

Nora Freeman Engstrom\* and Robert L. Rabin

# Felons, Outlaws, and Tort’s Troubling Treatment of the “Wrongdoer” Plaintiff

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**Abstract:** Two tort law tenets are broadly accepted. First, litigants are to be judged based on their conduct, not on their character. In tort law, if not in heaven, the sinner is entitled to the same treatment as the saint. Second, it’s also broadly understood that, as comparative negligence supplanted contributory fault in the latter years of the last century, compensation stopped being binary; recovery became proportional. When, as is very often the case, the plaintiff and the defendant both err, the plaintiff’s entitlement to compensation is a matter of more or less, not yes or no. Against that backdrop, this Essay identifies four doctrines—the wrongful conduct rule, the “innocence” prerequisite to legal malpractice actions, the non-innocent party doctrine, and the complicity defense—that implicitly challenge both of these bedrock principles. We show how these “wrongdoer doctrines” extinguish claims, not just because of what the plaintiff has done but, rather, who the plaintiff is. And we also explore the doctrines’ other infirmities. Namely, these doctrines subvert the basic goals of tort law, authorize character assassination, defy consistent or principled application, rest on a false premise, and operate to resurrect a stealth version of contributory fault. Finally, this Essay, written for a symposium celebrating the great tort cases of the 21st century, highlights a recent opinion out of West Virginia that unmasked one such doctrine and appropriately relegated it to the dustbin of history.

**Keywords:** complicity defense; legal malpractice; non-innocent party doctrine; opioid litigation; wrongdoer rule; wrongful conduct rule

## 1 Introduction

It is tort law 101 that individuals are to be judged for what they do, not who they are. As one scholar has put it: “The law—and tort law especially—does not distribute

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\*Corresponding author: **Nora Freeman Engstrom**, Stanford Law School, Stanford, CA, USA,

E-mail: [nora.engstrom@law.stanford.edu](mailto:nora.engstrom@law.stanford.edu)

**Robert L. Rabin**, Stanford Law School, Stanford, CA, USA

compensation based on who is a good person and who is not.”<sup>1</sup> Furthermore, it is *also* tort law 101 that, pursuant to principles of comparative responsibility (the doctrine that, some fifty years ago, swept through the tort law landscape to replace contributory negligence in all but four states), a plaintiff’s fault limits, but does not eliminate, her recovery.<sup>2</sup>

Yet, four tort doctrines fly in the face of both of those bedrock principles. Even now, more than half-a-century after the fall of contributory fault, these doctrines, which we collectively dub the “wrongdoer doctrines,” continue *completely* to bar certain plaintiffs from recovery. Even more surprising, these doctrines extinguish a plaintiff’s entitlement to relief for reasons related to who the plaintiff *is*—because the plaintiff is a “felon,” an “outlaw,” a “convict,” “complicit,” or “non-innocent.”<sup>3</sup>

This Essay, which seeks to spotlight, interrogate, and ultimately encourage the rejection of these antiquated and dissonant doctrines, proceeds in five parts. Part 2 looks back to trace and contextualize tort law’s long preoccupation with the plaintiff’s fault. Then, Part 3 canvasses the four wrongdoer doctrines and shows that these doctrines—the wrongful conduct rule, the “innocence” prerequisite to legal malpractice actions, the non-innocent-party doctrine, and the complicity defense—continue, in a roving and piecemeal fashion, to single out and entirely preclude certain “undeserving” plaintiffs from relief.

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1 Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 132 (1995). Numerous others articulate similar sentiments. *E.g.*, Restatement Third, Torts: Miscellaneous Provisions § 4B, Comment *b* (AM. L. INST., Tentative Draft No. 1 (2022)) (“[T]ort law does not consider the character... of a party. ...”); Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1018 (2002) (“[W]e usually do not... inquire into the moral fiber of the plaintiff.”); Ernest J. Weinrib, *Illegality as a Tort Defence*, 26 U. TORONTO L.J. 28, 37 (1976) (“[T]he law of torts focuses on specific acts rather than on a comparison of the general moral character of the litigants. The overall blameworthiness or praiseworthiness of each litigant is considered to be irrelevant. ...”). In this respect, tort law differs from criminal law, where, at least when it comes to punishment, a criminal defendant’s character can be legitimately considered. *See* Restatement Third, Torts: Miscellaneous Provisions § 4B, *supra*, Reporters’ Note to Comment *b*.

2 Contributory negligence persists in four states (Alabama, Maryland, North Carolina, and Virginia) plus the District of Columbia. *See* Restatement Third, Torts: Apportionment of Liability § 7, Reporters’ Note to Comment *a* (AM. L. INST. 2000). Most agree that “[t]he substitution of proportionality principles for the earlier all-or-nothing rule of contributory negligence ranks as the most important development of the field of tort law in the last hundred years.” Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 78–79 (2008). For more on that switch, see Part 2, *infra*.

3 As the Dobbs treatise astutely observes: “Sometimes the immoral plaintiff principle seems to trump all other rules.” DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 228 (2022 update).

Offering a normative perspective, Part 4 analyzes the problems with these wrongdoer doctrines. This Part argues that these doctrines, which categorically preclude *certain* plaintiffs from compensation, are inconsistent with, and ultimately subvert, states' move to comparative responsibility. And, beyond that, the doctrines are objectionable because they encourage character vilification, frustrate the policy goals of tort law, breed inconsistency and arbitrary decisionmaking, and finally, rest on a flawed premise: the fallacious and circular notion that the “wrongdoer” ought not be permitted to profit from his own wrong.

Finally, Part 5 highlights and celebrates one recent opinion from the West Virginia Supreme Court, *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo County*. *Tug Valley* merits recognition because that litigation—initiated in 2010 by roughly 30 opioid-dependent individuals against a “veritable rogue’s gallery of pill-pushing doctors and pharmacies”—appropriately relegated one such doctrine to the dustbin of history.<sup>4</sup>

In *Tug Valley*, the plaintiffs had checkered pasts and had concededly resorted to criminal activity to feed their addictions. Seizing on that fact, defendants sought summary judgment, citing the wrongful conduct rule and observing: “I just can’t imagine that these plaintiffs are people that should be allowed to proceed with their claims.”<sup>5</sup> But, plaintiffs’ counsel—a solo practitioner from Charleston, West Virginia, who single-handedly waged a 10-year battle against some of the most notorious pill mills in the United States—resisted. “Plaintiffs,” he maintained, “come to you warts and all, but they are entitled to have their day in court.”<sup>6</sup> Ultimately, plaintiffs prevailed. In its 2015 opinion, a divided West Virginia Supreme Court rejected inquiry into “[t]he moral characteristics of the parties before a court,”<sup>7</sup> declaring that “[t]he archaic notion that the judicial system is unavailable to so-called ‘outlaws’ has long-ago been supplanted by the concept of comparative fault, which plainly permits those with ‘polluted hands’ to access justice.”<sup>8</sup>

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4 773 S.E.2d 627 (W. Va. 2015). For “rogue’s gallery,” see Respondents’ Brief at 6, *Tug Valley Pharmacy*, 773 S.E.2d 627 (No. 14–0144), 2014 WL 7740202, at \*5 [hereinafter Respondents’ Br.]. Rather than one lawsuit, this litigation was a consolidation of eight actions initiated between 2010 and 2012. In the footnotes that follow, unless otherwise noted, all court documents come from the *Tug Valley* litigation.

5 Hearing on Defendants’ Motion for Summary Judgment, May 13, 2023, at 42 (argument of Michael M. Fisher, counsel for Tug Valley Pharmacy, Family Pharmacy, and Randy Ballengee) [hereinafter Hearing Tr.].

6 *Id.* at 42 (argument of James Cagle, counsel for the plaintiffs).

7 773 S.E.2d at 633 (quoting Prentice, *supra* note 1, at 122).

8 *Id.*

## 2 The Outlaw in Context: Tort Law’s Treatment of the “Blameworthy” Plaintiff

Any discussion of the wrongful conduct rule, the “innocence” bar to legal malpractice actions, the non-innocent party doctrine, and the complicity defense must begin by looking back to tort law’s early preoccupation with the plaintiff’s conduct—and, in particular, the early doctrine (contributory negligence) that, for some 150 years, with few exceptions, barred even minimally at-fault plaintiffs from relief.<sup>9</sup>

Contributory negligence dates back to the 1809 decision of *Butterfield v. Forrester*.<sup>10</sup> There, while making repairs to his house, defendant obstructed the highway by putting a pole across a part of the road.<sup>11</sup> Having just left an ale house and “riding very hard” while heading for home on horseback, plaintiff, oblivious to the obstruction, collided with the pole and sustained injury. Unsympathetic to his plight, Lord Ellenborough remonstrated:

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another’s using ordinary care for himself.<sup>12</sup>

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<sup>9</sup> As the text indicates, in time, courts carved exceptions into the harsh all-or-nothing rule. First, if the defendant’s injury-inducing conduct was taken to be more egregious than simple lack of due care—e.g., reckless in bringing about the plaintiff’s harm—then, the victim’s failure to exercise due care was excused. See Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 209 n.38 (1990) (collecting citations). Second, and of greater salience, was the near universal adherence—again dating back to the formative era of negligence doctrine—to last clear chance, enunciated in the leading English authority of *Davies v. Mann*, 152 Eng. Rep. 588 (Exchequer of Pleas 1842). There, plaintiff Davies had negligently fettered his donkey in the public highway. But when defendant Mann’s wagon, horse-driven at “a smartish pace,” failed to capitalize on the opportunity to avoid injury, the plaintiff’s contributory failings were overlooked. *Id.*

Two points are worth noting about these early exceptions. The first is the all-or-nothing approach of the common law. Thus, in recognizing the two categorical scenarios just mentioned, in which plaintiff’s wrong is excused, the pendulum swung from one extreme to the other; doing rough justice, plaintiff’s fault was either a total bar to recovery or entirely overlooked. Second, and just as interesting, is that solicitude for the injured plaintiff plays no role in fashioning the exceptions. Instead, it is the quality of the defendant’s misconduct—its excessiveness—that delineates the common law assessment of responsibility; negligence law as the acting out of a morality play.

<sup>10</sup> 103 Eng. Rep. 926 (KB 1809).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 927. An earlier version of this blameworthiness bar emerged in the English courts of equity, expressed in the maxim that “one who comes into equity must have clean hands.” For comprehensive discussion, see generally T. Leigh Anenson, *Announcing the “Clean Hands” Doctrine*, 51 U.C. DAVIS L. REV. 1827 (2018).

Writing in 1850, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court further articulated the doctrine in the famous case of *Brown v. Kendall*:

[I]f both plaintiff and defendant at the time of the [injury] were using ordinary care, or if at that time the defendant was using ordinary care *and the plaintiff was not*, or if at that time, *both the plaintiff and defendant* were not using ordinary care, then the plaintiff could not recover.<sup>13</sup>

And, by 1854, the Pennsylvania Supreme Court doubled down, declaring that contributory negligence had been the “rule of law from time immemorial, and is not likely to be changed in all time to come.”<sup>14</sup>

Contributory negligence gained (and maintained) such traction because it aligned with—and reinforced—several then-prevailing principles. These included a preference for binary yes-no answers to legal questions (partly fueled by the common law’s crabbed notion of proximate cause) and relatedly, a sense that juries were not equipped to slice and dice—i.e., that juries were not up to the task of assessing and allocating the damages attributable damage attributable to various parties.<sup>15</sup> Beyond that, the harsh doctrine’s widespread acceptance was fueled by a desire to encourage all citizens to comply with the community’s standard of care, plus the powerful (and, as we will see, persistent) notion “that courts should not assist a wrongdoer who suffered an injury as a result of his own wrongdoing.”<sup>16</sup> Finally (and perhaps most tellingly), the doctrine’s boosters insisted it was valuable because it protected defendants from “the plaintiff-minded jury.”<sup>17</sup> In so doing,

<sup>13</sup> 60 Mass. 292, 296 (1850) (emphasis added).

<sup>14</sup> Penn. R. Co. v. Aspell, 23 Pa. 147, 149 (1854). The negligence of the decedent was also imputed to plaintiffs in wrongful death litigation, barring recovery. And a corollary doctrine of avoidable consequences substantially reduced the defendants’ liability when the plaintiff failed to take reasonable steps to mitigate the extent of his loss.

<sup>15</sup> Harrison v. Montgomery Cnty. Bd. of Educ., 456 A.2d 894, 898 (Md. 1983) (observing that contributory negligence was “compatible with several unwritten policies of the common law at the time” including “a passion for a simple issue that could be categorically answered yes or no” as well as the era’s “theories of proximate causation”); accord W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 452–53 (5th ed. 1984) (reporting that courts’ early embrace of contributory negligence can be explained, in part, because the doctrine was consistent with “the tendency of the courts of the day to look for some single, principal, dominant ‘proximate’ cause of every injury” and also because courts, at the time, could not “conceive of a satisfactory method by which the damages for a single, indivisible injury could be apportioned between the parties”).

<sup>16</sup> Harrison, 456 A.2d at 898; cf. KEETON ET AL., *supra* note 15, § 65, at 452 (“It has been said that [contributory negligence] has a penal basis, and that the plaintiff is denied recovery to punish him for his own misconduct.”).

<sup>17</sup> KEETON ET AL., *supra* note 15, § 65, at 452 (reporting that tort law’s early acceptance of contributory negligence was fueled by courts’ “distrust of the plaintiff-minded jury” and their “desire to keep the liabilities of growing industry within some bounds”); cf. Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 169 (1946) (declaring contributory negligence to be “an

contributory fault neatly satisfied judges' desire to cabin liability that could, if left unchecked, stunt the growth of a fledgling industrial economy.<sup>18</sup>

Yet, in the early years of the last century, criticism of contributory negligence started to mount—and, as the years passed, the criticism grew sharper.<sup>19</sup> In 1944, Leon Green dubbed contributory negligence “the harshest doctrine known to the common law.”<sup>20</sup> By 1953, the U.S. Supreme Court dismissed it as “a discredited doctrine,”<sup>21</sup> and, the following year, Roscoe Pound declared it to be “fundamentally and radically unjust.”<sup>22</sup>

Shortly thereafter, the criticism bore fruit.<sup>23</sup> The switch from contributory negligence to comparative fault started as a trickle.<sup>24</sup> But then, in 1969, “the dam collapsed.”<sup>25</sup> During the roughly fifteen-year period starting in 1969, 37 states replaced contributory negligence with comparative responsibility,<sup>26</sup> such that, by 1984, all but six states had made the switch.<sup>27</sup> A consensus emerged that fault ought to be assessed proportionately, and, in most cases, even at-fault plaintiffs were entitled to some relief.<sup>28</sup>

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ingenious device which gave the court almost complete freedom to accept or reject jury participation at its pleasure”).

18 *Harrison*, 456 A.2d at 897 (“Many reasons have been advanced for the doctrine’s rapid acceptance in this country. One of the strongest was a... desire to limit the liability of newly developing industry.”).

19 *E.g.*, Charles L. B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934) (stating that “[l]ittle remains to be written about contributory negligence save its obituary”); Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164, 178 (1925) (remarking that “[i]t is difficult to imagine a more anti-social doctrine”).

20 Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 36 (1944).

21 *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Prior to that, in *The Max Morris v. Curry*, 137 U.S. 1 (1890), the Supreme Court abolished contributory negligence in maritime personal injury cases, and, in 1908, Congress passed the Federal Employees’ Liability Act (FEA), which also incorporated the doctrine of comparative, rather than contributory, negligence. *See* 45 U.S.C. § 53.

22 Roscoe Pound, *Comparative Negligence*, 13 NACCA L.J. 195, 197 (1954).

23 The reform got a serious boost by forces supporting and opposing auto no-fault. For discussion, see Nora Freeman Engstrom, *When Cars Crash: The Automobile’s Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 320–24 (2018).

24 KEETON ET AL., *supra* note 15, § 67, at 471 (explaining that “by the mid 1960s only seven states had replaced contributory negligence with comparative fault”).

25 Henry Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 WASHBURN L.J. 1, 3 (1975).

26 Nora Freeman Engstrom, *An Alternative Explanation for No-Fault’s “Demise,”* 61 DEPAUL L. REV. 303, 361 (2012).

27 Mutter, *supra* note 9, at 228.

28 DOBBS ET AL., *supra* note 3, § 218 (explaining that, in states that have made the switch “damages are reduced in proportion to the plaintiff’s fault or responsibility”).

### 3 The “Wrongdoer Doctrines”

The above traces the rise and fall of contributory negligence, and it explains how, for going on half a century, courts have accepted the notion that fault ought to be viewed proportionately, rather than categorically, and plaintiffs need not be without fault in order to be entitled to some recovery.

Against that benchmark, this Part zeroes in on four tort doctrines—the wrongful conduct rule, the “innocence” prerequisite to legal malpractice actions, the non-innocent party doctrine, and the complicity defense—that nonetheless *continue* to operate in a categorical manner, precluding certain plaintiffs from all recovery. Further, certain of these “wrongdoer doctrines” preclude a plaintiff from recovery for reasons related to who the plaintiff *is* (e.g., a criminal, outlaw, or drinker), rather than what the plaintiff *did*.

Now, it merits mention: The four doctrines we highlight below are not the *only* contemporary rules that are inflected with harsh morality-based judgments. A grab-bag of others are somewhat similar. These include tort’s treatment of trespassers (traditionally, precluded from relief unless subject to willful or wanton misconduct),<sup>29</sup> the inelegantly named “suicide rule” (which establishes a per se rule that, if an injured plaintiff ends his or her life, the suicide is deemed a superseding cause, breaking the causal chain),<sup>30</sup> some states’ restrictions on undocumented persons’

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<sup>29</sup> Under the traditional status-based categories, a land occupier’s obligation was merely to refrain from subjecting trespassers to willful and wanton harm. In 1968, however, the landmark case of *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), swept away these rigid categories and held instead that, regardless of who the entrant is or why she enters the property, a land occupier is duty-bound to exercise reasonable care. “[T]o focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care,” said the court, “is contrary to our modern social mores and humanitarian values.” *Id.* at 568.

But this humanitarian impulse was greeted with less than enthusiasm, even among those courts sympathetic to merging the categories of invitees and licensees. See *Heins v. Webster Cnty.*, 552 N.W. 2d 51, 54 (Neb. 1996) (cataloging the numerous states that followed *Rowland* in eliminating the distinction between licensees and invitees while breaking with *Rowland* in its treatment of trespassers). And in due course, the Third Restatement of Torts carved out a special category, “flagrant trespassers.” The presence of flagrant trespassers, the Third Restatement explained, is “so antithetical to the rights of the land possessor” that the latter owes only the traditional obligation to refrain from willful or wanton physical harm. Restatement Third, Torts: Liability for Physical and Emotional Harm § 52, Comment *a* (AM. L. INST. 2012).

<sup>30</sup> See *Cotten v. Wilson*, 576 S.W.3d 626, 639–40 (Tenn. 2019) (explaining that, pursuant to the broadly accepted “suicide rule,” “suicide will be deemed a superseding cause of death if it was a willful, calculated, and deliberate act of one who has the power of choice”) (quotation marks and citations omitted). For discussion and critique, see generally Alex B. Long, *Abolishing the Suicide Rule*, 113 Nw. U. L. REV. 767 (2019); Allen C. Schlinsog, Jr., *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased?*, 24 J. MARSHALL L. REV. 463 (1991).

permissible damages,<sup>31</sup> certain courts' (limited) tort law acceptance of the old equitable rule of "unclean hands,"<sup>32</sup> and the secondary implied assumption of risk defense (still, in a small minority of states, a complete bar to recovery).<sup>33</sup> And, it is also true that, even under a comparative responsibility system, sometimes, parties gain mileage by levying personal attacks on one another's character.<sup>34</sup> Yet, we

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**31** *E.g.*, ARIZ. CONST. art. II, § 35 ("A person who is present in this state in violation of federal immigration law related to improper entry by an alien shall not be awarded punitive damages in any action in any court in this state."); *Garcia-Lopez v. Bellsouth Telecomms., Inc.*, 2010 WL 1873042, at \*7 (S.D. Miss. 2010) ("The Court finds that the plaintiffs' lost wages and loss of earning capacity claims are barred... because any work performed by the plaintiffs in the United States would be illegal.")

**32** See generally T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 Ky. L.J. 63 (2011). For an example, see *Pond v. Ins. Co. of N. Am.*, 151 Cal. App. 3d 280, 291 (Ct. App. 1984) (applying the doctrine in a malpractice claim).

**33** See DOBBS ET AL., *supra* note 3, § 254 & n.2 (cataloging authority). That said, certain of these *other* doctrines are also, in our view, more defensible—and thus, not necessarily on all fours with the "wrongdoer doctrines" we highlight below. Consider the trespasser rule, discussed above at note 29. This rule, we believe, is different because trespassers are entitled to somewhat less protection not because of who they are, but rather, because the obligation to keep one's home reasonably safe for (say) a burglar's late-night arrival is itself unreasonable—as it imposes a disproportionate burden on homeowners. As the Prosser treatise explains: "[I]n a civilization based on private ownership, it is considered a socially desirable policy to allow a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right." KEETON ET AL., *supra* note 15, § 58, at 395. See also Restatement Third, Torts: Liability for Physical and Emotional Harm § 52, Comment *a* (AM. L. INST. 2012) ("[C]ulpable conduct—even extremely culpable conduct by an entrant—that does not infringe on the possessor's right is not relevant to whether a trespass is flagrant."); *id.*, Comment *h* (explaining that flagrant trespassers are entitled to somewhat less protection than other entrants "because of the privilege of the land possessor to exclude," not because "the trespasser . . . is a wrongdoer"). Furthermore, trespassers were treated poorly by the common law, even when they were not, in any sense, "wrongdoers." See DOBBS ET AL., *supra* note 3, § 273 (explaining that, under the common law, even "heroic rescuer[s]" were sometimes deemed trespassers).

**34** For this strategy, Exhibit A is the tobacco litigation which began in the mid-1950s and continued for decades. There, cigarette manufacturers vigorously investigated every aspect of the plaintiff's lifestyle, both to impose heavy litigation costs, but also to reveal the victim's questionable character—and then the manufacturers drew on what they found to tarnish the victim in the eyes of jurors. See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 868 (1992) (observing that the cigarette manufacturers conducted "exhaustive, often intimidating character investigations of the plaintiff"); *id.* at 873 (recounting how, in one early tobacco case, the plaintiffs' lawyer complained that the defense "portray[ed the claimant] 'as an unattractive person for Bible Belt jurors' by introducing evidence of his gambling and drinking," while, in another, "the defense was allowed to introduce evidence that the plaintiff was a heavy drinker, lived with other women while he was married, had trouble holding a job, and had suffered multiple stab wounds").

The strategy is also employed in contemporary opioid litigation, even when the wrongful conduct rule is not at issue. For example, Jan Hoffman, *Opioid Distributors Cleared of Liability to Georgia Families Ravaged by Addiction*, N.Y. TIMES, Mar. 1, 2023, at B3 discusses a recent (unsuccessful) lawsuit initiated by six families against a range of pharmaceutical companies, wherein the plaintiffs claimed



believe that the four doctrines we highlight here are distinctive *enough* to merit particular attention, even while noting that the normative arguments we raise in Part 4 might apply more broadly.

In this Part, we discuss the wrongdoer doctrines—the wrongful conduct rule, the “innocence” prerequisite to legal malpractice actions, the non-innocent party doctrine, and the complicity defense—in some detail.

### 3.1 Wrongful Conduct Rule

With roots in contract law, the wrongful conduct rule (or, as it is sometimes called, the *in pari delicto* doctrine, the unlawful acts doctrine, the *ex turpi causa* doctrine, or the serious misconduct bar), precludes a tort plaintiff from relief if the plaintiff's cause of action is based on the plaintiff's own unlawful conduct.<sup>35</sup> Or, as the Harper treatise puts it, the rule treats the lawbreaking plaintiff “as something of an outlaw who . . . is disentitled to seek redress through the courts for any injury to which his criminal conduct contributed.”<sup>36</sup>

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that their lives had been upended by their own or a loved ones' opioid addiction. Part of defendants' winning strategy was to “emphasize[] each family's own patterns of dysfunction, including . . . sexual predation, domestic violence, mental health disorders and the women's terrible choices in male companionship.”

**35** *Albert v. Sheeley's Drug Store, Inc.*, 265 A.3d 442, 446 (Pa. 2021); *see also* *Greenwald v. Van Handel*, 88 A.3d 467, 472 (Conn. 2014) (asserting that a plaintiff “cannot maintain a tort action for injuries that are sustained as the direct result of his or her knowing and intentional participation in a criminal act”). For a detailed discussion of the doctrine's contract law roots, *see* Weinrib, *supra* note 1, at 39–50. For various terminology, *see* Restatement Third, Torts: Miscellaneous Provisions § 4A, Reporters' Note to Comment c (AM. L. INST., Tentative Draft No. 1 (2022)). Interestingly, the Restatement of Torts has long disapproved of the wrongful conduct rule. *See id.* § 4A (“A person injured by an actor's tortious conduct is not barred from recovery merely because the person was engaged in an illegal, tortious, or otherwise wrongful act at the time of suffering harm.”); Restatement Second, Torts § 889 (AM. L. INST. 1979) (“One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a . . . crime. . .”).

Some states have enacted a version of the wrongful conduct rule via statute. *E.g.*, CAL. CIV. CODE § 3333.3 (“In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.”); OHIO REV. CODE ANN. § 2307.60(B)(2) (barring a tort action if the plaintiff, *inter alia*, “has been convicted of or has pleaded guilty to a felony, or to a misdemeanor that is an offense of violence, arising out of criminal conduct that was a proximate cause of the injury or loss for which relief is claimed in the tort action”). For an additional compilation, *see* *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 630 n.6 (W. Va. 2015).

**36** 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 17.6, at 707 (2d ed. 2006). The treatise goes on to dismiss the doctrine as a “barbarous relic of the worst there was in Puritanism.” *Id.* at 708.

Thus, in the early case of *Bosworth v. Swansey*, where recovery was sought for harm allegedly caused by a defect in the roadway, the court, in dismissing the claim, relied on the “plainly unlawful” conduct of the plaintiff in travelling for commercial purposes in violation of a Sunday closing law.<sup>37</sup> More recently, modern courts have deployed the rule to deny relief to a range of plaintiffs, including a twelve-year-old rape and medical malpractice victim who opted to terminate her pregnancy;<sup>38</sup> a fourteen-year-old boy from Alabama who was crushed to death when trying to jiggle soft drinks from a vending machine;<sup>39</sup> a Virginia woman who participated in the “crime of fornication”;<sup>40</sup> the estate of a man who died of thirst and heat exhaustion in Brooks County, Texas, after crossing, without documentation, into the United States;<sup>41</sup> and (as discussed in more detail in Part 5) legions of opioid-dependent individuals who were hooked on defectively designed, improperly labeled, and irresponsibly sold prescription painkillers and then, once hooked, resorted to desperate tactics to feed their addiction.<sup>42</sup>

The basis for the rule, in courts’ telling, is “that courts should not lend their aid to a plaintiff whose cause of action stems from his or her own illegal conduct.”<sup>43</sup> Additionally, courts explain that “allowing such suits to proceed to trial” would

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<sup>37</sup> 51 Mass. 363, 365 (1845).

<sup>38</sup> In the case, there was a lingering factual question as to whether the “infant plaintiff,” in fact, “willfully submitted to an abortion which she knew to be illegal.” *Symone T. v. Lieber*, 205 A.D.2d 609, 610 (N.Y. App. Div. 1994). The court advised that, if “her participation was,” in fact, “knowing and willful,” the wrongful conduct rule would properly apply. *Id.*

<sup>39</sup> *Oden v. Pepsi Cola Bottling Co. of Decatur*, 621 So. 2d 953, 954 (Ala. 1993).

<sup>40</sup> *Zysk v. Zysk*, 404 S.E.2d 721, 721 (Va. 1990).

<sup>41</sup> *Fuentes v. Alecio*, 2006. WL 3813780, at \*3 (S.D. Tex. 2006).

<sup>42</sup> For how the wrongful conduct rule was repeatedly deployed to defeat individual tort suits against opioid suppliers, see Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 *STAN. L. REV.* 285, 312 (2021); Samuel Fresher, Note, *Opioid Addiction Litigation and the Wrongful Conduct Rule*, 89 *U. COLO. L. REV.* 1311, 1318–26 (2018). Examples include: *Inge v. McClelland*, 725 F. App’x 634, 638 (10th Cir. 2018) (affirming reliance on the rule where plaintiffs “admit that they chose to purchase and consume the narcotics they obtained through illicit means”); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 695 (E.D. Ky. 2003) (barring OxyContin-dependent plaintiffs from recovering against Purdue while declaring: “This Court... will not accept the plaintiffs’ ‘victimization’ mentality.”); *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 486 (Miss. 2006) (rejecting a suit by an OxyContin-dependent plaintiff because the plaintiff “through his own fraud, deception, and subterfuge” misrepresented “his medical history and ongoing treatment to those from whom he sought care”); *Albert v. Sheeley’s Drug Store, Inc.*, 265 A.3d 442, 447 (Pa. 2021) (barring the plaintiff’s estate from recovery in a wrongful death action because the decedent’s death “was caused, at least partially, by his own criminal conduct: possessing and consuming a controlled substance that was not prescribed to him”); *Allen v. Purdue Pharma Co.*, No. 01-C-224, (W. Va. Cir. Ct. Aug. 15, 2002) (granting Purdue’s summary judgment motion and barring the plaintiff from recovery, given his “illegal and immoral acts”).

<sup>43</sup> *Albert*, 265 A.3d at 446.

create bad incentives and give courts a bad rap—that permitting “criminals” to recover through the tort system, “would condone and encourage illegal conduct” and “lead the public to view the legal system as a mockery of justice.”<sup>44</sup> Finally, and most frequently, courts justify the rule on what we call the “no-profit rationale”—that, absent the rule, wrongdoers could “receive compensation for, and potentially even profit from, their illegal acts.”<sup>45</sup>

When it comes to the rule’s application, courts tend to agree that not *all* illegality suffices.<sup>46</sup> (If it were otherwise, every jaywalking pedestrian or modestly speeding motorist would be entirely precluded from recovery when hit.) Cognizant that a higher threshold must be imposed, courts frequently clarify that the wrongful conduct rule only applies to “serious” or “substantial” plaintiff misconduct, although, when it comes to what exactly qualifies as sufficiently “serious” or “substantial,” courts tend to tie themselves in knots.<sup>47</sup> Thus, for example, in a monument to obfuscation and circularity, the New York Court of Appeals has declared: “when the plaintiff’s injury is a direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal act is judged to be so serious an offense as to warrant denial of recovery.”<sup>48</sup> And, in Michigan, the

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44 *Id.* at 448.

45 *Id.* (quotation marks omitted). For further discussion of the no-profit rationale, see, for example, *Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 213 (Mich. 1995) (explaining that, were it not for the wrongful conduct rule, “some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts”); *Zysk*, 404 S.E.2d at 722 (“The [wrongful conduct] rule mainly is premised on the idea that courts will not assist the participant in an illegal act who seeks to profit from the act’s commission.”); *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 637 (W. Va. 2015) (Ketchum, J., dissenting) (dissenting from the majority’s rejection of the wrongful conduct rule “because criminals should not be allowed to use our judicial system to profit from their criminal activity”); Emily J. Yang, Note, *The Opioid Crisis and the Wrongful Conduct Rule: Does It Matter Who’s to Blame?*, 75 *FOOD & DRUG L.J.* 574, 580 (2021) (“The rationale for supporting the wrongful conduct rule is not that the defendants are *right* and deserve to be shielded from litigation, but that the plaintiffs bringing the claim are *wrong* and have contributed to their own injury, and thus must not gain profit for the wrongful act or shift liability to another.”).

46 *KEETON ET AL.*, *supra* note 15, § 36, at 232 (explaining that “courts have long discarded the doctrine that any violator of a statute is an outlaw with no rights against anyone”); see also *Barker v. Kallash*, 468 N.E.2d 39, 42 (N.Y. 1984) (“[N]ot every violation of the law, no matter how petty or slight, will serve to completely resolve a question of tort liability.”).

47 See *King*, *supra* note 1, at 1035–36 (“The most common prerequisite for the serious misconduct bar is that the plaintiff’s misconduct must have been serious. Unfortunately, the courts have seldom adequately articulated the criteria for determining whether a plaintiff’s misconduct has crossed the ‘serious’ threshold.”); Prentice, *supra* note 1, at 103 (“No court has developed a satisfactory method... to develop any sort of clear guideline for deciding which types of wrongdoing can or cannot be subject to the *ex turpi causa* doctrine. ...”). For further discussion, see *infra* note 112.

48 *Barker*, 468 N.E.2d at 41.

Supreme Court has held that, in order for the wrongful conduct rule to preclude the plaintiff's claim, the plaintiff's conduct must be "prohibited or almost entirely prohibited under a penal or criminal statute" as opposed to a "violation of a safety statute, such as traffic and speed laws or requirements for a safe work place" because that latter conduct does not "rise to the level of serious misconduct."<sup>49</sup>

Then, like many categorical rules, the wrongful conduct rule is studded with (sometimes subjective) exceptions. One arises when "the statute that the plaintiff alleges the defendant violated allows the plaintiff to recover for injuries suffered because of the violation."<sup>50</sup> Another comes to the fore when the plaintiff and the defendant have both engaged in illegal conduct but the defendant is, for any number of reasons (e.g., his outsized influence, age, or condition) significantly more culpable.<sup>51</sup> Then, the rule is inapplicable absent a "sufficient" causal nexus between the plaintiff's illegal conduct and alleged injury (although the parameters of that "sufficient" causal nexus sometimes get shaky).<sup>52</sup> And, certain courts have also cautioned that the rule should not apply where the plaintiff lacks sufficient capacity, understanding, and free will.<sup>53</sup>

### 3.2 The "Actual Innocence" Prerequisite to a Legal Malpractice Action

Second, in the majority of states, a criminal defendant cannot prevail in a legal malpractice action against his (former) criminal defense lawyer unless he

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<sup>49</sup> *Orzel*, 537 N.W.2d at 214.

<sup>50</sup> *Id.* at 218.

<sup>51</sup> *E.g.*, *Stopera v. DiMarco*, 554 N.W.2d 379, 381 (Mich. App. 1996); *see also* *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 632 (W. Va. 2015) ("Many courts have found the rule inapplicable where... there is 'inequality' between the parties such as where plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age.") (quotation marks omitted).

<sup>52</sup> *See* *Greenwald v. Van Handel*, 88 A.3d 467, 473 (Conn. 2014) (explaining that "courts have universally recognized that there must be a sufficient causal nexus between the plaintiff's illegal conduct and his alleged injuries to bar recovery" and collecting supporting authority); *Orzel*, 537 N.W.2d at 215 ("For the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages.").

<sup>53</sup> *E.g.*, *Izzo v. Manhattan Med. Grp., P.C.*, 560 N.Y.S.2d 644, 647–48 (App. Div. 1990) (explaining that the fact that decedent drug addict forged prescriptions did not automatically bar a wrongful death claim against the defendant pharmacy because it is possible that the plaintiff, given his addiction, "lacked the capacity to know that it was wrong to forge prescriptions"); *Lee v. Nationwide Mut. Ins. Co.*, 497 S.E.2d 328, 330 (Va. 1998) (stating that, in order for the wrongful conduct rule to apply "the defendant must... prove that the plaintiff... engaged in [the illegal act] freely and voluntarily, without duress or coercion").

establishes, not just actual damages factually and proximately caused by his defense attorney's breach of the standard of care but, additionally, his *actual innocence*.<sup>54</sup> Thus, as the Massachusetts Supreme Court has explained: "[I]f a defendant attorney failed to assert a clearly valid defense of the statute of limitations, a client who did commit the crime, but should not have been convicted of it, sustained a real loss, but he may not recover against the attorney defendant."<sup>55</sup>

Echoing the explanations given to support the wrongful conduct rule, courts justify the actual innocence requirement by asserting that, even if the attorney has furnished deficient representation, "a guilty defendant's conviction and sentence are the direct consequence of his own perfidy."<sup>56</sup> Furthermore, recycling the no-profit rationale, courts explain: "public policy prohibits convicts from profiting from their illegal conduct."<sup>57</sup>

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54 As the text indicates, most states have adopted this restriction. See *Wiley v. County of San Diego*, 966 P.2d 983, 985 (Cal. 1998) (stating that a "clear majority of courts that have considered the question" require proof of plaintiff's innocence); *Glenn v. Aiken*, 569 N.E.2d 783, 785 (Mass. 1991) (observing that "[c]ourts have generally required that a former criminal defendant prove his innocence of the crime charged as an element of his claim that his former trial counsel was negligent in defending him"); see, e.g., *Rodriguez v. Nielsen*, 650 N.W.2d 237, 240 (Neb. 2002) ("Generally, in civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. However, in cases involving alleged malpractice in the defense of a criminal matter, a convicted criminal who files a legal malpractice claim against his or her defense counsel must also allege and prove that he or she is innocent of the underlying crime.") (citations omitted); cf. *Shaw v. State, Dep't of Admin.*, 861 P.2d 566, 572 (Alaska 1993) (endorsing a version of the rule but noting that "[r]ather than require the plaintiff to prove his actual innocence in order to succeed, we hold that the defendant may raise the issue of the plaintiff's actual guilt as an affirmative defense").

Many states go a step further and hold that it is not enough for a plaintiff to establish his factual innocence by a preponderance of the evidence. He must, additionally, show that he has successfully sought postconviction relief. See *King*, *supra* note 1, at 1031 & n.85 (collecting authority). For examples, see *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 671 (Cal. 2001) (holding that "postconviction exoneration is a prerequisite to prevailing on a legal malpractice claim"); *Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999) (holding that "a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action"); *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 495 (Tex. 1995) ("[W]ithout first establishing that she has been exonerated by direct appeal, post-conviction relief, or otherwise, [the criminal defendant, now legal malpractice plaintiff] cannot sue her attorney.").

Breaking with all the above, the Restatement Third of the Law Governing Lawyers § 53, Comment *d* (AM. L. INST. 2000), explains: "Although most jurisdictions addressing the issue have stricter rules, under this Section it is not necessary to prove that the convicted defendant was in fact innocent."

55 *Glenn*, 569 N.E.2d at 787.

56 *Wiley*, 966 P.2d at 987.

57 *Peeler*, 909 S.W.2d at 498. See also, e.g., *Rowe v. Schreiber*, 725 So. 2d 1245, 1251 (Fla. Dist. Ct. App. 1999) (stating, in legal malpractice context, that unless the plaintiff was in fact innocent, allowing

An example of the rule in action comes from Texas. There, Carol Peeler, an officer at a securities firm, was indicted for manufacturing illegal tax write-offs for wealthy investors.<sup>58</sup> She ultimately pled guilty to federal charges. But, three days *after* entering that plea, she learned something startling: Prior to the plea's entry, her defense lawyer had "failed to tell her that the United States Attorney had offered her absolute transactional immunity" (i.e., a get-out-of-jail free card) "if she would become a witness and testify against her colleagues."<sup>59</sup> Justifiably outraged, Peeler sued her former lawyer alleging malpractice.

Although the attorney's breach was clear (attorneys are *absolutely* duty-bound promptly to notify clients of all such offers), the Texas Supreme Court refused to countenance Peeler's claim.<sup>60</sup> The court observed: "[P]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong."<sup>61</sup> And, to allow such a suit, would "impermissibly shift[] responsibility for the crime away from the convict"<sup>62</sup> and, in so doing, "shock the public conscience, engender disrespect for courts and generally discredit the administration of justice."<sup>63</sup>

On similar grounds, courts have applied the "actual innocence" rule to bar malpractice claims where defense counsel failed to object to an improper sentencing calculation, causing his client to receive a sentence of 21 years rather than 12 years,<sup>64</sup> where counsel failed to schedule a resentencing hearing after his client's original

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recovery could indirectly reward the wrongdoer for his crime); *Rimert v. Mortell*, 680 N.E.2d 867, 874 (Ind. Ct. App. 1997) (stating that rule was at least "correlative with" state's "public policy against permitting one to profit from his or her wrongdoing"); *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (noting, in legal malpractice context, that rule is based on the "public policy that prohibits financial gain resulting, directly or indirectly, from criminal acts"); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 11 (1995) (explaining that courts justify this rule by asserting that it is "unjust to let someone who is actually guilty of a crime benefit even indirectly from criminal conduct"); Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 361 (2007) ("Numerous courts claim that allowing a criminal defendant who actually committed the charged offense to recover from her defense lawyer in a malpractice suit would impermissibly allow her to profit from her own fraud, take advantage of her own wrongdoing... or acquire property by her own crime.").

58 *Peeler*, 909 S.W.2d at 495.

59 *Id.* at 496.

60 See TEX. RULES OF PROF'L CONDUCT R. 1.02(a)(3) and R. 1.03 (involving required attorney-client communication).

61 *Peeler*, 909 S.W.2d at 497 (quotation marks omitted).

62 *Id.* at 498.

63 *Id.* at 497 (quotation marks omitted).

64 *Simpkins v. Neiswonger*, 2005. WL 8162000 (N.D.W. Va. 2005).

sentence was reversed on appeal, causing his client to remain in prison an extra 13 months;<sup>65</sup> and where an attorney's refusal to meet with his client at all *until the third day of trial* led to, among other things, an erroneous conviction for sexual assault.<sup>66</sup>

### 3.3 The Non-innocent Party Doctrine

Third, in many states, the “non-innocent party doctrine” prohibits an inebriated individual from asserting a claim against a social host or commercial vendor (sometimes called a “dram shop”) that negligently supplied the alcohol that precipitated his or her intoxication.<sup>67</sup>

65 Piris v. Kitching, 375 P.3d 627, 629–32 (Wash. 2016).

66 Jama v. Gonzalez, 2020 WL 13596413, at \*2 (Wis. Ct. App. 2020), *aff'd by an equally divided court*, 965 N.W.2d 458 (Wis. 2021). Some states compound the inequity. These states require the criminal defendant, now plaintiff, to show that she has been exonerated by direct appeal, post-conviction relief, or otherwise. *See supra* note 54 (compiling authority); Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999) (stating that this is the majority rule). But, because it takes time to formally establish one's actual innocence, sometimes, while a person is working to clear her name, the statute of limitations will run on a malpractice claim, effectively precluding appropriate relief. *See* Coscia v. McKenna & Cuneo, 25 P.3d 670, 677 (Cal. 2001) (“Because of the time required to complete postconviction proceedings, the statute of limitations [for malpractice claims] in most cases will have run long before the convicted individual has had an opportunity to remove the bar to establishing his or her actual innocence.”). For a recent example of this harsh and inequitable rule in action, see Dickerson v. Contra Costa Cnty., 2023 WL 2456790 (N.D. Cal. 2023).

67 *E.g.*, Panagakos v. Walsh, 749 N.E.2d 670, 672–73 (Mass. 2001) (concluding that a drinker “who was later injured as a result of his intoxication could not bring a claim against the social hosts who had supplied him with alcoholic beverage”); Tobias v. Sports Club, Inc., 504 S.E.2d 318, 319 (S.C. 1998) (holding “that South Carolina does not recognize a ‘first-party’ cause of action against a tavern owner by an intoxicated adult”); Kelly v. Falin, 896 P.2d 1245, 1248–49 (Wash. 1995) (refusing to make “commercial establishments pay for the self-inflicted injuries of an intoxicated [adult] patron”). For discussion, see James R. Myers, Comment, *Dramshop Liability: The Blurry Status of Drinking Companions*, 34 ST. LOUIS U. L.J. 1153, 1157 (1990) (“[C]ourts have usually barred the intoxicated person himself from recovering for his own injuries.”).

Some states reach this result by statute. *E.g.*, GA. CODE ANN. § 51-1-40(b) (“Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer.”); IDAHO CODE § 23–808(4)(a) (“No claim or cause of action . . . shall lie on behalf of the intoxicated person nor on behalf of the intoxicated person's estate or representatives.”); MICH. COMP. LAWS ANN. § 436.1801(8) (“The alleged visibly intoxicated person does not have a cause of action under this section and a person does not have a cause of action under this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.”); WIS. STAT. § 125.035(4)(b) (predicating liability on, among other things, whether the alcohol caused “injury to a 3rd party”).

An example of the non-innocent party doctrine in action comes from a 1995 opinion out of Washington State.<sup>68</sup> The suit arose when Cary Kelly got extravagantly drunk one November afternoon to the point that he was, by turns, “boisterous and unruly,” “slurring his speech and growing unintelligible,” “spilling beer, disturbing patrons, and unable to follow simple instructions.”<sup>69</sup> Yet, even as Kelly’s behavior deteriorated (and notwithstanding a clear obligation, under Washington law, to withhold service from any “obviously intoxicated” patron), defendant Family Tavern kept serving him pitcher after pitcher after pitcher of beer.<sup>70</sup> Ultimately, around 8:20 p.m., Kelly tried to drive home but almost immediately lost control of his car, slammed into a tree, and died in a one-car accident.<sup>71</sup> At the time of the crash, Kelly’s blood alcohol content was 0.31, three times the legal limit; to get that drunk, he likely consumed between 200 and 240 ounces of beer (which is to say, more than one-and-a-half gallons) between 2 p.m. and the time of the crash.<sup>72</sup>

After Kelly’s death, his estate brought a wrongful death action against Family Tavern and its owner, alleging (as seems undeniable) that the tavern continued to serve Kelly after he was obviously intoxicated. At the close of trial, the jury seemingly agreed, returning a special verdict finding Kelly and Family Tavern equally responsible for Kelly’s death (50 % each), which would have meant a partial recovery for the family, given Washington’s scheme of comparative negligence.<sup>73</sup> Subsequently, defendant Family Tavern appealed, and the Washington Supreme Court reversed, summarily declaring: “Unlike an innocent bystander hit by a drunk driver or a youth whose sense of immortality leads to reckless abandon, the responsibility for self-inflicted injuries lies with the intoxicated adult.”<sup>74</sup>

Other courts say a bit more to justify the bright-line prohibition—often recycling now-familiar themes. Some, that is, fret that, without the non-innocent party doctrine, “the inebriate could be rewarded for his own immoderation.”<sup>75</sup> Others return to the “no-profit” well, reasoning, to quote the Wyoming Supreme Court, that “an individual should not be able to profit from injuries arising from his own voluntary intoxication.”<sup>76</sup>

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68 *Kelly*, 896 P.2d at 1245 (Wash. 1995).

69 *Id.* at 1246.

70 *Id.* For the obligation not to serve “obviously intoxicated” persons, see *Purchase v. Meyer*, 737 P.2d 661, 664 (Wash. 1987).

71 *Kelly*, 896 P.2d at 1246.

72 *Id.*

73 *Id.*

74 *Id.* at 1249.

75 *Ohio Cas. Ins. Co. v. Todd*, 813 P.2d 508, 510–11 (Okla. 1991).

76 *White v. HA, Inc.*, 782 P.2d 1125, 1132 (Wyo. 1989).



Uncomfortable with a full blanket prohibition, certain courts add exceptions and qualifiers. These include (depending on the jurisdiction) carve-outs for minors under the age of eighteen<sup>77</sup> and so-called “habitual drunkards.”<sup>78</sup> These individuals, certain states agree, ought to recover, notwithstanding their own intoxication and injury.

### 3.4 The Complicity Defense

Finally, and in something of an extension of the non-innocent party doctrine, some states adhere to the “complicity” (sometimes called a “participation”) defense. Pursuant to that defense, a plaintiff directly injured by an inebriated tortfeasor may not recover in an action against a social host or commercial vendor who negligently over-served the direct tortfeasor if “the plaintiff either caused the [direct tortfeasor’s] intoxication, encouraged the drinking which caused the intoxication, or participated to a material and substantial extent in the drinking which led to the intoxication of the inebriate.”<sup>79</sup>

Similar to the rationales above, the stated justification for the complicity doctrine is that only “innocent” persons are entitled to the law’s protection.<sup>80</sup> Further,

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<sup>77</sup> See Richard Smith, Note, *A Comparative Analysis of Dramshop Liability and A Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 564 (2000) (“[A] number of states that forbid suits by intoxicated adult customers still permit intoxicated minor customers to recover from the dramshops that illegally sold them alcohol.”).

<sup>78</sup> *E.g.*, *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1047 (Fla. 1991) (authorizing first-party claims when a commercial establishment negligently sells alcohol to a “habitual drunkard”); accord Joel E. Smith, Annotation, *Liability of One Furnishing Intoxicating Liquor for Damages for Personal Injuries or Death of the Consumer in Consequence of Intoxication*, 98 A.L.R.3d 1230, § 2 (originally published in 1980) (explaining that first-party liability “has also been held established or supportable where the consumer was an habitual drunkard or alcoholic unable to control his appetite for liquor”).

<sup>79</sup> *Parsons v. Veterans of Foreign Wars Post 6372*, 408 N.E.2d 68 (Ill. App. Ct. 1980); see also, *e.g.*, *McIsaac v. Monte Carlo Club, Inc.*, 587 So. 2d 320, 322 (Ala. 1991) (“As we understand the doctrine of complicity, it precludes recovery for a plaintiff who willingly participated to a material and substantial extent in the drinking that led to the inebriate’s intoxication.”); *Oursler v. Brennan*, 67 A.D.3d 36, 42 (N.Y. App. Div. 2009) (“[A] person who affirmatively causes or encourages the intoxication of another person should not be permitted to assert a cause of action under the Dram Shop Act for injuries sustained as a result of that person’s intoxication. . .”).

<sup>80</sup> *Passini v. Decker*, 467 A.2d 442, 444 (Conn. Super. Ct. 1983) (“Those decisions allowing a ‘participation’ defense rely upon the rationale that as a participant in the consumption of alcohol with the intoxicated person, the participant is not ‘innocent’ of the intoxication of the intoxicated person, and thus is not entitled to relief. . ..”); *Cox v. Rolling Acres Golf Course Corp.*, 532 N.W.2d 761, 763–64 (Iowa 1995) (“The rationale supporting this defense is that the goal of the dram shop statute is to protect innocent parties, not those who have participated in the intoxicated person’s intoxication.”); 4 FLEM K. WHITED III, *DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL* § 29:38 (2023 update) (“The purpose of the complicity defense is to ensure that the individual seeking recovery is an ‘innocent person’ who is entitled to recover under the dram shop act.”).

courts frequently offer the no-profit rationale, observing that a plaintiff who, for example, bought a friend a drink and then is subsequently run over in the bar's parking lot by that drunken friend, should not be able to "profit" from her own wrong.<sup>81</sup> Some are even less persuasive, tautologically insisting that "[t]his doctrine is based on the premise that one who is guilty of complicity in the inebriate's intoxication should not be allowed to recover."<sup>82</sup>

Yet, even when the broad contours of the doctrine are clear, courts disagree as to the particulars—most notably, just how much "assistance" is needed to, as a matter of law, extinguish the companion's claim.<sup>83</sup> On the strict end of the continuum, some cases preclude all recovery when the plaintiff did nothing more than accept drinks from the intoxicated direct tortfeasor.<sup>84</sup> Other cases craft a slightly different trigger, explaining that a plaintiff is only out of luck if she "joined in the drinking of liquor."<sup>85</sup> Still other cases hold that that is not enough and that what matters is whether the plaintiff "caused or procured [the inebriated direct tortfeasor's] intoxication"—typically, by buying drinks.<sup>86</sup>

But, even when that much is clear, questions abound:

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<sup>81</sup> *E.g.*, *Anderson v. Moulder*, 394 S.E.2d 61, 69 (W. Va. 1990) (explaining that the complicity defense is frequently justified "on the grounds that one cannot profit from his own wrong") (quotation marks omitted); *WHITED*, *supra* note 80, § 29:38 (explaining that courts adhere to the complicity defense because the "judiciary is reluctant to permit individuals who participated in or contributed to the intoxication of the person who caused the injuries to profit from their own wrongdoing, or to recover for injuries which were set in motion by their own wrongful acts"); *Myers*, *supra* note 67, at 1154 ("The basic rationale underlying [the complicity] doctrine is that wrongdoers should not benefit from their own wrongs by voluntarily supplying, participating in, or inducing the intoxication which causes the injury."); *Brett N. Olmstead*, Note, *In Search of A Drinking Companion's Complicity Under Illinois's Dramshop Act*, 1994 U. ILL. L. REV. 217, 219 (1994) ("The defense of complicity is based on the idea that one ought not profit from her own wrong.").

<sup>82</sup> *Darguzas v. Robinson*, 515 N.E.2d 451, 452 (Ill. App. Ct. 1987).

<sup>83</sup> As one commentator observes: "There is considerable conflict in the cases as to whether participating in the drinking which led to the intoxication which produced injury justifies the denial of recovery; some cases deny recovery on the basis of mere participation, while others hold that recovery should be denied only where the plaintiff in some way actively induced the drinking." F. S. Tinio, Annotation, *Third Person's Participating in or Encouraging Drinking as Barring Him from Recovering Under Civil Damage or Similar Acts*, 26 A.L.R.3d 1112, § 2[a] (originally published in 1969). As another puts it, somewhat more bluntly: "Decisions on complicity are a mass of inconsistency." 2A STUART M. SPEISER ET AL., *AMERICAN LAW OF TORTS* § 9:89 n.18 (2023 update). See also *Olmstead*, *supra* note 81, at 217, 223 (lamenting that, at least in Illinois, "[c]ourts have no clear guidance on how much participation... is enough" and are, as a consequence, "all over the road as to how [the complicity defense] is applied").

<sup>84</sup> *Nelson v. Araiza*, 372 N.E.2d 637, 640 (Ill. 1978) (collecting citations).

<sup>85</sup> *Sterenberg v. Sir Loin Inc.*, 539 N.E.2d 294, 296 (Ill. Ct. App. 1989).

<sup>86</sup> *Mitchell v. Shoals, Inc.*, 227 N.E.2d 21, 23 (N.Y. 1967); *accord Cox v. Rolling Acres Golf Course Corp.*, 532 N.W.2d 761, 764 (Iowa 1995) (holding that a person's claim is not extinguished if the person is a "mere drinking companion").

[S]hould a participant be able to recover if he or she just purchased *one* of the [intoxicated direct tortfeasor's] many drinks? What if the [direct tortfeasor] was already partially intoxicated prior to joining the companion... and the participant just purchased the final drink or two? If "active participation" means "buying drinks," what if a party of people contributes equally for several pitchers of beer, but do not individually consume equal amounts?<sup>87</sup>

Then, does it matter whether the direct tortfeasor was already visibly intoxicated at the time of the possibly "complicit" plaintiff's alcohol purchase?<sup>88</sup> Does it matter whether the direct tortfeasor was a minor?<sup>89</sup> What if the direct tortfeasor was in a drinker's no-man's land—neither a minor nor legally "of age" (i.e., between the ages of 18 and 21)? What if the plaintiff did not *buy* the drinks but, instead, physically delivered them?<sup>90</sup> Or, what if the allegedly complicit companion left the bar before the direct tortfeasor got drunk?<sup>91</sup>

## 4 A Critique of the Wrongdoer Doctrines

The wrongdoer doctrines are problematic on a number of grounds. Below, we trace various infirmities. These include that the doctrines: (1) are inconsistent with, and represent a partial resurrection of, contributory fault; (2) authorize character-based attacks; (3) undermine tort law's twin aims of adequate compensation and efficient deterrence; (4) lead to arbitrary and inconsistent decision-making; and (5) are based on a specious rationale.

### 4.1 Backdoor Contributory Fault

First and most obviously, the wrongdoer doctrines are inconsistent with, and ultimately subvert, states' move to comparative responsibility.<sup>92</sup> As noted in Part 2, all

<sup>87</sup> Myers, *supra* note 67, at 1176.

<sup>88</sup> *E.g.*, *Oursler v. Brennan*, 67 A.D.3d 36, 42 (N.Y. App. Div. 2009) ("[T]he mere act of purchasing drinks for a companion prior to his or her visible intoxication, without more, is insufficient to constitute 'guilty participation' as a matter of law.").

<sup>89</sup> *Id.* at 41 (distinguishing between adults and minors and explaining that "purchasing a drink for a minor... constitutes 'guilty participation' in the minor's intoxication").

<sup>90</sup> *Parsons v. Veterans of Foreign Wars Post 6372*, 408 N.E.2d 68, 70, 74 (Ill. App. Ct. 1980) (holding that the complicity defense barred the plaintiff's claim where the plaintiff had been drinking with her husband and his friend and the plaintiff ferried beers from the bar).

<sup>91</sup> *Douglas v. Athens Market Corp.*, 49 N.E.2d 834 (Ill. App. Ct. 1943) (involving this fact pattern).

<sup>92</sup> Many commentators have criticized the wrongful conduct rule on this basis. *E.g.*, Johnson, *supra* note 2, at 79; King, *supra* note 1, at 1052; Prentice, *supra* note 1, at 128; James W. Sprague, *The Fault in in Pari Delicto: How Illegality Bars and Moral Culpability Collide with Tort Law*, 10 WAKE FOREST L. REV. ONLINE 107, 109 (2020). Courts have lodged similar criticisms. See *infra* note 95 (collecting judicial citations).

but four states have replaced contributory negligence with comparative responsibility.<sup>93</sup> Motivating this switch was states' recognition that, when both the plaintiff and the defendant err: (1) the plaintiff's and the defendant's errant conduct must be assessed and compared, and (2) liability ought to follow from that assessment and comparison. In the words of the California Supreme Court: "[I]n a system in which liability is based on fault, the extent of fault should govern the extent of liability."<sup>94</sup> Sometimes (when, for instance, the plaintiff voluntarily guzzles drinks far past the point of intoxication), the plaintiff's fault will swamp the defendant's (i.e., the social host or commercial vendor's) fault, appropriately leading to a very small or, in a modified comparative responsibility regime, a zero, recovery. Sometimes, such as when a person just carries a couple of beers to the drunken direct tortfeasor, a jury may find the opposite. But a commitment to a comparison of the plaintiff's and the defendant's fault, and compensation driven by that comparison, is the beating heart of comparative responsibility. And, it is undeniable: Reliance on the wrongdoer doctrines short-circuits, and represents a piecemeal rejection of, that broader principle.<sup>95</sup>

Further, in their piecemeal resurrection of contributory negligence, the doctrines also represent a judicial power grab from both juries and the legislature.

The wrongdoer doctrines wrest power from juries because comparative responsibility empowers *juries* to make all-important allocation decisions.<sup>96</sup> Yet, relying on the above doctrines, *judges* tend to resolve cases as a matter of law, depriving juries of their decision-making authority.<sup>97</sup> Meanwhile, the majority of

<sup>93</sup> See *supra* note 2 and accompanying text.

<sup>94</sup> *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230–31 (Cal. 1975).

<sup>95</sup> Numerous courts have recognized this essential fact. *E.g.*, *Kuahiwinui v. Zelo's Inc.*, 453 P.3d 254, 259 (Haw. 2019) ("The comparative negligence defense applicable in this jurisdiction is inconsistent with the complicity defense."); *Baxter v. Noce*, 752 P.2d 240, 243 (N.M. 1988) (explaining that the complicity defense and contributory negligence are "identical... in application" and "[b]ecause contributory negligence no longer acts to absolutely extinguish a plaintiff's right of recovery in New Mexico," the complicity defense, similarly, could not (properly) extinguish the plaintiff's claim); *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 636 (W. Va. 2015) ("The wrongful conduct bar allows selective resurrection of a contributory negligence defense. ...") (quotation marks omitted).

<sup>96</sup> Restatement Third, Torts: Apportionment of Liability § 7 (AM. L. INST. 2000) (assigning allocation decisions to the factfinder).

<sup>97</sup> See *Tug Valley Pharmacy*, 773 S.E.2d at 636 ("The wrongful conduct bar... legitimizes an avenue for the court to end-run the jury.") (quotation marks omitted); *id.* at 634 (observing that courts that endorse the wrongful conduct rule endorse a "surreptitious transfer of... fact-finding obligations"). That said, in some states, when applying certain of the above doctrines, judges sometimes rely on juries to fill in particulars. *E.g.*, *Walter v. Carriage House Hotels Ltd.*, 607 N.E.2d 662, 670 (Ill. App. Ct. 1993) (explaining that, in Illinois, "complicity is an issue of fact in some cases and an issue of law in others, depending upon the circumstances").

states adopted comparative responsibility by legislative action (not judicial decision).<sup>98</sup> Against that benchmark, this selective *judicial* restoration of what is, in essence, contributory negligence reflects a usurpation of legislative power.<sup>99</sup>

## 4.2 Authorizing Character Assassination

Second, the wrongdoer doctrines are problematic because they encourage character vilification. Cases involving the above doctrines frequently turn on who the plaintiff is, rather than what the plaintiff *did*, shifting the court's focus to something that is supposed to be off-limits.<sup>100</sup> Indeed, in *Tug Valley*, discussed below, Justice Benjamin's concurring opinion noted: "My dissenting colleagues take every opportunity to portray plaintiffs as criminals who are attempting to use our judicial system to profit from the negative consequences of their conduct. In other words, plaintiffs are bad people."<sup>101</sup> Likewise, in an early suit against Purdue, the company opened its winning brief before the Ohio Supreme Court with the declaration: "Ms. Howland is a convicted felon."<sup>102</sup> That, it seems, is par for the course—and it is a clear effort to center the trial on a referendum on the plaintiff's *character*—a matter that is, and is supposed to be, off limits.<sup>103</sup>

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98 SPEISER ET AL., *supra* note 83, § 13.4 ("In most jurisdictions that apply a comparative fault rule, the rule has been statutorily adopted by the legislature.")

99 The Texas Supreme Court made this point while rejecting the wrongful conduct rule in the Lone Star State. *Dugger v. Arredondo*, 408 S.W.3d 825, 827 (Tex. 2013) ("We hold that the Legislature's adoption of the proportionate responsibility scheme... evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily-recognized affirmative defense be apportioned. ... The common law unlawful acts doctrine cannot coexist with this scheme.")

100 Briefs and arguments involving the wrongdoer doctrines frequently go to great lengths to paint the plaintiffs as unsavory and unworthy of the law's protection. *E.g.*, *Albert v. Sheeley's Drug Store, Inc.*, 265 A.3d 442, 459 n.8 (Pa. 2021) (Dougherty J., dissenting) (explaining that, in its brief, defendant went "to great lengths to paint decedent as a generally unsavory character not worthy of protection by the legal system" and offering copious examples); *Engstrom & Rabin*, *supra* note 42, at 312 (describing Purdue's frequent efforts to defend itself from opioid litigation by "stigmatiz[ing] plaintiffs" and "emphasiz[ing] individual victims' own shortcomings and personal responsibility for their current plights").

101 *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 646 (W. Va. 2015) (Benjamin, J., concurring).

102 Brief on the Merits of Appellants, *Purdue Pharma L.P., et al., Howland v. Purdue Pharma L.P.*, 821 N.E.2d 141 (Ohio 2004) (No. 2003–1538), 2004 WL 5284775, at \*2.

103 For the impropriety of such judgments, see *supra* note 1.

### 4.3 Inconsistent with the Instrumental Goals of Tort Law

Third, the wrongdoer doctrines frustrate the policy goals of tort law. Tort law, after all, seeks to supply adequate compensation and promote efficient deterrence. The above doctrines undermine those objectives.

Most obviously, tort exists to compensate victims of accidents; in so doing, it spreads (and pulverizes) the costs of accidents. By giving defendants a selective escape hatch from liability, the above doctrines obstruct tort law's compensation (and accompanying loss-spreading) benefits.<sup>104</sup>

Tort law's deterrence function is similarly subverted. One problem is that some of the above doctrines grant *certain* tortfeasors what amounts to near-blanket immunity. Consider criminal defense lawyers. The actual innocence requirement erects what amounts to a massive shield, insulating criminal defense counsel from nearly all civil liability.<sup>105</sup> Yet we, collectively, presumably value non-deficient criminal defense lawyering just as much as we value non-deficient civil defense lawyering. (There are, in fact, lots of reasons why we should be *more* concerned if criminal defendants are furnished shoddy counsel.) It is nonsensical, then, that, in the great run of cases, the tort system only incentivizes reasonable care in the latter realm.<sup>106</sup> Or, consider abortion. In states with the wrongful conduct rule but without legalized abortion, abortion providers who (illegally) terminate women's pregnancies will be systematically shielded from civil liability (and, thus, under no tort law incentive to furnish adequate care).<sup>107</sup>

Then, beyond these discrete pockets of virtual immunity, the wrongdoer doctrines categorically undercut defendant deterrence—and that's a particular problem given party identity.<sup>108</sup> After all, many defendants in these cases (think, taverns, drug manufacturers, pharmacies, and law firms) are *enterprises* that are particularly able to spread losses and engage in systematic risk assessment and reduction. On the

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**104** See King, *supra* note 1, at 1062 (explaining how the wrongful conduct rule undermines the compensatory goals of the tort system). For a classic articulation of tort's loss spreading benefits—particularly when liability is passed to enterprises, see *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

**105** See Koniak, *supra* note 57, at 6 (explaining that the actual innocence requirement furnishes “what amounts to special immunity for criminal defense lawyers to perform incompetently”).

**106** One might reply that, when it comes to lawyer quality, other mechanisms, such as licensure requirements and bar disciplinary actions, fill various gaps. In reality, however, these mechanisms are notoriously lax and limited. See Johnson, *supra* note 2, at 67–68.

**107** *E.g.*, *Symone T. v. Lieber*, 613 N.Y.S.2d 404, 406 (App. Div. 1994) (conditionally approving the application of the wrongful conduct rule to preclude a tort claim by a twelve-year-old rape victim who underwent an illegal abortion).

**108** See King, *supra* note 1, at 1061–62 (making a similar point).

other hand, the plaintiffs tend to be individuals, and they are often also young, impaired, incapacitated, or acting on spur-of-the-moment-impulse. Decades of evidence establish that, compared to enterprises, individuals are not particularly likely to respond to the signals created by liability rules.<sup>109</sup> This means that, if we want to minimize the social cost of accidents, the wrongdoer doctrines get it precisely backward—while the doctrines' substitute (i.e., comparative responsibility), leaves room to *selectively* deter party misconduct through an embrace of the cheapest cost avoider principle.<sup>110</sup>

#### 4.4 Arbitrary and Inconsistent

Fourth, certain of the wrongdoer doctrines breed decisional inconsistency and horizontal inequity.<sup>111</sup> The inconsistencies arise because, in giving *some* defendants an end-run around the well-established comparative fault framework, the doctrines engraft a binary yes-or-no question onto an otherwise non-categorical decision-making process. Worse, many of these binary determinations—such as whether the plaintiff's criminal conduct was *sufficiently* serious,<sup>112</sup> whether the inebriate was or was not a “*habitual drunkard*,”<sup>113</sup> or whether a drinking companion's conduct was *sufficiently* supportive of the intoxicated tortfeasor's intoxication<sup>114</sup>—are deeply

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109 For the canonical work explaining why enterprises are the “cheapest cost avoiders,” see generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970). See also Robert L. Rabin, *The Ideology of Enterprise Liability*, 55 *MD. L. REV.* 1190, 1201 (1996) (explaining that “incentives to safety are enhanced if doctrinal hurdles that lead to suboptimal investment in risk reduction... are eliminated from the framework of *negligence* liability”). For further discussion, see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *YALE L.J.* 697, 718 (1978) (observing that “human conduct that is determined by some subconscious process is the least likely to be governed by the narrowly rational influence of a liability rule like contributory negligence”).

110 See generally CALABRESI, *supra* note 109.

111 The actual innocence requirement is not as susceptible to this critique, although it is true that states differ as to the doctrine's precise boundaries. Some states establish that the plaintiff/criminal defendant must show his innocence by the preponderance of the evidence, others demand that he show his exoneration, and still others turn the tables, making the defendant's factual guilt an affirmative defense. See *supra* note 54 (cataloging these divergent approaches).

112 See King, *supra* note 1, at 1076 (explaining that “the serious misconduct bar suffers structurally from the absence of lucid, predictable, or workable standards guiding its application”). For additional discussion, see *supra* notes 47–49 and accompanying text (compiling criticism and offering examples).

113 See *supra* note 78 and accompanying text.

114 For the checkerboard of standards that govern the complicity doctrine, see *supra* notes 83–86 and accompanying text.

subjective and context dependent, and, consequentially, defy predictable or consistent resolution.<sup>115</sup>

Consider the simple matter of teenage joyriding. In a 1998 case, the Supreme Court of Virginia applied the wrongful conduct rule to bar a thirteen-year-old's claim, when the boy participated in an illegal joy ride.<sup>116</sup> But, in a 1995 case, also involving a thirteen-year-old boy and an illegal joy ride, the Alabama Supreme Court declared the doctrine inapplicable—and even affirmed the award of punitive damages.<sup>117</sup> In still another case, this time from 1999 and out of Alaska, a fifteen-year-old boy died when the car he was illegally driving hit a utility pole; there, the court sided with Alabama, ruling that joy riding, in fact, does not rise to the level of “serious criminal conduct” (even though, it bears notice, the plaintiff was behind the wheel).<sup>118</sup> But, in a 1997 case involving a teenager who was hurt when the car in which she was a *passenger* crashed into a pole, the New York Court of Appeals concluded “that plaintiff’s active participation in joyriding . . . was such a serious violation of the law as to preclude recovery for injuries stemming directly from the violation.”<sup>119</sup>

The complicity doctrine is likewise, in the words of the Illinois Supreme Court, “a mass of inconsistency.”<sup>120</sup> In one case, for example, the Illinois Court of Appeals barred the plaintiff’s recovery as a matter of law where the plaintiff purchased one round of drinks for a group of friends at a local tavern *hours before* the inebriate assaulted the plaintiff in a brutal and seemingly unprovoked attack.<sup>121</sup> But, in

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**115** Thus, as Professor King has observed in the context of the wrongful conduct rule: “We are left then with deciding what conduct will be deemed ‘serious’ enough to rub a judge the wrong way.” King, *supra* note 1, at 1070–71. Likewise, the West Virginia Supreme Court observed that it is “virtually impossible to comprehensively articulate” all of the requirements and exceptions of the wrongful conduct rule, which make it “highly unlikely” that the rule will be “judiciously applied.” Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty., 773 S.E.2d 627, 633 (W. Va. 2015).

**116** Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328, 330–31 (Va. 1998).

**117** Lemond Const. Co. v. Wheeler, 669 So. 2d 855 (Ala. 1995). The court rejected the rule’s application because the teen’s crime did not involve “moral turpitude.” *Id.* at 861. Two years prior, the same court had held that a fourteen-year-old boy, who was crushed to death while trying to jiggle soft drinks out of a vending machine, *had* engaged in a crime involving “moral turpitude.” Thus, in that wrongful death suit, the court held that summary judgment for defendant Pepsi was properly granted. Oden v. Pepsi Cola Bottling Co. of Decatur, 621 So. 2d 953, 954 (Ala. 1993).

**118** Ardinger v. Hummell, 982 P.2d 727, 736 (Alaska 1999). The court emphasized that, although the teenage plaintiff was “driving a car without its owner’s permission. . . [s]uch a violation does not represent the level of serious criminal conduct generally necessary to bar recovery.” *Id.*

**119** Manning v. Brown, 689 N.E.2d 1382, 1385 (N.Y. 1997).

**120** Nelson v. Araiza, 372 N.E.2d 637, 640 (Ill. 1978).

**121** Approximately three hours elapsed between the alcohol purchase and the violent attack; during those hours, plaintiff went to work. Douglas v. Athens Mkt. Corp., 49 N.E.2d 834, 836 (Ill. App. Ct. 1943). Notably, at the trial, some had claimed that the plaintiff provoked the assailant. Chapman v. Powers, 331 N.E.2d 593, 596 (Ill. App. Ct. 1975) (noting that, in *Douglas*, “there was conflict in the testimony on



another case, the same court held that the plaintiff was entitled to recover, where the plaintiff purchased one drink for an inebriate and was later shot thereby.<sup>122</sup>

## 4.5 The Bankrupt “No-Profit” Rationale

Fifth and finally, the wrongdoer doctrines rest on a fundamentally flawed premise, insofar as these doctrines backstop on the notion that a “wrongdoer” ought not be permitted to profit from his own wrong.<sup>123</sup> That rationale is based on a fallacious premise.<sup>124</sup> After all, absent the provision of punitive damages (which are very rare),<sup>125</sup> a tort plaintiff does not seek (and, in any event, is not entitled) to *profit*. The plaintiff is entitled to be made whole—simply to be returned to the *ex ante* position.<sup>126</sup> Further, given attorneys’ fees and litigation costs, which are, in practice, deducted from prevailing plaintiffs’ recoveries, even when plaintiffs are formally made whole, they *actually* recover far less. In the great run of cases, the “profiting plaintiff” is pure fiction.<sup>127</sup>

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this point”). Indeed, in *Chapman*, the court used that supposed inconsistency (that the attack in *Douglas* was provoked but the attack in *Chapman* wasn’t) to justify a different result. *See id.* at 595–96. Yet, in *Douglas*, the appellate court was reviewing a jury verdict for the plaintiff. As such, all facts had to—and have to—be viewed in the light most favorable to the plaintiff, meaning that the *Chapman* court’s after-the-fact revision of the record was highly improper.

122 *Chapman*, 331 N.E.2d at 594.

123 *See supra* notes 45, 57, 61, 76, and 81 and accompanying text.

124 Many have noted as much. *See, e.g.*, *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 632 (W. Va. 2015) (“The suggestion that the absence of such a rule allows a plaintiff to ‘profit’ from his wrongdoing is misguided; if a plaintiff is injured as the result of someone’s negligence, merely obtaining compensation for his loss does not constitute ‘profit.’”); *see also, e.g.*, King, *supra* note 1, at 1044; Weinrib, *supra* note 1, at 41; Gail D. Hollister, *Tort Suits for Injuries Sustained During Illegal Abortions: The Effects of Judicial Bias*, 45 VILL. L. REV. 387, 392 (2000); Prentice, *supra* note 1, at 110; Kenneth W. Simons, *Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law*, 8 J. TORT L. 29, 60 (2015); Sprague, *supra* note 92, at 116; *accord Oden v. Pepsi Cola Bottling Co. of Decatur*, 621 So. 2d 953, 960 (Ala. 1993) (Ingram J., concurring in part) (“The facts of this case (a 14-year-old boy is crushed to death while trying to steal a few canned drinks) make it obvious that the one who violated the law is not going to ‘profit’ from this action. . .”).

125 Punitive damages are awarded in 4–6 % of trials in which plaintiffs are successful—and trials, themselves, are vanishingly rare. MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 758 (11th ed. 2021).

126 *Rimert v. Mortell*, 680 N.E.2d 867, 874 (Ind. Ct. App. 1997) (“[W]hen an individual seeks damages alleged to have been caused by the negligence of another, that individual is not seeking to ‘profit.’ Rather, the person is seeking to be made whole through compensation for a loss already sustained.”).

127 Recognizing this, in regard to the wrongful conduct rule, the Third Restatement of Torts explains: “In barring a victim’s recovery because of a victim’s wrongful conduct, courts often rely on the notion that a victim should not be ‘rewarded’ for or ‘profit from’ his or her criminal activity. That principle, while rhetorically attractive, misses the mark, because an injured victim—even one who is awarded compensatory damages for a tortiously inflicted injury—is not rewarded or in any way advantaged

Worse, as Ronald Dworkin has pointed out, the adage—that “no man may profit from his own wrong”—is also inaccurate. From adverse possession to efficient breach, the law is studded with examples of instances where the “wrongdoer” does just fine.<sup>128</sup>

## 5 *Tug Valley Pharmacy* and the Repudiation of the Wrongful Conduct Rule

With that prologue, we now spotlight a recent case out of West Virginia where the state supreme court relegated one wrongdoer doctrine—the wrongful conduct rule—to the dustbin of history. The case involved certain plaintiffs’ attempt to hold pill mills responsible for their addiction, and so we begin by stepping back to set that scene.

West Virginia is the epicenter of the opioid epidemic.<sup>129</sup> It leads the nation in per capita overdose deaths.<sup>130</sup> Indeed, the state that ranks second (Tennessee) doesn’t even come close.<sup>131</sup> It has been the hardest hit financially.<sup>132</sup> And, from 2006 through 2012, on a per capita basis, its pharmacies led the nation in the sale of prescription painkillers.<sup>133</sup>

*Within* West Virginia, Mingo—a rural county nestled along the state’s southern edge—is ground zero. Dubbed by some “the opioid capital of America,” from 2007 to 2012, that Appalachian county led West Virginia in opiate sales.<sup>134</sup> In fact, during that

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by his or her criminal conduct; he or she is merely compensated for tortiously inflicted harm.” Restatement Third, Torts: Miscellaneous Provisions § 4B, Comment *h* (AM. L. INST., Tentative Draft No. 1 (2022)).

**128** Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25–26 (1967); see also Prentice, *supra* note 1, at 106 (“The law often allows people to profit, quite legally, from their wrongs.”).

**129** Rachel Merino et al., *The Opioid Epidemic in West Virginia*, 38 HEALTH CARE MANAGER 187, 187 (2019) (explaining that West Virginia has been the “epicenter” of the country’s opioid epidemic).

**130** *Drug Overdose Mortality by State*, NAT’L CTR. HEALTH STATS., CDC (Mar. 1, 2022), [https://www.cdc.gov/nchs/pressroom/sosmap/drug\\_poisoning\\_mortality/drug\\_poisoning.htm](https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm) (reporting data from 2021).

**131** As of 2021, West Virginia recorded 90.9 overdose deaths per 100,000 citizens; Tennessee recorded 56.6. *Id.*

**132** Feijun Luo et al., *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose — United States, 2017*, 70 MORBIDITY & MORTALITY WKLY. REP. 541, 541 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015a1-H.pdf> (tallying per capita costs of the opioid epidemic and reporting that West Virginia leads the pack).

**133** Scott Higham et al., *76 Billion Opioid Pills: Newly Released Federal Data Unmasks the Epidemic*, WASH. POST, July 16, 2019 (“The states that received the highest concentrations of pills per person per year were: West Virginia with 66.5, Kentucky with 63.3, South Carolina with 58, Tennessee with 57.7 and Nevada with 54.7.”).

**134** Chris McGreal, *Why Were Millions of Opioid Pills Sent to a West Virginia Town of 3000?*, GUARDIAN, Oct. 2, 2019.

period, enough prescription painkillers were pumped into Mingo County to supply a staggering 215 tablets per year to every man, woman, and child.<sup>135</sup> Because, during the years in question, the United States led the world in opioid use and addiction and because West Virginia led the United States in opioid use and addiction and because Mingo County led West Virginia in opioid use and addiction, it seems fair to say that the people of Mingo County were among the hardest hit by the opioid epidemic of anyone, anywhere on earth.<sup>136</sup>

When you zoom in further, from roughly 2006 through 2012, several of the defendants targeted by the litigation were the undisputed kingpins of the drug trade in Mingo County. Consider Tug Valley Pharmacy. In 2009, this Williamson, West Virginia pharmacy—located in a town of 3191 people—filled more than 3 million prescriptions for hydrocodone alone.<sup>137</sup> Meanwhile, Sav-Rite pharmacy in the neighboring town of Kermit (population 406 in the 2010 census), did such a brisk business that it churned out at least one prescription per minute.<sup>138</sup> Prescriptions were filled so rapidly that “Sav-Rite workers literally thr[e]w bags containing drugs over a divider and onto a counter in order to keep pace.”<sup>139</sup> In 2007 and 2008 enough hydrocodone moved through that pharmacy to supply 11,000 pills to every town resident.<sup>140</sup>

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**135** Eric Eyre, *780M Pills, 1728 Deaths*, GAZETTE-MAIL, Dec. 18, 2016. For more on Mingo County's dubious dominance, see W. VA. Bd. OF PHARMACY, WEST VIRGINIA BOARD OF PHARMACY PRESCRIPTION OPIOID INDICATORS REPORT MINGO COUNTY – 2019, at 2 (2020), [https://dhr.wv.gov/vip/county-reports/CountyReports/County%20Reports%202019/Mingo\\_County\\_Report\\_2019.pdf](https://dhr.wv.gov/vip/county-reports/CountyReports/County%20Reports%202019/Mingo_County_Report_2019.pdf).

**136** CHRIS MCGREAL, AMERICAN OVERDOSE: THE OPIOID TRAGEDY IN THREE ACTS xiv (2018) (“The United States consumes more than 80 % of the world's opioid painkillers yet accounts for less than 5 % [of] its population.”).

**137** Eyre, *supra* note 135. The population figure comes from the U.S. Census Bureau for 2010. *Total Population*, U.S. CENSUS BUREAU, <https://data.census.gov/table?q=Williamson,+West+Virginia&y=2010> (last visited Apr. 25, 2023). Hydrocodone, a Schedule II narcotic, frequently goes by the trade names Vicodin®, Lortab®, Lorcet-HD®, Hycodan®, and Vicoprofen®. It is the most frequently prescribed opioid in the United States. For further discussion, see Drug Enforcement Administration, Hydrocodone Fact Sheet (Oct. 2019), [https://www.deadiversion.usdoj.gov/drug\\_chem\\_info/hydrocodone.pdf](https://www.deadiversion.usdoj.gov/drug_chem_info/hydrocodone.pdf) [hereinafter DEA Fact Sheet].

**138** ERIC EYRE, DEATH IN MUD LICK: A COAL COUNTRY FIGHT AGAINST THE DRUG COMPANIES THAT DELIVERED THE OPIOID EPIDEMIC 36 (2020). Other evidence suggests that “Sav-Rite was filling six hundred to a thousand prescriptions a day, and 90–95 % were for powerful narcotics such as hydrocodone” *id.* at 38, and “Sav-Rite was filling more prescriptions for hydrocodone than any other pharmacy in West Virginia, Kentucky, Virginia, Pennsylvania, and Ohio,” *id.* at 40.

**139** MCGREAL, *supra* note 136, at 199 (quoting a search warrant sworn by federal agent Mary Ann Withrow).

**140** EYRE, *supra* note 138, at 176 (explaining that, in 2007 and 2008, Sav-Rite dispensed “nearly 9 million hydrocodone pills” a number “[t]hat amounted to more than 11 thousand painkillers a year for every resident of Kermit”). Debbie Preece described Sav-Rite as “like a circus. They even handed

Another defendant, Mountain Medical Center—the clinic that generated many of the prescriptions at issue—raked in cash deposits of \$20,000 per day.<sup>141</sup> “They had a money counting machine in the office, like at a bank.”<sup>142</sup> Between 2002 and 2010, Dr. Katherine Hoover, a physician at Mountain Medical Center, who was also a named defendant, reportedly prescribed more pain medicine than any other physician in West Virginia.<sup>143</sup> On some days, she prescribed pills to 400 patients.<sup>144</sup> Assuming a ten-hour workday with no breaks, that is forty patients an hour—or a new patient, and a new prescription, every one-and-a-half minutes.<sup>145</sup> Another named defendant, Dr. Diane Shafer, personally wrote more prescriptions for opioids than entire hospitals.<sup>146</sup> She ultimately admitted that she “left signed, undated prescriptions for controlled substances at her office so members of her staff could distribute them in exchange for cash.”<sup>147</sup>

## 5.1 The Tug Valley Plaintiffs’ Claims

None of the above sat well with plaintiffs’ lawyer James (“Jim”) Cagle, who had cut his teeth in legal aid, and who witnessed first-hand the wreckage of his neighbors and neighborhoods. “At one time, these communities were flourishing,” he explained, “and now they were nothing except people lined up at pharmacies to get their scripts.”<sup>148</sup> In time, Cagle decided to “do something,” and, in particular, he resolved to take action in the courts.<sup>149</sup> A former client, Debbie Preece, who had lost her brother

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out popcorn to people waiting in line.” Chris McGreal, “*It Was a Conspiracy*”: Recovering Addicts Wage Legal Battle Over Prescription Use, *GUARDIAN*, Aug. 28, 2016.

141 Telephone Interview with James Cagle, Mar. 17, 2023 [hereinafter Cagle Interview].

142 *Id.*

143 Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty., 773 S.E.2d 627, 629 n.4 (2015).

144 MCGREAL, *supra* note 136, at 222 (quoting Mike Smith of the West Virginia Police Department).

145 *Id.*

146 *Id.*

147 *Former Mingo County Doctor Sentenced to Federal Prison for Painkiller Prescription Conspiracy*, U.S. ATTY.’S OFF. FOR THE S. DIST. OF W. VA. (Sept. 18, 2012), [https://www.justice.gov/archive/usao/wvs/press\\_releases/Sept2012/attachments/091812Shafer-sentencing.html](https://www.justice.gov/archive/usao/wvs/press_releases/Sept2012/attachments/091812Shafer-sentencing.html). Ultimately, Shafer was arrested and pled guilty to the charge of “conspiracy to misuse a Drug Enforcement Administration (DEA) registration number.” In its press release, the FBI explained: “Shafer admitted that she was responsible for providing painkiller prescriptions to patients she did not examine, but who came to her Williamson, West Virginia office and paid a cash fee.” *Id.* In 2009 alone, Dr. Shafer reportedly wrote 17,065 prescriptions. MCGREAL, *supra* note 136, at 222.

148 Cagle Interview, *supra* note 141.

149 *Id.* Prior to filing a lawsuit, Cagle tried to engage the DEA. In fact, he wrote a letter to the DEA’s top investigator in West Virginia, Special Agent Dominic Grant, alerting him to the cars with out-of-state license plates that streamed in to Sav-Rite’s parking lot. Cagle even sent along a surveillance tape

to a prescription overdose, put the word out that Cagle was considering litigation and numerous individuals came forward, clamoring for assistance.<sup>150</sup>

With Preece's help, in 2010, Cagle filed the first suit on behalf of various men and women from Mingo County. The complaint alleged that a range of defendants, including Tug Valley Pharmacy, Sav-Rite Pharmacy, Mountain Medical Center, Dr. Katherine Hoover, and Dr. Diane Shafer along with a few others "negligently prescribed and dispensed controlled substances causing [plaintiffs] to become addicted to and abuse the controlled substances."<sup>151</sup> As one court filing put it: "The Plaintiffs are persons who went to the physicians who were operating the 'pill mills' in Mingo County and pharmacies who acted with these corrupt physicians to create and to continue the epidemic."<sup>152</sup>

The crux of plaintiffs' complaint was that they sought treatment following various accidents and injuries (frequently, car wrecks and injuries sustained in the local coal mines) and then were irresponsibly prescribed ever-escalating doses of prescription painkillers.<sup>153</sup>

Regarding Mountain Medical, the plaintiffs alleged:

Individuals who went to Mountain Medical paid in cash. The cost of the initial visit was approximately \$450. The cost of all follow-up visits was \$150 each. Patients were called back to see persons of unknown qualification who would then take their blood pressure and perhaps weigh them. Then the medications would be called in. However, if an individual was well known to an employee, the employee would call that person into the hallway and tell them that their prescription would be called in. They seldom or never saw a doctor. No medical examination occurred and any physical examination which was conducted was merely cursory in nature and pretextual.<sup>154</sup>

In so doing, plaintiffs claimed, Mountain Medical "regularly wrote prescriptions which they should have known by the exercise of due diligence were not written for legitimate medical purposes, thereby continuing or causing addiction and related debilitating medical conditions."<sup>155</sup> As one plaintiff, Willis Duncan, more colorfully

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substantiating his claims. "I find the situation deplorable and tragic," he wrote. "It is as if a whole region of people is suffering from an epidemic while a few are prospering while they feed the epidemic and misery which it causes." Despite this effort, for a long time, the DEA stayed on the sidelines. EYRE, *supra* note 138, at 27.

150 *Id.* at 45, 47.

151 Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty., 773 S.E.2d 627, 628 (W. Va. 2015).

152 Plaintiffs' Memorandum in Support of Response to Motion for Summary Judgment, at 3 [hereinafter Summary Judgment Response].

153 EYRE, *supra* note 138, at 46 (describing plaintiffs' "path to addiction").

154 Plaintiff Dennis Mitchell Smith's Responses to Defendant Tug Valley Pharmacy's First Set of Interrogatories and Requests for Production of Documents.

155 Plaintiff Joyce Mullins' Responses to Defendant Tug Valley Pharmacy's First Set of Interrogatories and Requests for Production of Documents.

described the practice: “You’d get to the clinic at five o’clock in the morning. They didn’t open till eight o’clock, but at five o’clock there would be a hundred people there waiting.” “You could tell them [anything] hurts and they would write you a script. The doctor’s signature was already on it when you went in.”<sup>156</sup>

The conduct by defendant pharmacists was, in plaintiffs’ telling, similarly deficient. As plaintiffs explained in regard to Sav-Rite: “The pharmacy was in effect an assembly line filling one prescription for controlled substances after another for cash to addicts or other drug seekers who came every month for the same ‘cocktail’ of pain medications.”<sup>157</sup> Likewise, Tug Valley, one plaintiff recalled, was characterized by a line of “[s]o many people. . . coming in from everywhere.”<sup>158</sup> “And there were people slumped over. I mean, totally out of their mind.”<sup>159</sup>

In time, plaintiffs said, they became addicted to opiates. This addiction, they said, resulted in the loss of their jobs, the fracturing of their families, the deterioration of their health, and—particularly relevant for the litigation—their “admitted criminal abuse of the prescriptions and criminal activity associated with obtaining the drugs.”<sup>160</sup>

## 5.2 Defendants’ Invocation of the Wrongful Conduct Rule

Defendants seized upon this final fact. After engaging in extensive discovery to compile a detailed record of each plaintiff’s criminal conduct, in 2013, defendants moved for summary judgment pursuant to the wrongful conduct rule. Plaintiffs, they alleged, had “made admission after admission of illegal conduct,” including

<sup>156</sup> McGreal, *supra* note 140.

<sup>157</sup> Plaintiff Bruce Blankenship’s Responses to Defendant Strosnider Drug Store, Inc’s First Set of Interrogatories and Requests for Production of Documents. Sav-Rite and Strosnider were the same outfit that, at times, went by different names.

<sup>158</sup> Respondents’ Br., *supra* note 4, at 12 (quoting deposition of plaintiff Sula Collins).

<sup>159</sup> *Id.*

<sup>160</sup> *Tug Valley Pharmacy*, 773 S.E.2d at 629. In particular, the court recounted:

All of the [plaintiffs] admitted to engaging in most, if not all, of the following illegal activities... criminal possession of pain medications; criminal distribution, purchase, and receipt of pain medications (“off the street”); criminally acquiring and obtaining narcotics through misrepresentation, fraud, forgery, deception, and subterfuge (not advising doctors of addiction or receipt of narcotics from other doctors); criminally obtaining narcotics from multiple doctors concurrently (commonly known as “doctor shopping”); and abusing and/or misusing pain medication by ingesting greater amounts than prescribed and snorting or injecting the medications to enhance their effects.

*Id.*

“possession of a controlled substance by misrepresentation, fraud, forgery, deception and subterfuge.”<sup>161</sup> This misconduct, defendants argued, barred the plaintiffs from relief. As Tug Valley put it in a summary judgment motion against a particular plaintiff:

Plaintiff has distinguished himself with prolonged, deliberate, *immoral, illegal, and criminal* conduct throughout all times relevant, conduct that was specifically designed to gain access to and abuse the very drugs that he now claims harmed him. The actions of this Plaintiff are not those of a victim, but rather, they are the actions of a criminal. West Virginia’s longstanding public policy dictates that no person should profit from his or her own illegal activity. This Court, and the civil justice system, should afford no shelter or redress for such clear wrongdoers.<sup>162</sup>

Elsewhere, defendants went further, reciting now-familiar arguments: “[T]he plaintiffs have the audacity to attempt to seek financial recovery for alleged injuries and damages which stem from their own illegal and immoral acts. . . . Quite simply, the plaintiffs are attempting to make a mockery of our judicial system and to profit from their own wrongdoing.”<sup>163</sup>

Cagle, meanwhile, conceded that the plaintiffs had taken desperate and even unlawful actions to feed their addictions. But he drew the arrow backward, maintaining that the *responsibility* for the plaintiffs’ actions rested with the defendants. “[Y]es,” the plaintiffs had “an addiction, an overuse problem,” Cagle conceded, but “[w]here does that come from and how is that supplied? By the defendants that we sue.”<sup>164</sup> “[O]ne who becomes drug addicted or dependent through acts of others,” he insisted, “should be entitled to sue as a plaintiff in a case against those who have caused, contributed to and profited from plaintiff’s addiction.”<sup>165</sup>

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**161** Hearing Tr., *supra* note 5, at 7, 15 (argument of Michael M. Fisher, counsel for Tug Valley Pharmacy, Family Pharmacy, and Ricky Ballengee).

**162** Defendant Tug Valley Pharmacy, LLC’s Memorandum of Law in Support of its Motion for Summary Judgment Against Dewey Marcum, at 19. In their brief to the West Virginia Supreme Court, defendants further insisted: “[T]he plaintiffs seek, through the prosecution of these claims, to profit from their own admitted criminal wrongdoing and immoral behavior, to persuade the Court to encourage and condone their illegal conduct, and to abuse and make a mockery out of our judicial system. . . .” Petitioners’ Brief in the Supreme Court of West Virginia, Apr. 28, 2014, at 2 [hereinafter Petitioners’ Br.].

**163** Petitioners’ Br., *supra* note 162, at 19.

**164** Hearing, *supra* note 5, at 35 (argument of James Cagle). *See also* Summary Judgment Response, *supra* note 155, at 21 (“The gravamen of the complaints is that the Defendants caused the addiction. The snorting, buying off the street, etc., followed the addiction and were a resulting and foreseeable product of the addiction.”).

**165** Respondents’ Br., *supra* note 4, at 3–4. Supporting Cagle, see Lauren Rousseau & I. Eric Nordan, Tug v. Mingo: *Let the Plaintiffs Sue—Opioid Addiction, the Wrongful Conduct Rule, and the Culpability Exception*, 34 W. MICH. U. COOLEY L. REV. 33, 72 (2017) (explaining that the well-established “diagnostic features of severe opioid use disorder” neatly track the plaintiffs’ activity).

Unsure of the status of the wrongful conduct rule in West Virginia, the Circuit Court of Mingo County ultimately certified the question to the state's high court.<sup>166</sup> The Circuit Court asked: “May a person maintain an action if, in order to establish the cause of action, the person must rely, in whole or in part, on an illegal or immoral act or transaction to which the person is a party?”<sup>167</sup>

### 5.3 The Decision of the West Virginia Supreme Court

A divided (3–2) Supreme Court of West Virginia answered the question in the affirmative. The court started by offering a summary of the wrongful conduct rule, and then the court cataloged the trouble with the doctrine. In particular, the court artfully highlighted the risk of ad hoc and arbitrary application—particularly since “moral offensiveness is a patently subjective notion.”<sup>168</sup> And, the court observed that, where the rule has been accepted, its application has been (to put it charitably) uneven.<sup>169</sup>

Then, the court turned to the traditional justifications for the rule—and it subjected those justifications to blistering critique. Addressing the “no-profit” rationale, the court explained: “[T]he suggestion that the absence of such a rule allows a plaintiff to ‘profit’ from his wrongdoing is misguided; if a plaintiff is injured as the result of someone’s negligence, merely obtaining compensation for his loss does not constitute ‘profit.’”<sup>170</sup> Also unconvincing, in the court’s view, was “the fear that the public will find recovery by those who engage in criminal conduct ‘unseemly.’”<sup>171</sup> That, said the court, “is based upon the antiquated conceit that ‘[n]o polluted hand

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Given the plaintiffs’ vulnerability (which the defendants undeniably preyed upon and profited from), it is interesting to consider whether *Tug Valley* would have come out as it did, even if the court had endorsed the wrongful conduct rule, in light of the rule’s well established exceptions. Namely, the wrongful conduct rule does not bar the plaintiff’s claims when the defendant is more culpable than the plaintiff, *see supra* note 51 and accompanying text (describing the culpability exception); nor does it apply when the plaintiff lacks sufficient capacity, understanding, and free will, *see supra* note 53 (describing the capacity exception). *Cf. Tug Valley Pharmacy*, 773 S.E.2d at 633 n.10 (observing that, though the plaintiffs did engage in criminal activity, compared to the plaintiffs, the “wrongdoing by highly-trained, licensed professionals, charged with the grave responsibility of the health and welfare of the public, may actually be considered more abhorrent”).

<sup>166</sup> *Tug Valley Pharmacy*, 773 S.E.2d at 629–30.

<sup>167</sup> *Id.* at 630.

<sup>168</sup> *Id.* at 631 (quoting King, *supra* note 1, at 1051).

<sup>169</sup> *Id.* at 632.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 633.



shall touch the pure fountains of justice” and “is a dangerous premise.”<sup>172</sup> “Our duty,” declared the court, “is to the rule of law, not public opinion.”<sup>173</sup>

Finally, the court turned to the wrongful conduct rule’s inconsistency with comparative fault—and it ended that analysis with a rousing celebration of both comparative fault and jury discretion. In so doing, the court flatly rejected the “Hobson’s choice” of either: “(a) barring plaintiff’s recovery, thereby encouraging *plaintiff* to obey the law, or (b) permitting plaintiff’s recovery, thereby encouraging *defendant* to obey the law.”<sup>174</sup> The genius of comparative fault, the court observed, is that it “obviates the need for such a choice.”<sup>175</sup> Comparative fault “leaves to the jury, fully versed on the facts and inter-relationship between the wrongful actors, the decision as to which conduct it, as a society, prefers to discourage.”<sup>176</sup> And, *modified* comparative fault, long in place in West Virginia, appropriately empowers *juries* to “bar[] recovery for individuals who contribute 50 % or more to their own injuries.”<sup>177</sup>

The court explained that, pursuant to this system of modified comparative fault, rather than slapping “a ‘bad actor’ tag on each of the parties and washing the courts’ hands of the matter,” a different and more granular analysis is called for.<sup>178</sup> In particular, when the plaintiff “has engaged in allegedly immoral or criminal acts, the jury must consider the nature of those actions, the cause of those actions, and the extent to which such acts contributed to their injuries”—all complex and fact-intensive inquiries—which “require the jury’s venerable analysis and respected consideration.”<sup>179</sup>

The court concluded that, “while facially deeming persons unworthy may assuage the sensitivities of decision makers... such a position undermines our tort system of compensatory justice.”<sup>180</sup> Accordingly, “[u]nless otherwise provided at law,” a plaintiff’s conduct must be assessed *alongside* the defendant’s conduct, in accordance with comparative fault principles.<sup>181</sup>

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172 *Id.*

173 *Id.* at 632–33 (certain citations omitted).

174 *Id.* at 636 (quotation marks and citation omitted).

175 *Id.*

176 *Id.*

177 *Id.* at 633.

178 *Id.* at 636.

179 *Id.* at 635.

180 *Id.* at 636 (quotation marks and alterations omitted).

181 *Id.*

## 5.4 A Post-script

Notwithstanding the court's elegant and incisive opinion, the story of *Tug Valley Pharmacy* does not have an unequivocally happy ending. As the case was pending, the West Virginia legislature stepped in to codify the wrongful conduct rule, and Governor Earl Ray Tomblin signed the bill into law on the day after the *Tug Valley* oral argument.<sup>182</sup> Given that legislative action, the plaintiffs' victory, Cagle explained, was a "one-off."<sup>183</sup> After these plaintiffs walked through the door opened by the Supreme Court's decision, that door was unceremoniously shut.

Nor did the plaintiffs themselves flourish. In the years following the court's decision, the parties continued to engage in hard-fought discovery, including additional rounds of depositions where defendants continued to grill plaintiffs on their illicit drug acquisition and use.<sup>184</sup> Then, after a few more years—roughly 10 years after the first claims were filed—the litigation was finally settled for a confidential sum.<sup>185</sup> Asked whether the settlement made a difference in the lives of his clients, Cagle reflected: "I would hope so, but I'm not so naïve to think that it necessarily did. One of the things I did offer to the clients was that I'd put aside some money and that money would go to anyone who wanted to go to rehab. But nobody ever took me up on that offer."<sup>186</sup>

Nor, of course, is the broader opioid story a happy one. Roughly five years after Jim Cagle filed the first *Tug Valley* suit, the broader battle against opioid sellers and manufacturers took a sharp turn. Mimicking tobacco litigation, where, between 1950 and 1990, individual injury suits initiated by smokers faltered and then, ultimately, public plaintiffs took the reins—in opioids, states, counties, and municipalities ultimately stepped in for (and supplanted) individual victims. Unlike drug users (or the smokers before them), these *public* plaintiffs complained, not about injury to their bodies but, rather, the blow to their bottom lines.<sup>187</sup> This public-for-private substitution was driven, in large measure, because the surrogate public plaintiffs (unlike, say, the embattled men and women of Mingo County) were impervious to the

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**182** W. VA. CODE ANN. § 55-7-13d(c). The law established: "In any civil action a person... who asserts a claim for damages may not recover if: (1) Such damages arise out of the person's commission, attempted commission, or immediate flight from the commission... of a felony; and (2) That the person's damages were suffered as a proximate result" therefrom. For discussion, see *Tug Valley Pharmacy*, 773 S.E.2d at 641–42 & n.1 (Benjamin, J., concurring); EYRE, *supra* note 138, at 49.

**183** Cagle Interview, *supra* note 141. The legislative action did not affect the plaintiffs' claims. See *Tug Valley Pharmacy*, 773 S.E.2d at 630, n.6.

**184** Cagle Interview, *supra* note 141.

**185** *Id.*

**186** *Id.*

**187** See Engstrom & Rabin, *supra* note 42, at 316–21.

wrongful conduct rule, character assassination, and the assumed risk defense. To paraphrase Mike Moore, the Attorney General for the State of Mississippi who, in the early 1990s, had pioneered this strategy: Unlike the men and women of Mingo County, the state of West Virginia had never doctor shopped or abused prescription opioids.<sup>188</sup>

With public actors holding the reins, litigation against opioid defendants ultimately took off.<sup>189</sup> In 2017, a massive MDL was formed to consolidate what would balloon to roughly 2700 federal claims brought by cities, counties, municipalities, Indian tribes, and hospitals all ravaged by opioid abuse; states, too, filed suit (though these suits were not consolidated).<sup>190</sup> Over the past six years, these thousands of public plaintiffs have battled a dense web of opioid defendants (including manufacturers, distributors, and retailers). Recently, following some marquee bellwethers, the litigation has started to wind down; as of the time of this writing, the parties have inked more than \$54 billion in settlements.<sup>191</sup>

Yet, individual litigation, initiated by those whose lives have been damaged (or extinguished) by opioids, has continued to struggle. Indeed, to the best of our knowledge, no individual plaintiff has ever prevailed (via judgment) in a suit against an opioid retailer, distributor, or manufacturer, although, like the plaintiffs of Mingo County, some have received payments via settlement.<sup>192</sup>

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**188** Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B. A. J., Jan. 1997, at 53 (pointing out that the state of Mississippi had never smoked); accord Edgar Aliferov, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 *FORDHAM L. REV.* 1141, 1173–74 (2018) (observing that “government-entity claims circumvent all of the issues related to blameworthiness that encumbered lawsuits by individuals against opioid companies: product misuse, wrongful conduct, and contributory or comparative negligence”).

**189** This, too, echoes tobacco. As noted, smokers’ suits against tobacco companies faltered. But state litigation against tobacco companies saw extraordinary success—and, in fact, led to the largest settlement in the history of American civil litigation. In particular, in November 1998, the five major tobacco companies entered into the Master Settlement Agreement (MSA) with 46 states for \$206 billion to be paid over 25 years. (Four states had settled earlier for an additional \$40 billion.) For discussion, see ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* 432–38 (2007).

**190** See Engstrom & Rabin, *supra* note 42, at 319–20.

**191** For up-to-date settlement information, see <https://www.opioidsettlementtracker.com/globalsettlementtracker>. For a notable bellwether, see *City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 2022 WL 3224463 (N.D. Cal. 2022).

**192** For past settlements, see Engstrom & Rabin, *supra* note 42, at 314. For judgments, see Hoffman, *supra* note 34 (reporting that no opioid case involving individual victims alleging injury at the hands of pharmaceutical companies even made it to trial in the United States prior to January 2023—and that that suit, involving 21 plaintiffs who went to trial in Brunswick, Georgia, resulted in a defense verdict).

Meanwhile, the on-the-ground opioid story is unreservedly grim. True, across the country, many pill mills that initially fueled the epidemic have closed,<sup>193</sup> and physicians' prescription practices have normalized.<sup>194</sup> (Between 2011 and 2021, opioid prescriptions fell more than 60 %.<sup>195</sup>) But it is all, unfortunately, too little too late. As doctors became less willing to write scripts, many who were already hooked on prescription opioids transitioned to cheaper and more readily available off-market alternatives.<sup>196</sup> And these off-market alternatives (chiefly, fentanyl and heroin) are, unfortunately, deadly. Fueled by fentanyl, 2022 witnessed a staggering 110,236 overdose deaths in the United States, such that drug overdose is now the leading cause of injury mortality in the United States<sup>197</sup> and the number one cause of death for Americans under age 50.<sup>198</sup> Enough young people died by overdose to drag down the life expectancy in the country to the lowest level in two decades.<sup>199</sup> One cannot help but wonder what the picture would look like if so many early lawsuits against opioid manufacturers, distributors, pill mills, and pharmacies had not experienced defeat at the altar of the wrongful conduct rule—and if accountability

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**193** For a discussion of state crackdowns, see Maia Szalavitz, *We're Overlooking a Major Culprit in the Opioid Crisis*, SCI. AM., May 28, 2021; Terry Spencer, *Florida 'Pill Mills' Were 'Gas on the Fire' of Opioid Crisis*, ASSOCIATED PRESS, July 20, 2019; Mary Ann Roser, *A Few States Making Big Strides in Shuttering Pill Mills*, AUSTIN AM.-STATESMAN, Sept. 25, 2018.

**194** In 2020, doctors and dentists penned 43.3 opioid prescriptions per 100 persons. By comparison, between 2010 and 2012 (the opioid prescription peak), doctors and dentists penned approximately 81 prescriptions per 100 persons. CDC, *U.S. Opioid Dispensing Rate Maps*, <https://www.cdc.gov/drugoverdose/rxrate-maps/index.html>. See also DEA Fact Sheet, *supra* note 137 (reporting that, in 2013, 136.7 million prescriptions for hydrocodone-containing products were dispensed, whereas, by 2018, that number was down to 70.9 million).

**195** Szalavitz, *supra* note 193.

**196** For more on the move from on-market to off-market alternatives, see COUNCIL OF ECON. ADVISERS, *THE ROLE OF OPIOID PRICES IN THE EVOLVING OPIOID CRISIS* 9, 30–31 (2019) (tracing the rise in heroin and fentanyl use to the drop in the supply of prescription opioids and the 2010 reformulation of OxyContin which made it harder to crush); Szalavitz, *supra* note 193 (explaining that “when people with addiction lost access to pharmaceuticals like oxycodone (the active drug in OxyContin), they created a massive demand for street opioids”).

**197** For the total death figure, see Brian Mann, *2022 Was a Deadly (But Hopeful) Year in America's Opioid Crisis*, NPR, Dec. 31, 2022. Roughly three-quarters of these overdoses involved opioids. See CDC, *Death Rate Maps & Graphs*, <https://www.cdc.gov/drugoverdose/deaths/index.html> (providing data from 2020). For the fact drug overdose is the leading cause of injury mortality, see CDC, *Drug Overdose Deaths*, <https://www.cdc.gov/nchs/hus/topics/drug-overdose-deaths.htm>.

**198** Dean Reynolds, *Overdoses Now Leading Cause of Death of Americans Under 50*, CBS NEWS, June 6, 2017.

**199** Mann, *supra* note 197. Those aged 25 to 54 record the lion's share (roughly 71 %) of opioid deaths. See Nat'l Safety Council, *Drug Overdoses*, <https://injuryfacts.nsc.org/home-and-community/safety-topics/drugoverdoses/>.

had come sooner to those who manufactured, distributed, prescribed, and sold the prescription opioids that got so many Americans hooked.

But any coda to *Tug Valley* must include this critical fact. In late 2009, Debbie Preece had asked Jim Cagle: “why can’t we do something to the pharmaceutical companies?” and that question had gnawed on him.<sup>200</sup> Later, when Cagle was deposing Randy Ballengee, the pharmacist who owned and operated Tug Valley Pharmacy, Cagle took the opportunity to zero in. Cagle asked who supplied Tug Valley with its millions of pills, and Ballengee talked, describing the irresponsible practices of AmerisourceBergen and others.<sup>201</sup> Thereafter, Cagle, and his longtime friend, Rodney “Bulldog” Jackson, approached West Virginia’s then-Attorney General Darrell McGraw and convinced McGraw to file the first major public lawsuit against the distributors, including AmerisourceBergen and Cardinal Health.<sup>202</sup> It was *that* lawsuit, with roots firmly planted in *Tug Valley*, that, in 2015, brought the first round of opioid distribution data to light.<sup>203</sup>

## 6 Conclusion

The wrongdoer doctrines—the wrongful conduct rule, the actual innocence requirement, the non-innocent party doctrine, and the complicity defense—are, in our view, born of two persistent preoccupations in American tort law. The first is a continuing fixation on “blameworthiness”—and judges’ desire, as the West Virginia Supreme Court put it, to affix “a ‘bad actor’ tag” on certain plaintiffs, barring them

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**200** EYRE, *supra* note 138, at 51.

**201** *Id.* at 53. In a subsequent deposition, Cagle tried to ask James Wooley about Sav-Rite’s suppliers, but he pled the Fifth Amendment. *Id.* at 54. Ultimately, Wooley was sentenced to six months in federal prison for “conspiracy to acquire or obtain controlled substances by misrepresentation, fraud, forgery, deception, and subterfuge.” FBI Press Release, *Mingo County Pharmacist Sentenced to Prison Time for Conspiracy to Acquire Controlled Substances by Fraud*, Nov. 15, 2012. When entering the plea, Wooley finally “admitted that he knew that the prescriptions that were issued to various patients at the time were not valid.” *Id.*

**202** EYRE, *supra* note 138, at 57–60. For further discussion, see Edgar Aliferov, *The Role of Direct-Injury Government-Entity Lawsuits in the Opioid Litigation*, 87 *FORDHAM L. REV.* 1141, 1153–54 (2018).

**203** As one Pulitzer prize-winning journalist put it, the lawsuit unlocked “the pill numbers... that would change everything.” EYRE, *supra* note 138, at 165. Likewise, the *Washington Post* explained: With that 2015 “data dump... [f]or the first time, the state learned the scale of the opioid shipments.” Debbie Cenziper et al., *The Opioid Files: ‘They Looked at Us Like an Easy Target’*, *WASH. POST*, Oct. 18, 2019. That public litigation was settled in January 2017. As part of the settlement, AmerisourceBergen agreed to pay \$16 million, Cardinal Health committed \$20 million, and the smaller distributors agreed to pay a total of \$11 million. Cenziper et al., *supra*. Later, Cagle called the cases “‘the maiden voyage’ in the series of lawsuits that would follow.” *Id.*

from relief.<sup>204</sup> The second is judges' interest in maintaining control and a refusal to cede *too much* authority to juries. As Part 2 explains, in the early years of the nineteenth century, both of these impulses fueled the widespread adoption of contributory fault. And now, even though contributory fault has long been discarded, the same basic impulses endure—albeit now in these vestigial forms.

Writing in 1946, during a time when contributory fault barred even modestly at-fault plaintiffs from relief, Wex Malone wrote that the rise and popularity of that all-or-nothing doctrine was largely explained by *control*—the fact that “[c]ourts wanted to control juries during the last century, they want to control them today, and they will probably want to continue to control them in the future.”<sup>205</sup> Indeed, with striking prescience, Malone predicted, “if not through contributory negligence, they will find some other way.”<sup>206</sup> Roughly 30 years after Malone wrote, contributory negligence was supplanted by comparative fault.<sup>207</sup> Undeterred, courts adhered to the wrongful conduct rule, the actual innocence prerequisite, the non-innocent party doctrine, and the complicity defense, retaining for themselves this control mechanism.

As the West Virginia Supreme Court so powerfully explained, courts that extinguish plaintiffs' claims through the wrongful conduct rule (and also, we would add, that rule's sister doctrines) essentially conclude “*as a matter of law*, the plaintiff's fault exceeded the defendant's.”<sup>208</sup> They deploy, as the court put it, “a stealth version of comparative fault, but with the court in control rather than the jury.”<sup>209</sup> “Rather than endorsing this surreptitious transfer” of power, in *Tug Valley*, in a forceful and well-reasoned opinion, a slim majority of the West Virginia Supreme Court returned the authority to assess and allocate the parties' fault to properly instructed juries—the place where that authority rightly belongs.<sup>210</sup>

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204 *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 636 (W. Va. 2015).

205 Malone, *supra* note 17, at 841.

206 *Id.*

207 See *supra* notes 23–27 and accompanying text.

208 *Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cnty.*, 773 S.E.2d 627, 634 (2015) (quotation marks omitted).

209 *Id.* (quotation marks omitted).

210 *Id.*