⁹ Although the majority held that a reasonable jury could find an inadequate warning on these facts,¹⁵⁰ which seems at least mildly far-fetched given the several different signs posted at the site ("Danger,"

146. See *Lee*, 605 N.E.2d at 500 ("[P]laintiff presented evidence at trial of 10 prior accidents which occurred between 1948 and 1975 on the 3.2-mile segment of track where the CTA's third rail ran at grade level."); *id.* at 501 ("[T]he third rail is located a mere 6½ feet from the public sidewalk, which is adjacent to a busy city street. The CTA knew that pedestrians used the sidewalk to cross the tracks, and . . . [it] was aware that such persons could possibly come into dangerous proximity with the third rail."); see also *id.* at 505–07 (rejecting objections to the admission of evidence concerning these prior incidents).

147. See *id.* at 512 (Moran, J., dissenting) ("Although a youth had fallen onto the third rail from a fence he was scaling at that location in 1974, there was no recorded incident of a pedestrian ever previously contacting the third rail after leaving the sidewalk at the Kedzie/Ravenswood crossing. I do not believe that the CTA's knowledge of accidents taking place more than 15 months earlier and at other locations along the line is enough . . ."); see also *id.* (explaining that more than a year before this accident the CTA had "installed pointed boards on the ground to alert trespassers to the fact that they were walking where they ought not to be").

148. See *id.* at 501 (majority opinion) ("[W]e hold that the CTA owed plaintiff's decedent a duty of ordinary care to properly warn of the third rail.").

149. See *id.* at 499 (explaining that the plaintiff urged it to recognize a landowner "duty of ordinary care to protect and/or warn the trespasser"); *id.* at 502 ("[T]he risk of serious injury or death to a pedestrian as a result of contact with a third rail located at grade level, in close proximity to a sidewalk, outweighs any burdens associated with more formidable safeguards or, at the least, adequate warning."). Indeed, the majority rejected the CTA's objections to the admissibility of a plaintiff's expert whose testimony had focused on steps other than warnings. See *id.* at 504–05 (discussing the use of overhead wires, gates, or cover boards). Moreover, in response to the CTA's objection that the trial judge should not have allowed the plaintiff to amend her complaint before closing argument to allege that the defendant had failed to adopt safeguards, the majority found no prejudice because the evidence offered by both parties encompassed more than the adequacy of the warnings and included a discussion of barriers. See *id.* at 508–09.

150. See *id.* at 501 ("There was nothing which indicated either the existence or the location of the third rail, or that the electric current was carried in a rail. There were no markings on the third rail itself."); *id.* at 502 ("Of the five warning signs posted at the crossing, not one warning indicated the presence of the third rail. Additionally, as we have previously stated, the third rail was not marked, nor was there any indication that the electric current, of which the posted signs warned, was carried in any of the grade-level rails.").

“Keep Out,” and “Electric Current”),¹⁵¹ its conclusion that this inadequacy represented the cause of Mr. Lee’s death absolutely boggles the mind.¹⁵² If, however, this newfangled duty to trespassers might require taking additional steps such as fencing or replacing the electrified rail with overhead wires, then the plaintiff would have little difficulty proving causation.¹⁵³ Thankfully, courts in other states that continue to impose minimal landowner duties running to adult trespassers have rejected absurd claims of this sort.¹⁵⁴

151. See *id.* at 512 (Heiple, J., dissenting); see also Lars Noah, *The Imperative to Warn: Disentangling the “Right to Know” from the “Need to Know” About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 347–50, 361–74 (1994) (discussing considerations relevant to judging the adequacy of warnings in products liability litigation and elsewhere).

152. Initially, the court suggested that Mr. Lee’s state of inebriation would not factor into the causation inquiry. See *Lee*, 605 N.E.2d at 502 (“The decedent’s intoxication was properly a consideration only with respect to his contributory negligence.”). Then it concluded that his condition would not defeat causation, offering nothing more by way of analysis than the following: “we cannot conclude that plaintiff’s decedent’s injuries would have occurred without the CTA’s failure to adequately warn of the electric current in the rail. Significantly, plaintiff’s decedent apparently had the presence of mind to seek the privacy and shelter of the surrounding buildings at the crossing before relieving himself.” *Id.* at 503. As one of the dissenters put it: “These signs were printed in English which the decedent could not read. With a 0.341 concentration of blood alcohol, however, it is questionable whether it would have mattered if the signs had been printed in Korean or even in pictures. The decedent was virtually blind drunk.” *Id.* at 512–13 (Heiple, J., dissenting); see also *id.* at 513 (“In addition to the signing, sharp triangular shaped boards had been installed between the sidewalk and the third rail to make it extremely difficult and awkward for a person to walk [more than six feet] up the tracks.”). Nonetheless, Justice Heiple seemed willing to give the plaintiff the benefit of the doubt on causation; instead, he questioned the jury’s decision to apportion 50% of the responsibility to the CTA (thinking that 10% made more sense) or assess \$3 million as compensatory damages (thinking that \$750,000 made more sense). See *id.* (suggesting that he might have affirmed an award of \$75,000).

153. This assumes, of course, that the plaintiff could establish a breach given the far greater costs of undertaking such measures. See *id.* at 512 (Moran, J., dissenting) (“[T]he majority does not weigh the cost to the CTA—and the public—of putting into place and maintaining other safeguards. The CTA contends that measures such as swinging gates and catenary [i.e., overhead] wires would impose a heavy financial burden, and that such measures have not proved effective in protecting the public.”); cf. *Adams v. Bullock*, 125 N.E. 93, 93–94 (N.Y. 1919) (reversing judgment for a plaintiff electrocuted by overhead trolley wires because this risk was too remote and it would have been impossible to bury the wires).

154. See, e.g., *Rotter v. Union Pac. R.R.*, 4 F. Supp. 2d 872, 874–75 (E.D. Mo. 1998) (granting summary judgment against a negligence claim asserted by an inebriated adult hit by a train in the defendant’s switching yard during the middle of the night); *Schofield v. Merrill*, 435 N.E.2d 339, 340–45 (Mass. 1982) (holding that the owner of an abandoned quarry owed no duty to an adult trespasser who suffered serious injury after he dove into a pit filled with water and submerged rocks); *Leffler v. Sharp*, 891 So. 2d 152, 155, 158–60 (Miss. 2004) (affirming summary judgment for defendants where drunk patron of a bar crawled through a small open window onto an adjacent rooftop that he fell through); *Tantimonico v. Allendale Mut. Ins.*, 637 A.2d 1056, 1061 (R.I. 1994) (affirming summary judgment against the claims of two adult motorcyclists who negligently collided while trespassing on the defendant’s undeveloped land:

4. Shareholder Derivative Lawsuits

One could also view shareholder derivative actions as countenancing a form of intrapersonal liability. Such litigation empowers some owners to bring a lawsuit on behalf of a company in order to challenge the wisdom of decisions made by those in control—namely, its directors and officers.¹⁵⁵ As one commentator explained: “While acknowledging a corporation was a separate legal entity that normally was the proper party to bring suit against its managers for mismanagement or fraud, courts recognized that corporate managers controlled the corporation’s decision to sue and were not likely to sue themselves.”¹⁵⁶ Although managers charged with misconduct would face personal liability, companies typically purchase “D&O” insurance for their directors and officers to cover most such judgments.¹⁵⁷ Any damages recovered in a derivative lawsuit would go to the corporation, which would benefit the successful plaintiff shareholders only indirectly. In effect, this mechanism allows a

“Property owners have a basic right to be free from liability to those who engage in self-destructive activity on their premises without permission.”); *see also* *Blakely v. Camp Ondessonk*, 38 F.3d 325, 327–29 (7th Cir. 1994) (applying Illinois law, though without citing *Lee*, and affirming summary judgment for the operator of a large camping area where an intoxicated 17-year-old trespasser suffered paralysis after falling down a cliff); *Kirschner v. Louisville Gas & Elec. Co.*, 743 S.W.2d 840, 844–45 (Ky. 1988) (affirming summary judgment for a defendant where a 15-year-old boy got electrocuted after he climbed 66 feet up one of the utility’s towers that carried high voltage lines).

155. *See* *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (adding that shareholders also might use this mechanism to bring claims on behalf of the corporation against third parties); *Barrett v. S. Conn. Gas Co.*, 374 A.2d 1051, 1055 (Conn. 1977) (same); *see also* FED. R. CIV. P. 23.1; John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 341–87 (2016) (discussing the historical origins of this corporate accountability mechanism and the difficulties involved in asserting such claims).

156. Ann M. Scarlett, *Shareholder Derivative Litigation’s Historical and Normative Foundations*, 61 BUFF. L. REV. 837, 907 (2013); *see also id.* at 841, 888–95 (elaborating). As the United States Supreme Court explained the procedure, “equity would hear and adjudge the corporation’s cause through its stockholder with the corporation as a defendant, albeit a rather nominal one.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949); *see also* *Nejmanowski v. Nejmanowski*, 841 F. Supp. 864, 865–66 (C.D. Ill. 1994) (“In a shareholder derivative suit, the corporation is always initially named as a defendant . . . The named plaintiff, however, is only the nominal plaintiff. The corporation is the real party in interest. . . . Thus, in most cases the corporation will be realigned as a plaintiff.”); *Pyott v. La. Mun. Police Emps. Ret. Sys.*, 74 A.3d 612, 617 (Del. 2013) (explaining that “the real plaintiff in a derivative suit is the corporation”).

157. *See* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 57 (1991); *id.* at 84 (“[F]inancial penalties are virtually never imposed on managers who are sued (settlements are paid by D&O insurance and firms do not adjust top management’s compensation in response to lawsuits).”). *See generally* TOM BAKER & SEAN J. GRIFFITH, *ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION* (2010).

corporation victimized by itself to secure a financial recovery from a liability insurance policy that it had secured.¹⁵⁸

To the extent that shareholder derivative claims offer a meaningful parallel to intrapersonal liability, however, compensation plays a diminished role relative to deterrence in this context.¹⁵⁹ Indeed, it becomes somewhat more difficult to map the model of such litigation on to a genuinely intrapersonal injury claim: can the lungs or other organ injured by the poor choices made by that individual's brain assert a claim on behalf of the integrated body against itself?¹⁶⁰ Perhaps the analogy improves if we imagine that the current managers of a corporation—whether or not prompted by a demand lodged by shareholders—decide to assert claims on behalf of the corporation against a group of former officers and directors for misconduct that occurred while the latter acted as its agents.

II. MY BAD: TENTATIVELY MAKING THE CASE FOR INTRAPERSONAL LIABILITY

As revealed by the recurring references to principles of comparative negligence, tort law already imposes a duty of self-care, but it does not yet make breaches of that duty independently actionable. In contrast to the previously discussed parental negligence lawsuits such as *Broadbent*,¹⁶¹ recognizing an intrapersonal tort claim could not possibly disrupt harmony, dissipate assets, provide the wrongdoer a windfall upon the victim's death, or interfere with a person's exercise of discretion. Although the prospect of such (“mea culpa”?) liability would hardly discourage and might even encourage self-harming behaviors, incentives for self-preservation should render the moral hazard concern presumably less worrisome than in the intrafamily liability context. Allowing individuals to sue themselves would, however, certainly magnify fears

158. See Dale A. Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 571 (discussing this “farcical triangle”).

159. See *Cohen*, 337 U.S. at 548 (“This remedy, born of stockholder helplessness, was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests.”); *Kramer v. W. Pac. Indus.*, 546 A.2d 348, 351 (Del. 1988); John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 302–08 (1981) (explaining that deterrence has come to predominate over compensatory aims).

160. Cf. *Hertz Corp. v. Friend*, 559 U.S. 77, 89–97 (2010) (adopting a “nerve center” test to situate a corporation's principal place of business when determining diversity of citizenship for jurisdictional purposes); *id.* at 95 (“The metaphor of a corporate ‘brain,’ while not precise, suggests a single location.”); Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 488–507 (2013) (elaborating on metaphorical references to the human body in the construction of corporate personhood).

161. See *supra* notes 27–61 and accompanying text.

about insurance fraud. Nonetheless, to the extent that compensatory goals predominate, the case for intrapersonal liability seems at least as strong as that for intrafamily liability or first-party negligent entrustment claims.

A. *It's About Time: Intertemporal Insights from Other Disciplines*

At times, people make colloquial references to their "younger selves,"¹⁶² and researchers have identified fundamental differences between the earliest period of adulthood and later stages of life.¹⁶³ Of particular relevance to the present discussion, young adults engage in hazardous behaviors more frequently than either adolescents or persons over the age of twenty-four,¹⁶⁴ which helps to explain the imposition of higher age restrictions for access to certain dangerous products (e.g., alcohol and tobacco).¹⁶⁵ Moreover, while we do not all necessarily reach the same profound milestones or respond to them in the same way, sooner or later most of us will encounter one or more fairly fundamental (positive

162. See, e.g., ELLYN SPRAGINS, *WHAT I KNOW NOW: LETTERS TO MY YOUNGER SELF* (2006) (collecting dozens of such essays penned by leading women); see also Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 *LEGAL THEORY* 23, 24 & n.5 (1997) (emphasizing "that 'self' is a different concept from 'person' and that the idea of multiple selves inhabiting the same person either simultaneously or successively (or both) is not inconsistent with the way we think and talk," citing a play by Edward Albee that featured three versions of the same adult at distinct ages). Similarly, consider the oft-heard lament that someone's spouse is not the same person whom they married. For a different cultural phenomenon that relates to this broader discussion, consider the rise of "self-gifting" in lieu of the older approach of getting a close family member something that you secretly want for yourself. See Michelle Boorstein, *To Thine Own Self: Gift, Too*, *WASH. POST*, Dec. 18, 2012, at C1.

163. See Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 644 (2016) (explaining that "the research does suggest that young adults, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults"); *id.* ("The research on age patterns of risk-taking, combined with the neuroscientific and psychological research on young adults, suggests that the period of young adulthood can be understood as a transitional stage between adolescence and mature adulthood."); *id.* at 645–53 (elaborating).

164. See *INST. OF MED. & NAT'L RESEARCH COUNCIL, INVESTING IN THE HEALTH AND WELL-BEING OF YOUNG ADULTS 203–13* (Richard J. Bonnie et al. eds., 2015) (explaining that a spike in morbidity and mortality occurs between the ages of eighteen and twenty-four from a variety of preventable causes, including traffic accidents, unsafe sexual behaviors, violence, and substance abuse). In some cases, however, the consequences of these risky behaviors may not become manifest until many years later.

165. During the 1980s, Congress successfully pressured every state to adopt 21-years-of-age as the minimum for consuming alcoholic beverages. See *South Dakota v. Dole*, 483 U.S. 203, 206–12 (1987) (holding that Congress enjoyed the power under the Spending Clause to impose conditions on federal highway funds in order to encourage states to raise the drinking age); Laura Hambleton, *Experts Debate Merit of Making Drinking Age 21*, *WASH. POST*, Dec. 7, 2010, at E5. Recently, several states and localities have imposed a similar threshold for accessing tobacco products. See Tripp Mickle & Alejandro Lazo, *California Lifts Age for Cigarettes*, *WALL ST. J.*, May 5, 2016, at B2.

or negative) emotional experiences.¹⁶⁶ According to research undertaken by psychologists, however, people routinely underestimate how much their personalities, values, and preferences will continue to change throughout their lifetimes.¹⁶⁷ Similarly, behavioral economists have documented “hyperbolic discounting,” which refers to the tendency to disregard longer-term consequences.¹⁶⁸ Lastly, philosophers have struggled with questions about the fundamental nature of personal identity over time.¹⁶⁹

Even in a fairly mundane physiological sense, we differ from one point in time to another. For instance, regular cell and tissue replacement means that our bodies change constantly even if imperceptibly,¹⁷⁰ though

166. See Avshalom Caspi & Brent W. Roberts, *Personality Development Across the Life Course: The Argument for Change and Continuity*, 12 PSYCHOL. INQUIRY 49, 51 (2001) (“[E]vidence indicates that personality does not stop developing in childhood, adolescence, or early adulthood. Rather, personality appears to grow increasingly consistent with age and to reach a plateau later in life than originally thought (e.g., age 50).”); Norma Haan et al., *As Time Goes By: Change and Stability in Personality over Fifty Years*, 1 PSYCHOL. & AGING 220, 230 (1986) (“If personality is fluid, innovative, and adaptive, then it logically follows that changes should occur when people confront definitive experiences of clear, unalterable consequence.”); see also Steve M.J. Janssen et al., *Why Does Life Appear to Speed up as People Get Older?*, 22 TIME & SOC’Y 274 (2013).

167. See Jordi Quoidbach et al., *The End of History Illusion*, 339 SCIENCE 96, 98 (2013); see also Mathew A. Harris et al., *Personality Stability from Age 14 to Age 77 Years*, 31 PSYCHOL. & AGING 862, 873 (2016) (“[P]ersonality changes only gradually throughout life, but by older age it may be quite different from personality in childhood.”).

168. See George Ainslie & John Monterosso, *Will as Intertemporal Bargaining: Implications for Rationality*, 151 U. PA. L. REV. 825, 830–33 (2003); Richard H. McAdams, *Present Bias and Criminal Law*, 2011 U. ILL. L. REV. 1607, 1608 (“[T]ime inconsistency typically pushes one to abandon long-term preferences in favor of immediate gratification.”); Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 CONN. L. REV. 1215, 1242–43, 1251–56 (2015); Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 612–14, 633–37 (2007); Stephanie Clifford, *Why Healthy Eaters Fall for Fries*, N.Y. TIMES, June 30, 2013, at SR5.

169. For an accessible summary, see *Identity over Time*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 6, 2016), <https://plato.stanford.edu/entries/identity-time/>. For an analysis of some of the legal implications of such insights, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 965–68, 976 (1992) (discussing “the contingent self”); *id.* at 966 (“In discussing the temporal dimension of the self, I distinguish between a *momentary* and a *total* self. This distinction designates two ways of comprehending the self: one resembling the snapshot, the other a motion picture . . . [or better yet] a single composite picture that incorporates all the momentary selves.”); *id.* at 972 (“Responsibility, understood as a stance taken by the self, implicates the distinction between the momentary and the total self.”); *id.* at 998–99 (using the temporal dimension to explain the defense of duress).

170. See Olaf Bergmann et al., *Evidence for Cardiomyocyte Renewal in Humans*, 324 SCIENCE 98, 101 (2009) (finding that approximately half of heart muscle cells get replaced over a normal life span); Nicholas Wade, *Your Body Is Younger than You Think*, N.Y. TIMES, Aug. 2, 2005, at F1 (“The entire human skeleton is thought to be replaced every 10 years or so in adults . . .”).

you can hardly miss the accumulated effects of aging over longer stretches of time.¹⁷¹ More dramatically, chronic disease, disability, and major mental illness may cause fairly dramatic transformations in an individual's physical and emotional constitution, whether or not these spring from a tortiously caused injury.¹⁷² Conversely, whether or not prompted by efforts to mitigate such conditions, people nowadays can choose from among a range of increasingly sophisticated enhancement technologies, including prosthetic devices, biopharmaceutical agents, and surgical interventions.¹⁷³ In short, to a greater or lesser extent, the passage of time changes everyone.

Given the inevitability of such changes, should courts recognize that present victims stand apart (literally and figuratively) from their earlier wrongdoing selves? Criminal law occasionally confronts an extreme version of such questions when defendants claim that they should escape responsibility for the unlawful actions of their former and different selves: in rare cases, a serious condition such as a brain tumor may have affected their decision-making;¹⁷⁴ in other situations, a profound mental illness such as dissociative identity disorder means that an alternate personality displaced the host.¹⁷⁵ Insofar as these sorts of discontinuities in identity may at least partially excuse criminal misconduct, might tort

171. Moreover, an inability to detect such changes might signal an even more profound loss of identity. See Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1601 (2006) ("Those with extreme memory disorders, like advanced Alzheimer's disease, may lack such memories and may lose a stable sense of self. While memory is not the sole constituent of personal identity, it creates much of the psychological continuity that makes us aware of our continuing existence over time." (footnote omitted)).

172. See Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 242–52, 264–87 (1999). Research on "hedonic adaption" cautions, however, against overstating the consequences of physical and emotional setbacks. See Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 466–67 & n.149 (2009); cf. Sean Hannon Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535, 537 (2011) (discussing "the transformative nature of this adaptive process . . . that leads to a 'changed person'").

173. See LARS NOAH, LAW, MEDICINE, AND MEDICAL TECHNOLOGY 1287–89, 1315, 1318–19 (4th ed. 2017); Lars Noah, *Growing Organs in the Lab: Tissue Engineers Confront Institutional "Immune" Responses*, 55 JURIMETRICS 297, 301–09 (2015); Lars Noah, *Turn the Beat Around?: Deactivating Implanted Cardiac-Assist Devices*, 39 WM. MITCHELL L. REV. 1229, 1273–74 n.182 (2013).

174. See Dan-Cohen, *supra* note 169, at 990–91 (discussing *Regina v. Charlson*, 1 W.L.R. 317 (1955)).

175. See *United States v. Denny-Shaffer*, 2 F.3d 999, 1016–18 (10th Cir. 1993). See generally Symposium, *Multiple Personality Disorder and Criminal Responsibility*, 10 S. CAL. INTERDISC. L.J. 179 (2001).

law allow the present injured self to seek compensation from the wrongdoing earlier self?¹⁷⁶

B. *Pragmatic Considerations and Insurance Countermeasures*

To the extent that intertemporal shifts enhance the case for allowing intrapersonal tort claims, this feature might present a variety of difficulties. If the victim has become someone fundamentally different with the passage of time, then so has the wrongdoer, posing questions about the equity of penalizing the named defendant for tortious behavior that may have occurred a long time ago. At a minimum, the standard of care will have to relate back to the time of the injurious conduct, assuming that statutes of limitation do not stand in the way: for harmful exposures that occurred before adulthood, courts may apply a somewhat more forgiving age-adjusted standard of care.¹⁷⁷ In addition, as explained below, comparative fault defenses will invariably limit if not altogether bar recoveries for intrapersonal torts. More seriously, liability insurers will respond as they have to the expanding availability of intrafamily torts by attempting to exclude any such coverage.

Changes that occur over extended periods of time arguably render the nominal defendant fundamentally different from the original tortfeasor, but in other contexts that has never really served as grounds for exculpation. For instance, in awarding punitive damages against a corporation for decisions made decades earlier, courts endeavor to gauge the reprehensibility of the tortious conduct against the standards that prevailed at the time in question, but they have rejected suggestions that the present instantiation of that continuing concern has changed so fundamentally that the company should escape this form of punishment.¹⁷⁸ Similarly, courts have adopted rules of “successor” liability, making corporations that acquire the assets of tortfeasors

176. Imagine, for example, a previously inoperable (or simply undetectable) brain tumor in an adult that caused self-injurious behavior—upon successful treatment of the tumor, does the individual have any basis for recourse against their cognitively impaired former self (assuming at least that the prior impairment did not rise to such a level that even an injured third party would have no recourse)?

177. See, e.g., *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 684–85 (Iowa 1993); *Goss v. Allen*, 360 A.2d 388, 390–91 (N.J. 1976) (holding that an age-adjusted standard would apply to a 17-year-old who collided with the plaintiff while skiing); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10(a) (AM. LAW INST. 2012); Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 638–39 (2016).

178. See *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 475–76 (N.J. 1986) (discussing these issues in an asbestos case that involved the passage of almost four decades between exposure and litigation).

financially responsible for those earlier misdeeds under an expanding set of circumstances.¹⁷⁹

Statutes of limitation could pose something of an obstacle.¹⁸⁰ Of course, a long-ago exposure that only triggers illness much later in life would remain actionable under the discovery rule used for latent diseases.¹⁸¹ Moreover, parties can waive this defense to the filing of tardy claims,¹⁸² and the nominal defendants in intrapersonal liability cases would have every reason to do so, though their liability insurers surely would not tolerate a failure to interpose an available limitations objection.

Another affirmative defense might pose a more serious barrier to these sorts of cases. By definition, the victim and culprit would have been equally culpable for causing the injury. Under the old contributory negligence rule or the modified versions of comparative negligence that bar recovery unless the victim shared less responsibility than the defendant(s),¹⁸³ intrapersonal liability claims would invariably founder, putting aside the possibility of waiver in the unlikely event that counsel provided by the liability insurer neglects to raise the defense. In a clear majority of jurisdictions, however, such claims would allow plaintiffs to recoup exactly half of their damages. Even so, proximate causation principles may cabin undue consideration of intertemporal changes, disregarding factors too far removed in time or space as "remote" causes.

Insurance coverage limitations probably would pose the most significant practical obstacle to the assertion of intrapersonal liability claims. Apart from automobile policies, younger adults often do not carry

179. See, e.g., *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49, 55–58 (Alaska 2001); *Huff v. Shopsmith, Inc.*, 786 So. 2d 383, 388 (Miss. 2001); see also Richard L. Cupp, Jr. & Christopher L. Frost, *Successor Liability for Defective Products: A Redesign Ongoing*, 72 BROOK. L. REV. 1173, 1195–99, 1207–09 (2007) (summarizing and applauding this development); cf. *Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170, 1173–75 (N.Y. 2006) (declining to follow the more expansive case law); *Tabor v. Metal Ware Corp.*, 168 P.3d 814, 817 (Utah 2007) (same). See generally John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371 (2011).

180. See generally RESTATEMENT (SECOND) OF TORTS § 899 (AM. LAW INST. 1979); Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 609–18 (2008).

181. See, e.g., *Griffin v. Garratt-Callahan Co.*, 74 F.3d 36, 38–39 (2d Cir. 1996) (applying New York's statute); *Griffin v. Unocal Corp.*, 990 So. 2d 291, 293 (Ala. 2008); *Poosh v. Philip Morris USA, Inc.*, 250 P.3d 181, 187 (Cal. 2011); see also Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 976–79 (1988) (discussing the widespread endorsement and adoption of this reform as well as some of the interpretive difficulties that it posed).

182. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (“[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.”).

183. See *supra* notes 78–81 and accompanying text.

liability insurance.¹⁸⁴ If they reside at the home of their parents at the relevant time (either while still minors or as dependent adults),¹⁸⁵ then homeowner insurance policies often come into play. Insurers have, however, responded to the growing judicial recognition of intrafamily claims by including coverage exclusions.¹⁸⁶ Although occasionally struck down as offending public policy,¹⁸⁷ most courts enforce such limitations.¹⁸⁸ If drafted to exclude coverage of claims brought against an insured by anyone in the household, then existing policies apparently would not pay for intrapersonal liability claims; and, to the extent that current policy exclusions suffer from any ambiguities, insurers will quickly learn to make their unwillingness to cover such losses unmistakable in the future.¹⁸⁹

C. Does Compensation Alone Justify Expanding Tort Liability?

Viewed in isolation, each of the doctrinal developments canvassed in Part I may seem more or less defensible. Although far from uniformly adopted or unscathed by occasional criticism, almost no one fundamentally objects to the demise of spousal and parental immunities (though prenatal injury claims against mothers may provoke greater objections), the decline of contributory negligence as a complete defense, the growing unwillingness to enforce waivers of liability, the allowance of negligent entrustment and dram shop liability (though perhaps less so with first-party versions of these claims), the decline of status-based

184. See Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 664, 670–71 (2006) (explaining why homeowners routinely carry personal liability insurance while typically younger renters do not).

185. See Tamar Lewin, *Millennials' No. 1 Roommates Are Their Parents*, N.Y. TIMES, May 25, 2016, at A3.

186. See Ashdown, *supra* note 57, at 254–55.

187. See, e.g., *Lewis ex rel. Lewis v. W. Am. Ins.*, 927 S.W.2d 829, 832–36 (Ky. 1996) (holding that a family member exclusion in an automobile liability policy offended public policy even though it applied only to coverage amounts that exceeded the statutory minimum); *cf. Reserve Ins. v. Pisciotta*, 640 P.2d 764, 769–70 (Cal. 1982) (narrowly construing the “family” exclusion in a policy as not encompassing a stepson).

188. See *Principal Cas. Ins. v. Blair*, 500 N.W.2d 67, 69 (Iowa 1993) (collecting cases); *Vierkant ex rel. Johnson v. AMCO Ins.*, 543 N.W.2d 117, 120–21 (Minn. Ct. App. 1996); *Allen v. Prudential Prop. & Cas. Ins.*, 839 P.2d 798, 804–07 (Utah 1992) (holding that a household exclusion in a homeowner’s liability policy relieved the insurer of any obligation to cover a negligence claim brought by a 2-year-old child against his mother after she spilled boiling water on him); *Rich v. Allstate Ins.*, 445 S.E.2d 249, 251–53 (W. Va. 1994); *Shannon v. Shannon*, 442 N.W.2d 25, 35 (Wis. 1989); see also *Purkey v. Am. Home Assurance Co.*, 173 S.W.3d 703, 706–09 (Tenn. 2005) (holding that a family exclusion in an automobile liability policy did not offend public policy).

189. In the absence of insurance coverage, a young adult might try this maneuver in order to get early access to a trust fund.

distinctions in defining landowner duties to entrants (apart from arguable obligations running even to trespassers), or the use of shareholder derivative actions. Viewed in the aggregate, however, the nature of each of these seemingly justifiable doctrinal choices suggests a broader and perhaps more controversial expansionist tendency in American tort law. The prospect of intrapersonal liability, premised on plausible extensions of these various developments, serves to illustrate the nature of that phenomenon more starkly.

At first blush, intrapersonal liability sounds like a ridiculous idea. Creative personal injury lawyers have, however, regularly managed to press what seem like equally counterintuitive claims,¹⁹⁰ though some commentators discern incrementalism as opposed to genuine novelty in this field.¹⁹¹ Civil recourse and corrective justice theorists undoubtedly would scoff at the suggestion,¹⁹² even though the latter group may aspire

190. See, e.g., Lars Noah, *Adding Insult to Injury: Paying for Harms Caused by a Competitor's Copycat Product*, 45 TORT TRIAL & INS. PRAC. L.J. 673, 684–95 (2010) (criticizing the use of negligent misrepresentation claims against brand-name product manufacturers when consumers suffer injuries from generic versions sold by companies that do not offer as desirable a litigation target, and contrasting it with the slightly less radical market-share liability theory); Noah, *supra* note 82, at 370–78, 403–04 (discussing loss-of-a-chance recoveries in medical malpractice cases); Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 364–79 (2002) (tracing expansions in duties of disclosure owed by physicians to their patients); Lars Noah, *Platitudes About "Product Stewardship" in Torts: Continuing Drug Research and Education*, 15 MICH. TELECOMM. & TECH. L. REV. 359, 365–66 & n.28 (2009) (noting the advent of recoveries for "medical monitoring" expenses); see also *id.* at 366–80 (questioning "product stewardship" and "informed choice" proposals for pharmaceutical cases); *cf. id.* at 385–91 (advocating instead an extension of negligent marketing claims).

191. See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1540–41, 1544 (1997) (counting only four brand-new torts that succeeded in the 20th century); see also Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 414–15 (1999) (recognizing some objections to the excessively narrow focus of her earlier essay); Robert F. Blomquist, "New Torts": *A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23, 82 & n.434, 128–29 (1990) (offering a broader list, and commenting on the different meanings of this concept); Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75, 93–98 (2015) (same); *id.* at 97 ("In all, this analysis considers the diffusion of more than thirty innovations in tort law—far from a complete recitation of the broad changes that have occurred in this field, but a respectable sample nevertheless.").

192. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 & n.7, 945–46, 972–73 (2010) (emphasizing the relational aspects of tort law, and drawing contrasts with the loss-allocation theories that have come to predominate); *id.* at 929 ("[A]n obsession with accidents prompted mid-twentieth-century jurists to emphasize tort law's potential as a source of compensation while deemphasizing its foundation in a notion of wrongs."); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 351 (2002) ("Corrective justice links two parties and no more because a relationship of correlativity is necessarily bipolar."); see also Robert M. Ackerman, *Tort Law and Communitarianism: Where*

to figuratively go back in time in order to undo a harm,¹⁹³ and those scholars preoccupied with deterrence goals would see absolutely no value in recognizing intrapersonal liability.¹⁹⁴ In contrast, the more numerous courts and commentators who rush to applaud the predominantly compensatory function of tort law¹⁹⁵ presumably would at least grudgingly—if not wholeheartedly—endorse the idea. Perhaps this exercise will throw some much needed cold water on enthusiastic members of that latter camp.

CONCLUSION

More than two decades of regularly teaching *Torts* has left me profoundly cynical about the entire enterprise. Consider this long-ago lament from one prominent scholar: “When I was in law school twenty years ago, we used to joke that the purpose of the first year torts class was to teach us why the widows and orphans could not always win. That lesson may be less frequent today.”¹⁹⁶ To my mind, things have only gotten worse in the intervening quarter of a century. The drive to find a handy pot of money for victims has marginalized the need to identify

Rights Meet Responsibilities, 30 WAKE FOREST L. REV. 649, 673–74 (1995) (objecting to the “protect me from myself” cases).

193. See Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 117 (2011) (part of a symposium on this broader subject); see also *id.* at 118–28 (arguing that, properly understood, corrective justice aims to allow adversaries to “get even” rather than to undo the damage that one has done to another).

194. See generally Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181 (2012).

195. See Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999) (“We argue compensation is not only a plausible goal of the tort system, it is a desirable—and indeed an essential—goal.”); *id.* at 145 (“To the extent scholars attempt to create mixed theories of tort law, they should focus not only on deterrence and corrective justice but on compensation in more than just its instrumental role in helping to implement the other two.”); *id.* at 152–54 (elaborating); cf. Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2162 (2000) (explaining that, under “a form of strict products liability that takes questions about defectiveness out of the equation . . . , enterprises would know that they must pay for any product-related injuries to consumers, no matter . . . the social disutilities of the price increases that would have to accompany such a regime of compulsory insurance”); Lars Noah, *This Is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839, 851–52 & n.47, 907–09 & n.302 (2009) (criticizing commentators who advocate on purely compensatory grounds a duty to warn about or design against even “unknowable” risks). The case law highlighted in Part I of this Article invariably emphasized the compensatory purposes of tort law.

196. E. Donald Elliott, *Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?*, 43 RUTGERS L. REV. 1069, 1075 n.19 (1991); see also Noah, *supra* note 79, at 1656 n.210 (“I have never fully understood this apparently widespread assumption that outcomes favoring defendants are somehow inherently more suspect.”). See generally Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 OKLA. L. REV. 359 (2018).

genuine culprits. Indeed, I find it mildly alarming that one can craft a remotely plausible case for recognition of intrapersonal liability. Welcome to my waking nightmare.

