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Two to Tango: Rethinking a Unilateral Duty of Care

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INTRODUCTION

Contributory negligence is at once familiar and intuitively attractive, yet somehow still awkward to employ and justify.[1] While just about everyone will be intuitively pleased to hear that those who set themselves up for harm will have their recovery for such harm reduced,[2] the operation of the rule is clunky. Black letter law calls contributory negligence a duty owed to others to behave reasonably towards oneself.[3] But that definition is at odds with what we normally mean when we use the term 'duty.'[4] For instance, while it may be in breach of a freestanding 'duty,' nobody in the world has standing to keep me from eating more calories than I should.[5] Likewise, nobody in the world can recover damages from my juggling knives alone in my home.[6] But the legal system has a useful, and admittedly nifty, mechanism for enforcing this duty of self-care.[7] The duty is enforceable solely through reduction in recovery when the person who violates the duty is injured and the violation of the duty contributes to her injury.[8]

As for justifications, even though contributory negligence is so immediately attractive and universally recognized and accepted, its foundation is unclear.[9] Initially, contributory negligence was an all-or-nothing bar to recovery premised on the legal fiction of a single legal cause.[10]

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1. This article assumes an introductory familiarity with negligence and contributory negligence claims. For a more thorough analysis, *see* Restatement (First) of Torts § 463 (West 2019) (defining contributory negligence and pointing to resources for understanding its many intricacies).

2. *See* Davis v. Guarnieri, 15 N.E. 350, 359 (Ohio 1887).

3. DAN B. DOBBS ET AL., THE LAW OF TORTS I § 219, 764 (2d ed. 2011).

4. *See id.* at § 219, 764-65, n.4 ("Traditionally a duty is enforceable by a legal action.").

5. A plaintiff-to-be has no standing without injury; *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (recognizing an established irreducible constitutional minimum for standing containing three elements: injury in fact, causality, and redressability).

6. *See Lujan*, 504 U.S. at 560-61.

7. *See e.g.,* DOBBS ET AL., *supra* note 3, at § 219, 764-65 n.4 ("[T]he plaintiff owes a duty to use reasonable care for her own safety, a duty enforceable by a reduction in or a bar to her damages.").

8. *See id.* at § 219, 765 n.4.

9. DAN B. DOBBS ET AL., THE LAW OF TORTS I § 223 (2d ed. 2019) [hereinafter DOBBS II ET AL.]

10. Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 693 (1953) ("Earlier legal thinking had been very much dominated, though perhaps never exclusively, by the notion that while there may be many causes of an injury in a lay or scientific sense, yet the law should quest for a sole or principal *proximate* cause.").

The goal was to find the one person actually responsible for an injury and place the entire monetary loss resulting from the injury solely upon her lonely shoulders.[11] As legal scholars became more discerning, they realized that injuries nearly always have multiple contributors, and so contributory negligence expanded from an instrument of sole legal cause.[12] Today, no one justification is clearly favored above the others, but three are worth mentioning. First, many scholars justify contributory negligence by viewing it strictly as a corollary of proximate cause.[13] Much like an enlightened legal cause approach, the proximate cause approach seeks to split a loss between those who have caused an injury.[14] That is, contributory negligence apportions responsibility to all those who have proximately caused an injury.[15] Importantly, the proximate cause corollary is morally neutral.[16] It does not place blame on those who cause injuries, it merely places responsibility.[17]

A second group of scholars justify contributory negligence through a moral filter.[18] A reduction in recovery from contributory negligence, therefore, is a response to a plaintiff's moral culpability for violating the duty owed to herself.[19] Under this view, a plaintiff who misbehaves is rightfully limited in recovery because her misbehavior puts her on the same morally bankrupt ground as the person who has injured her.[20] Put another way, only those with clean hands can avail themselves of the protections of the judicial system.[21]

The third justification views contributory negligence as a deterrent to self-carelessness.[22] Under this view, the civil legal system acts as a set of

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11. *See id.* at 693 & n.14.

12. *Id.* at 697 ("There are situations, to be sure, where plaintiff's negligence is the sole proximate cause of his injury. But in such a case there is neither need nor room for the doctrine of contributory negligence. Indeed . . . [c]ontributory negligence is *never* properly invoked when plaintiff's negligence alone causes the damage but only when the negligence of both the plaintiff and defendant are contributing proximate causes of it.").

13. *Id.* at 696 ("The contributory negligence rule is sometimes sought to be justified as a corollary of principles of proximate cause.").

14. *See id.* at 696-97; *see also* Palsgraf v. Long Island R. Co., 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (representing the proposition that the law should apportion liability for injuries to those who proximately cause it).

15. *See* James, Jr., *supra* note 10, at 696-97 & n.27.

16. *See* Gregory C. Sisk, *Comparative Fault and Common Sense*, 30 GONZ. L. REV. 29, 34 (1994).

17. *See id.* at 38.

18. *Davis*, 15 N.E. at 359 ("The doctrine of contributory negligence . . . is founded upon . . . [t]he principle which requires every suitor who seeks to enforce his rights or redress his wrongs, to go into court with clean hands, and which will not permit him to recover for his own wrong.").

19. *See* Sisk, *supra* note 16, at 34; *See also* DOBBS ET AL., *supra* note 3, at § 219, 765 n.4.

20. *Davis*, 15 N.E. at 359.

21. *Id.*

22. James, Jr., *supra* note 10, at 700; *See generally* William Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 270 (1890) ("A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict is likely to be more careful in future.").

incentives to guide behavior ex ante.[23] Contributory negligence, therefore, works to promote reasonableness in plaintiffs as standard negligence works to promote reasonableness in defendants.[24] What should be apparent on closer inspection is that – absent some evidence of the diminishing marginal deterrent effects – this justification just does not work.[25] For every bit of incentive-creating, whip-cracking liability contributory negligence saddles an unreasonable plaintiff with, it offers exactly the same amount of incentive-defeating amnesty to an unreasonable defendant.[26] The deterrent effect of contributory negligence is therefore entirely nullified.[27] For that reason, this article will refer only to the morally neutral proximate cause justification and the morally- motivated clean hands justification as it applies new concepts to existing justifications.[28] As this article progresses, I will make the case that the morally neutral proximate cause justification is the more appropriate of the two.[29] Do you agree?

The reason I have taken a dip into the pond of theoretical justifications is that this article analyzes the intersection of contributory negligence and the eggshell skull rule.[30] More specifically, it argues that where the eggshell skull does not currently allow defendants to raise the contributory negligence defense, it should.[31] In order to make such a claim, it will be necessary to frequently review the justifications for the rule.[32]

Before getting there, however, there is a little more table-dressing that must be done. The last bit of technical groundwork to be laid (technical plates and silverware?) is the distinction between causal apportionment and comparative fault. Both split liability between two or more parties, but they do so in different situations.[33] Causal apportionment is invoked when an injury is divisible.[34] An injury is divisible when damages can be separated

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23. Schofield, *supra* note 22, at 269-70 ("In an action for negligence it is of no consequence to the law whether the particular defendant shall be compelled to pay damages, or whether the loss shall be allowed to lie where it fell. The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and to tend to prevent like accidents from happening in future.").

24. *See* DOBBS ET AL., *supra* note at 3, at § 219, 764 n.4.

25. *See* Charles L. B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 682 (1934).

26. *Id.* ("[I]f punishing a man for his negligence makes men careful, then the failure to punish negligence encourages carelessness.").

27. *Id.*

28. *See infra* Part III.C.1.

29. *Id.*

30. *See infra* Part I.

31. *See infra* Part II.A, II.B.

32. *See infra* Part III.C.1, III.C3.

33. *See* DOBBS II ET AL., *supra* note 9, at § 229.

34. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26(a) (WEST 2019); *see* DOBBS II ET AL., *supra* note 9, at § 229.

into discrete parts caused by different actions.[35] The damages are therefore said to be apportioned based on which actions caused them.[36] Comparative fault is invoked when an injury is indivisible.[37] An injury is indivisible when grounds for separation of damages do not exist.[38] Liability is then assigned to whichever person's or persons' tortious conduct is determined responsible for the indivisible damages, with a greater portion of liability being assigned to more responsible parties.[39]

To illustrate the points I have just made, consider a three-car car crash.[40] Drivers A and B, both texting while driving, collide head-on with one another in the middle of an intersection, causing driver A to break his right arm. Moments later, driver C, also texting while driving, barrels through the intersection, crashing into driver A's car, breaking A's left arm. Suppose also that all facts stipulated can be proven at trial. A's injury (his two broken arms) is divisible and will be apportioned causally. A's right arm break will be apportioned to the first crash (which is itself a single indivisible injury). The right arm break will be subject to comparative fault analysis and a court will likely find that both A and B have behaved equally negligently, and liability will be split between them. B has breached a duty owed to A to avoid injuring A (negligence). A has breached a duty to B to avoid injury herself (contributory negligence). A's left arm break will be apportioned to the second crash. The break will be subject to comparative fault analysis and a court will likely find that only C has behaved negligently, and the entirety of the liability will be assigned to her.[41]

Throughout the rest of the article, every injury will be an indivisible injury (where they are questionable, assume indivisible).[42] Therefore, anytime I refer to an assignment of liability (or the like), I am in shorthand referring to comparative fault.

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35. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26(b); *see* DOBBS II ET AL., *supra* note 9, at § 229.

36. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26(a).

37. *Id.*; *See* DOBBS II ET AL., *supra* note 9, at § 229.

38. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26(b); *see* DOBBS II ET AL., *supra* note 9, at § 229.

39. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 26(c); *see* DOBBS II ET AL., *supra* note 9, at § 229.

40. *But see* Holtz v. Holder, 418 P.2d 584, 586-87, 588 (Ariz. Ct. App. 1966) (noting that where multiple defendants each cause a substantial amount of harm and the harm cannot be apportioned, once the plaintiff satisfies her burden of showing each defendant's fault, the burden switches to the defendants to show that they did not cause her injuries).

41. Is A's being in the crosswalk a preexisting condition caused by A's own negligence? Yes! But, C's negligence is superseding.

42. This assumption is supported by case law. *See, e.g.*, Borman v. Raymark Indus., Inc., 960 F.2d 327, 335 (3d Cir. 1992) (cancer); Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173-74 (2d Cir. 1970) (schizophrenia); Bartolone v. Jeckovich, 481 N.Y.S.2d 632, 635 (N.Y. App. Div. 1984) (schizophrenia); Garner v. Wyeth Labs., Inc., 585 F. Supp. 189, 190, 193-94 (D.S.C. 1984) (heart attack).

A final note on comparative fault: it may be striking how morally charged the phrase 'comparative fault' appears on its surface. In referring to the division of liability based on multiple contributing causes, the word 'fault' is used.[43] It may be tempting to infer that a moral justification should influence our understanding of the term's operation given that the language itself is so pervasively imbued with a morally charged connotation.[44] But in the case of contributory negligence, a duty to take care of oneself seems difficult to reconcile with fault, guilt, or blameworthiness.[45] In the case of texting while driving, morality has some place; texting while driving risks injuring many more people than just the person who is texting while driving.[46] But in other cases where a plaintiff's contributory negligence risks injuring only herself, there seems to be no obvious room for moral judgment.[47] Consider a person who stands in a construction zone without a hardhat. To the extent that person risks only her own wellbeing, moral judgments appear entirely misplaced.[48] I therefore argue that we should assign 'fault' a neutral connotation such as responsibility, given the incompatibility of guilt with a lack of self-care.[49]

We are now in a position to discuss the eggshell skull rule. To understand the rule, one needs to look little further than the name. It is coined for a plaintiff whose skull is thinner or more fragile than an ordinary skull.[50] Where a typical plaintiff—suppose hit by negligently tossed football—would suffer no more than a slight bruise, the plaintiff with an abnormally brittle skull may suffer life-ending injuries. The eggshell skull rule operates such that the weak-skulled plaintiff may recover for the entire extent of his injuries which are proximately caused by the defendant's tortious acts.[51]

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43. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 722 (1978).

44. Many commentators signal that they understand the phrase to be imbued with morality. *See, e.g.*, Sisk, *supra* note 16, at 35 ("Even in those circumstances where the plaintiff's negligence has posed a risk only to himself and not to others . . . society may properly take full account of the contributorily negligent behavior by treating the plaintiff as a blameworthy actor, together with the defendant.").

45. *See* Schwartz, *supra* note 43, at 722 ("With contributory negligence, however, the conduct in question is conduct that runs an unjustified risk to the actor himself, rather than to others. Given this difference, the conduct that establishes contributory negligence cannot be regarded as egoistical or antisocial; instead it is behavior that, from the actor's or others' perspective, is merely foolish or stupid. This assessment undermines the supposed moral parity between the 'fault' of negligence and the 'fault' of contributory negligence.").

46. *Cf. id.* at 722-23 ("The motorist who drives at night without lights creates an unreasonable risk to himself and to others at the same time.").

47. *Id.*

48. *Id.*

49. *Id.*

50. The classic formulation of the eggshell skull rule is by Kennedy J. in Dulieu v. White and Sons [1901] 2 K.B. 669, 679 (KB) ("If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.").

51. JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 11:1 (3d ed. 2019) ("An injured person is entitled to recover full compensation for all damages that proximately result from a

Traditionally, a plaintiff's recovery is not diminished by the fact that the plaintiff's injury may not have occurred but for a preexisting condition or susceptibility to injury.[52] A defendant takes a plaintiff as she comes, broken as she may be.[53] A defendant pays for the damages she causes.[54] But shockingly, a plaintiff's recovery is not reduced by the fact that her preexisting condition or susceptibility results from her own conduct, voluntary or otherwise.[55] This paper challenges this last, shocking, point.[56] Where the law forces a defendant to take a plaintiff as she comes, broken as she may be, this paper points out that not all brokenness is created equal; in particular, some is created by a plaintiff herself.[57] Ultimately, this paper asserts that the law should bar recovery to the extent that the plaintiff's injury is caused by her own actions.[58]

To clarify the assertion I have just made, consider the realm of possible injuries for which a plaintiff may seek to recover. While the eggshell skull rule applies to all of these injuries, the role of contributory negligence varies from category to category.[59] Consider two basic distinctions. On one axis, consider the character of the injury. That is, distinguish injuries to a plaintiff herself from injuries to things the plaintiff owns or relies on. On the other axis, consider the role of the plaintiff in causing the injury. Distinguish events which the plaintiff causes which cause her injuries (I will refer to these as triggering events) from actions which leave the plaintiff subject to injury from triggering events not caused by her. Regardless of the type of injury, injuries resulting from triggering events caused by a plaintiff allow for a defense of

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defendant's tortious act, even if some or all of the injuries might not have occurred but for the plaintiff's preexisting physical condition, disease, or susceptibility to injury"). This is also true with regard to psychological injuries; *see*, *e.g.*, Steinhauser, 421 F.2d at 1173-74 (noting that where an injured party has a preexisting mental condition, she can still recover damages for mental injury so long as the damages are related to the injury).

52. STEIN, *supra* note 51, at § 11:5 ("The 'eggshell skull' rule, pursuant to which an injured person may recover full compensation for all damages proximately caused by a defendant's tortious act, even if some or all of the injuries might not have occurred but for the plaintiff's preexisting condition or susceptibility to injury, is not changed by the fact that the plaintiff's disability is one resulting from his or her own voluntary conduct.").

53. Cody N. Guarnieri, *Personal Injury Actions and Preexisting Conditions: The Eggshell Plaintiff Doctrine*, BROWN PAINDIRIS & SCOTT, LLP (Feb. 1, 2019), https://www.bpslawyers.com/Articles/Eggshell-Plaintiff-Doctrine.shtml.

54. *Id.*

55. STEIN, *supra* note 51, at § 11:5.

56. *See infra* Parts I.B, I.C.

57. *Id.*

58. *See infra* Parts II.B, III.C.1.

59. The Eggshell Skull Rule is more of an underlying principle of recovery than a doctrine that applies in specific cases; *see* STEIN, *supra* note 51, at § 11:1. Contributory negligence, on the other hand, does not apply when a plaintiff causes a plaintiff's own preexisting susceptibility to injury; *see id.* at § 11:5.

contributory negligence.[60] In other words, if a plaintiff causes an event which injures her, a defendant is entitled to raise contributory negligence as an affirmative defense.[61] However, where a plaintiff merely causes the susceptibility to injury, the law treats injuries to property differently from personal injuries.[62] In the case of property, defendants are entitled to raise a contributory negligence defense.[63] In the case of personal injuries, however, defendants are not entitled to such a defense.[64]

Part I explains these distinctions in greater detail, using contrasting hypotheticals to demonstrate the inconsistencies of contributory negligence.[65] Part II follows up by asking whether the inconsistent applicability of contributory negligence is simply inconsistent or is rather necessarily distinct.[66] In order to make a case that the rule's application is merely inconsistent without theoretical grounding, Part II continues by addressing some of the most obvious arguments against contributory negligence's application to preexisting conditions of individuals.[67] Part III then concludes by addressing the challenges presented by applying contributory negligence to preexisting conditions of individuals. Where necessary, Part III offers potential solutions to those challenges.[68]

PART I—HOUSE, BODY, AND MIND

This part explores contributory negligence's inconsistent applicability in the eggshell skull rule by exploring three contrasting hypotheticals.[69] The first uses the example of a homeowner who inadequately maintains her home to demonstrate how the eggshell skull rule applies to the most basic cases and to set a norm for the role of contributory negligence as an affirmative defense.[70] This hypothetical will provide a brief re-introduction to the jargon of negligence claims and defenses and serve as a comparator for the second

60. Contributory negligence has always applied to cases where the plaintiff injures herself. *See, e.g.*, Butterfield v. Forrester [1809] 11 East 59, 60-61 (KB) (creating contributory negligence and applying it to a plaintiff who injured himself).

61. *Id.* at 61.

62. *See, e.g.*, 12 AM. JUR. *Pl. & Pr. Forms Fires* § 46 (2019).

63. *See, e.g.*, *id.* ("Plaintiff was guilty of contributory negligence, which was the sole, direct, and proximate cause of the damage complained of, in that plaintiff permitted dead and dry grass and other combustible material to be and remain on plaintiff's property and to extend to the property of defendant. Plaintiff knew, or in the exercise of due care should have known, that such combustible material constituted a fire hazard and would be ignited when flames came near *[his/her]* premises. Therefore, the damage complained of occurred without fault or negligence on the part of defendant.").

64. STEIN, *supra* note 51, at § 11:5

65. *See infra* Part I.

66. *See Infra* Part II.

67. *See infra* Parts II.A, II.B.

68. *See infra* Parts III.A, III.C.1, III.C.3.

69. *See infra* Part I.A, I.B, I.C.

70. *See infra* Part I.A.

and third hypotheticals.[71] Ultimately, because this paper argues that contributory negligence should be extended to both preexisting conditions and psychological injuries, this first hypothetical serves as a model of contributory negligence in action for application to other cases.[72]

The second hypothetical uses the example of an obese person who inadequately maintains her body to demonstrate how the eggshell skull rule applies to preexisting conditions. Additionally, the second hypothetical contrasts the limited role of contributory negligence as applied to duties owed to one's body with its relatively expansive role as applied to duties owed to one's property.[73]

The third hypothetical uses the example of a mentally unstable person who inadequately maintains her psychology to demonstrate how the eggshell skull rule applies to psychological injuries (also referred to as the eggshell psyche rule[74]) and further contrasts the limited role of contributory negligence as applied to duties owed to one's psyche with its role as applied to both duties owed to one's body and to one's property.[75]

A. House

Suppose Harriet is a homeowner. She lives in a part of the country beset by frequent tropical storms. Every Fall, severe storms bombard her small home with torrential rains, causing damage to her aging roof. After several years, her roof begins to leak from the onslaught. Now, Harriet, having learned the golden rule of home maintenance from her parents ("If it doesn't move and should, use WD-40. If it does move and shouldn't, use duct tape."), decides, rather than calling someone to fix her roof (why pay if she can solve the problem herself?) or climb on top of her roof during a storm, to instead get on a ladder in her living room and duct tape the leaks from the inside.

Year after year, Harriet ameliorates her leaky roof with duct tape applied to her living room ceiling. During the dry seasons, she forgets to call a repairman and over time, her concerns for the structural integrity of her roof subside. But this lack of concern for her safety is gravely misguided. Her roof becomes severely water damaged and begins to rot and sag under its own weight. It is under these circumstances our plaintiffs enter the picture.

Two teenage boys, brothers Brian and Bob who live down the street, decide one summer's day to play baseball in their front yard. Overestimating

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71. *Id.*
72. *Id.*
73. *See* i*nfra* Part I.B.
74. *See* Malcolm v. Broadhurst [1970] 3 All E.R. 508, 511 (QB) (stating that "there is no difference in principle between an egg-shell skull and an egg-shell personality") (language later adjusted to 'Eggshell Psyche').
75. *See* i*nfra* Part I.C.

their ability to control the direction of the balls they hit, one sails down the street and lands directly in the center of Harriet's dilapidated roof. Due to its severe disrepair, the roof collapses, crushing all of Harriet's furniture, her possessions, and her cat. Harriet sues the boys to recover for the negligent destruction of her property.[76]

In this hypothetical suit, Harriet could make out a prima facie case of negligence fairly easily. The boys owed her a duty to behave reasonably with relation to her property,[77] which they breached by playing baseball in their front yard.[78] Their suburban baseball outing was both the cause-in-fact of her injury (her house would not have collapsed without their baseball outing[79]), and the proximate cause of her injury (damage to property was squarely within the scope of the risk of their misbehavior[80]). Notably, the eggshell

76. While she likely could also sue the parents for negligent supervision, that analysis would add little to the hypothetical's value and is therefore omitted.

77. *See* Heaven v. Pender [1881-85] All E.R. Rep. 35 (QB) ("Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that anyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there would be danger of injury to the person or property of him for whose use the thing was supplied, and who was to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. Per a neglect of such ordinary care and skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence."); *see also* Stewart v. Motts, 654 A.2d 535, 537 (Pa. 1995) ("[T]here is but one standard of care to be applied to negligence actions involving dangerous instrumentalities . . . [t]his standard of care is 'reasonable care.'").

78. *See* Hainlin v. Budge, 47 So. 825, 832–33 (Fla. 1908) ("As a matter of fact, we have learned from the teaching of common sense and every-day observation and experience that the 'reasonably prudent man,' 'the man of ordinary prudence,' or under whichever one of the various kindred aliases he may be designated, has no actual existence, and does not correspond to anybody in particular in everyday life, but is rather a type with whom everybody may be compared. In other words such a man is a pure abstraction, a legal fiction, as much so as the 'economic man' in political economy is purely a methodological assumption, and both must be regarded as travesties of the truth, if taken as full and complete accounts of the actual facts. . . . [o]ur own belief is that consciously, subconsciously or unconsciously, the judge or the juryman does in each case when he attempts to apply his test have in mind a concrete individual who is no less a person than himself; this is his mental image, and the question which he really asks himself is, does the defendant appear to *me* to have exercised prudence or not? Should I have done the same, if I had been in his place? And he answers this to himself, without any reference to any general standard or general rule at all, but merely according to his own individual experience and the idiosyncrasies of his own particular disposition. Hence it results that, so far from the test of 'the man of average prudence' being a general and universal one, it varies with each individual who applies it, and the learned Chief Justice . . . accurately described his own test when using the phrase as variable as the foot of each individual." (internal quotations omitted)).

79. Hale v. Ostrow, 166 S.W.3d 713, 718 (Tenn. 2005) ("The defendant's conduct is the cause in fact of the plaintiff's injury if, as a factual matter, it directly contributed to the plaintiff's injury. In a case such as this one, we must ask whether the plaintiff's injury would have happened 'but for' the defendants' act.").

80. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (WEST 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."); Haynes v. Hamilton Cty., 883 S.W.2d 606, 612 (Tenn. 1994) (Proximate cause is addressed with a three-prong test: "(1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because

skull rule says that if the boys are found liable for negligence, they will be liable for the entire extent of Harriet's injury.[81]

In the context of damage to property, however, Brian and Bob are entitled to use contributory negligence as an affirmative defense.[82] The boys can argue that Harriet's roof collapsing was the proximate result of her own negligence rather than theirs.[83] That is, the scope of the risk of allowing her roof to rot certainly included its collapse.[84] Further, a well-maintained roof should easily withstand the hardly thunderous impact of a single baseball. The boys would be entitled to argue that because Harriet's own negligence was more a cause of her injury than theirs, they should not be liable for any of her injury.[85]

It is my expectation that nothing in the hypothetical above should come as a surprise to most readers. This should seem like a reasonable and expected outcome to all of those familiar with tort law (and even those who are not). A defendant pays for the harm she causes unless the plaintiff's harm is, in reality, self-inflicted. Keep this last sentence in mind as you read the following two hypotheticals; consider whether plaintiffs are actually recovering for self-inflicted injuries.[86]

B. Body[87]

Suppose Olivia is obese. Since she was a child,[88] food has been her method of coping with emotional problems. When she was in second grade, she naturally gained some weight. In turn, kids at school teased her for being overweight, to which she responded by turning to food for comfort (a vicious cycle). Over time, as her self-confidence plummeted, she turned more and more consistently to the only thing that ever made her feel truly comfortable – food.

Olivia is now in her late thirties; she is massively overweight. For the last decade, she has ignored her doctor's warnings that her disastrous relationship with food is putting immense strain on her cardiovascular system. Resigned to her size and either unwilling to give up her passion for

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of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.").

81. STEIN, *supra* note 51, at § 11:1.

82. *See e.g.,* AM. JUR., *supra* note 62, at § 46.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See infra* Part I.B, I.C.

87. Inspired by *Borman*, 960 F.2d 327 (noting that defendant's asbestos, plaintiff's own smoking resulting in cancer was treated as a single indivisible injury).

88. Does it make a difference whether this is a new phenomenon or an old one?

eating or unprepared to combat her aliment ailment, she has continued to return to her cruel master, declining to heed her doctor's warnings.

On her way to work one morning, Olivia is rear-ended in traffic by Randal who is texting while driving. Her car is not visibly damaged, and she suffers no direct physical injuries except that the shock of the impact causes Olivia to go into cardiac arrest. She is rushed to the nearest hospital where she is declared dead on arrival due to catastrophic heart failure. Her estate sues Randal for negligently causing Olivia's wrongful death.

As above, Olivia's estate can clearly make out a prima facie case of negligence. Driving on the highway, Randal owed a duty of care to actively avoid injuring the other drivers.[89] He breached this duty by texting while driving.[90] His texting while driving was both the cause-in-fact (but for his texting while driving, he would not have rear-ended Olivia and her heart attack would not have occurred) and proximate cause (people being shocked and injured when hit by cars is within the scope of the risk of texting while driving) of Olivia's injury.[91] Notice, just as above, if Randal were to be found liable for negligence, the eggshell skull rule would hold Randal liable for the entire extent of Olivia's injury.[92]

But in this case, as opposed to the one above, Randal would not be entitled to raise contributory negligence as a defense because the eggshell skull rule allows a plaintiff to recover for an aggravation of her preexisting condition even when the plaintiff herself caused the preexisting condition.[93] Assuming Olivia can successfully make out a prima facie case for Randal's negligence, Randal will be liable for the entire extent of her untimely death.[94] This is true even though Olivia ignored her doctor's instructions to lose

89. *See Heaven*, All E.R. Rep. at 503 ("Whenever one person is placed in such a position with regard to another . . . if he did not use ordinary and reasonable care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.").

90. He did not behave as a reasonably prudent person in the circumstance. *See Hainlin*, 47 So. at 832–33.

91. *See Hale*, 166 S.W.3d at 718-19 (stating that a "defendant's conduct is the cause in fact of [a] plaintiff's injury if, as a factual matter, it directly contributed to the plaintiff's injury" and that proximate cause places a limit on the causal chain in that a "defendant[] will not be held liable for injuries that were not substantially caused by [his] conduct or were not reasonable foreseeable results of [his] conduct"); *see also Haynes,* 883 S.W.2d at 612. (stating a three-prong test for proximate cause is met when "(1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence."). There is, perhaps, room to argue that Olivia's heart attack was not within the scope of the risk of Randal's texting while driving. For the sake of the hypothetical, it's not important whether a heart attack is actually within the scope of the risk. Assume for the purposes of this hypothetical that it is.

92. STEIN, *supra* note 51, at § 11:1.

93. *Id.* at §11:5.

94. *But see infra* Part I.D.

weight.[95] In other words, because the eggshell skull rule in the context of preexisting conditions does not allow a defendant to raise a contributory negligence defense as to the cause of the preexisting condition,[96] plaintiffs may recover for their self-created susceptibilities.[97]

Compare this outcome to the previous hypothetical.[98] In that case, Harriet (the homeowner) may not recover for her roof's collapse because she was the cause of its susceptibility.[99] One may be tempted to call it a preexisting condition of the roof.[100] The defendants in that case could raise contributory negligence as an affirmative defense to avoid liability for an injury almost exclusively attributable to the plaintiff's own disregard for her roof.[101] In this hypothetical, Olivia (the obese deceased) may recover for her heart's collapse though she was the cause of its susceptibility. The defendant in this case cannot raise contributory negligence as an affirmative defense to avoid liability for an injury almost exclusively attributable to the plaintiff's own disregard for her heart. Harriet is held responsible for the maintenance of her home; Olivia is not held responsible for the maintenance of her heart. As you read the next hypothetical, consider whether this tension feels normatively different in the context of psychological injuries. Also, continue to consider whether plaintiffs are recovering for self-inflicted injuries.

C. Mind[102]

Suppose Peter is a powerlifter. When Peter was a kid, his dream was to race cars professionally. Unfortunately, his family was not wealthy. In fact, they struggled to make ends meet. By the time he was fifteen, however, his mother had started to turn things around. She was promoted to manager of the store she worked at and saved up enough money to buy her son his own car to learn to drive in. To celebrate Peter's newly-available dream, Peter's mother proposed ice cream for dinner. Mom, dad, daughter, and son packed into their second-hand 1978 Ford Pinto and embarked on their maiden voyage

95. STEIN, *supra* note 51, at § 11:5.

96. But defendants may still raise contributory negligence as an affirmative defense to the cause of the injury. In this case, had Olivia also been texting or drunk, Randal would be able to challenge Olivia's claim of negligence with his own claim of contributory negligence. *See, e.g.*, *Butterfield*, 11 East at 60-61 ("One who is injured by an obstruction in a highway against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.").

97. STEIN, *supra* note 51, at § 11:5.

98. *See supra* Part I.A.

99. *Id.*

100. *Id.*

101. *Id.*

102. Inspired by *Bartolone*, 481 N.Y.S.2d at 635 (noting that a car accident triggered psychotic breakdown due to deprivation of weight-lifting ability, plaintiff's mechanism for coping with emotional hardship, treated as a single indivisible injury).

to the ice cream parlor on the other side of town. More of a Titanic than an Apollo 11, however, Peter lost control of the car going over a bridge and drove through a guardrail into the river below. Peter, not wearing his seatbelt at the time, was the only one of his family to escape the car.

In the months after the tragic accident, Peter found his only solace in a gym near his home. He felt inundated by a sea of chaotic emotions and lifting weights gave him something to control, an escape from the constancy of his existential fear and anxiety. He began going to the gym more and more. Eventually, powerlifting became not only an activity to keep himself busy, but also a method of coping with the looming unresolved dread of his family's untimely demise. Either subconsciously or barely consciously, Peter assured himself that through powerlifting, he could ensure his own invulnerability. Teachers and counselors at school recommended that he try actual counseling, which his school offered for free. Some others recommended church. But Peter ignored their suggestions, instead finding his salvation in the temple of iron.

Thirty years later, Peter owns the gym. He has walked to and from work every day since he first got a job at the front desk, but recently moved in with his girlfriend who lives much farther away. His walk now takes him an hour in each direction. Peter decides a car is necessary, so he goes with his girlfriend to get a reliable, safe car. A week later, on his drive to work, Peter is rear-ended by Robert who is texting while driving. Peter suffers only minor whiplash, but the memories of his family submerged in their Ford Pinto flood back into his mind. Over the next several days, Peter struggles through this rush of unresolved terror, but because his neck is injured, he is incapable of lifting weights to distract himself from his reality. His family is dead; he, too, will die.

Peter has a psychotic breakdown. He becomes incapable of running his gym, maintaining his relationship, paying his bills, of being a productive adult. He is institutionalized for a year. After release from the psychiatric hospital, Peter brings suit against Robert for negligently causing his psychotic breakdown.

We can assume, as we have in the last two hypotheticals, that Peter can make out a prima facie case for Robert's negligence.[103] Robert's texting while driving breached a duty owed to the other drivers on the road, which caused the accident resulting in Peter's psychological injuries.[104]

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103. *See supra* Part I.A, I.B.

104. *See Heaven*, All E.R. Rep. at 503 ("Per a neglect of such ordinary care and skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence"); *Hainlin*, 47 So. at 832-33 (noting the reasonably prudent man standard); *Hale*, 166 S.W.3d at 718 (defendant's conduct must be but for cause of plaintiff's injury); *Haynes*, 883 S.W.2d at 611-12 (noting the defendant's conduct must be proximate cause of plaintiff's injury). Just as in the previous hypothetical, there is room to argue that a

Just as above in the case of Olivia,[105] Robert is not entitled to raise contributory negligence as a defense to Peter's claim because the eggshell skull rule allows plaintiffs to recover for injuries stemming from their own preexisting susceptibilities,[106] even when those susceptibilities are caused by their own actions.[107] Assuming, as we have, that Peter can make out a prima facie case for Robert's negligence, Robert will be liable for the entirety of Peter's whiplash and psychotic breakdown.[108] This is true even though Peter caused his family's death and even though he refused counseling, opting instead for weightlifting.[109] More generally, the eggshell skull rule, as in the previous hypothetical, allows plaintiffs to recover for injuries which result from their own self-created susceptibilities.[110]

Compare the outcome of this hypothetical to the outcome of the previous hypothetical.[111] In the previous case, the plaintiff was entitled to recover for her untimely death, even though her heart failure was almost entirely a result of her own negligence.[112] In this case, the plaintiff is entitled to recover for his psychotic breakdown, even though his breakdown was almost entirely the result of his own actions and failure to seek counseling. Do these two examples seem analogous?

From the defendants' points of view, the outcomes seem nearly identical. The same behavior results in their liability for the entirety of two injuries which they have only set in motion. Their respective plaintiffs have negligently set up houses of cards, which they have unknowingly toppled. To keep using idioms, their respective plaintiffs have piled straw on their own backs, which the defendants have added the final straws to. It is worth noting that aside from a plaintiff's own negligence, this is exactly the outcome the policy rationale of the eggshell skull rule mandates.[113] Defendants do not get

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psychological injury is not within the scope of the risk of texting while driving. Assume for the purposes of this hypothetical that it is.

105. *Supra* Part I.B.

106. It may be worth asking whether psychological injuries can be treated as preexisting conditions. On one hand, psychological injuries evade most of the certainty of cause-and-effect we find in physical injuries and it is therefore difficult to assign cause to an aggravation of a preexisting mental condition as opposed to the negligence of another. On the other hand, they feel normatively similar to physical injuries in that attendance to one's mental health directly influences susceptibility to injury. This article does not venture an opinion on whether they should be treated separately. It merely deals with them together for simplicity's sake.

107. STEIN, *supra* note 51, at § 11:5.

108. *Id.* at §11:1.

109. *Id.* at §11:5

110. *Id.*

111. *See* s*upra* Part I.B.

112. *Id.*

113. Gary L. Bahr & Bruce N. Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive*, 15 LOY. L.A. L. REV. 409, 410 (1982) ("The thin skull principle's aphorism [is] that a defendant greets his plaintiff as he finds him.").

to choose their plaintiffs.[114] They pay for the harm they cause, regardless of its magnitude and in whatever way it manifests.[115] The harms should be treated the same way.[116]

But from the point of view of the plaintiffs, the two examples may not even seem fairly juxtaposed. In the case of Olivia, her own overeating caused her cardiovascular vulnerability.[117] We may be entirely willing to call that behavior negligent.[118] The link between eating poorly and cardiovascular strain is well understood.[119] Olivia's doctor even explicitly warned her of the dangers of continuing to eat as she did.[120] It may be uncomfortable, however, to say that Peter caused his own vulnerable psyche. We are forced to accept either that Peter driving his family into a river should be considered the cause of all of his emotional trauma for the remainder of his life (an assertion I refute in Part III, Section B.), or that Peter's method of coping with his family's untimely demise was unreasonable and disqualifies him from recovering for his psychological injuries.[121] Given the immense uncertainty of psychological cause and effect (and many other reasons discussed in Part III, Section B.), the rule barring the defense of contributory negligence in cases of psychological injury may be more intuitively attractive than the rule barring contributory negligence in cases of aggravated preexisting physical injuries.[122] The law nonetheless affords psychological injuries the same treatment as it affords aggravated preexisting physical injuries: Contributory negligence is unavailable to defendants in both circumstances.[123]

This article argues that courts should extend the defense of contributory negligence to all eggshell tort cases.[124] In other words, it argues that in addition to Brian and Bob (the baseball boys),[125] the law should allow Randal and Robert (the rear-enders)[126] to raise contributory negligence as affirmative defenses to the claims against them.

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114. *See id.*

115. STEIN, *supra* note 51, at § 11:1. Limited, of course, by the outer bounds of proximate cause. *See id.*

116. *Id.*

117. *See supra* Part I.B.

118. *Id.*

119. *See generally*, Mustafa Murat Tumuklu et al., *Effect of Obesity on Left Ventricular Structure and Myocardial Systolic Function: Assessment by Tissue Doppler Imaging and Strain/Strain Rate Imaging*, 24 J. OF CV ULTRASOUND & ALLIED TECH 802 (2007) ("[S]everely obesity has long been recognized to cause a form of cardiomyopathy characterized by chronic volume overload, left ventricular (LV) hypertrophy, and LV dilatation.").

120. *See supra* Part I.B.

121. *See infra* Part III.B.

122. *See infra* Part III.B; Part I.C.n.63.

123. STEIN, *supra* note 51, at § 11:5.

124. *See infra* Part II.A, II.B, II.C.

125. *See supra* Part I.A.

126. *See supra* Part I.B, I.C.

D. A Brief Caveat

All of the hypotheticals above claimed that a defendant, without the ability to invoke contributory negligence in her defense, will be liable for the whole of the plaintiff's injury.[127] That statement is both true and potentially misleading, as it overlooks other limitations on the outer bounds of a plaintiff's injury which apply in cases of both personal and property injuries, namely the rule of *Dillon v. Twin State Gas & Elec. Co*.[128]

In *Dillon*, a fourteen-year-old boy fell while climbing the outside of a bridge, about nineteen feet above the ground.[129] On his way down, he grabbed a wire in an attempt to catch his fall, but the wire was negligently maintained and electrocuted him, killing him instantly.[130] The boy's estate brought a negligence suit for wrongful death against the electric company responsible for maintaining the wire.[131] The court, as a result of clever – and, under the circumstances, heartless – lawyering held that the estate's recovery should be discounted by the likelihood that the fall would have resulted in the boy's death or serious bodily injury.[132] The court further stated, in dicta, that had the boy's death been inevitable, the plaintiff would have no claim for negligence at all, because negligence requires injury.[133] In other words, a plaintiff's injury is discounted by the state he would be in but for the defendant's negligence.[134]

Notice that *Dillon* applies to all of our hypotheticals above.[135] In *Dillon* itself, it could be said that the boy had a preexisting condition of being nearly dead, as he was likely to die in the fall.[136] That phraseology is not helpful for an analysis of any of the legal issues in the case, but it is helpful to notice that this is a case like Olivia's that applies the eggshell skull rule to personal injuries.[137] *Dillon* also applies to psychological injuries as well.[138] Take *Steinhauser v. Hertz Corp.* as an example.[139] In that case, the plaintiff's

127. *See supra* Part I.A, I.B, I.C.

128. 163 A. 111 (1932) (noting that the injury the plaintiff suffered must be discounted by the state he would be in but for the defendant's negligence). This is distinct from *Dillon's* rule which gives cities and municipal governments power to manage their own affairs absent prior state approval. *See* 2 MCQUILLIN MUN. CORP. § 4.11 (3d ed. 2019) (discussing "Dillon's Rule).

129. *Dillon*, 163 A. at 111.

130. *Id.*

131. *Id.*

132. *Id.* at 115.

133. *Id.* at 115.

134. *See Dillon*, 163 A. at 115.

135. *See supra* Part I.A, I.B, I.C; *see Dillon*, 163 A. at 115. *Dillon*, much like the Eggshell Skull Rule, is an underlying principle of recovery rather than a rule applicable only to specific cases.

136. *See Dillon*, 163 A. at 114-15.

137. *See supra* Part I.B.

138. *See e.g., Steinhauser*, 421 F.2d 1169.

139. *Id.*

schizophrenia was triggered by a car accident caused by the defendant.[140] The defendant successfully reduced his liability by arguing that the plaintiff's schizophrenia was likely to have been triggered in the absence of any car accident.[141] The court invoked *Dillon* to hold the defendant liable for the plaintiff's entire schizophrenic state discounted by the expected value of her schizophrenia but for the car accident.[142]

In negligence cases (and in other personal injury suits as well), a defendant pays for the harm she causes.[143] *Dillon* limits only what we consider harm.[144] Where a plaintiff would have inevitably been injured notwithstanding a defendant's negligence, her overall harm is her current injury (resulting from the defendant's negligence) discounted by the injury which she would have suffered otherwise.[145] But the important takeaway of this detour is that limitations on what we consider harm are only half of the equation. A defendant pays for the harm *she causes*.[146] Irrespective of the total harm, to whom that loss is assigned is unanswered by *Dillon*.[147] Contributory negligence ensures that liability for the harm, whatever it may be, is assigned to the party who causes it.[148]

PART II—INCONSISTENT OR NECESSARILY DISTINCT?

Part I showed that the law affords differential treatment to contributory negligence in cases of injury to a plaintiff's property on one hand and injury to a plaintiff's self on the other.[149] This Part asks whether that differential treatment is merely inconsistent or is necessarily distinct.[150] At the outset, it is worth noting that if the differential treatment is not a necessary distinction, it does not necessarily follow that the proper result should be the extension of contributory negligence to all eggshell tort cases. Without more, it should be just as valid to assume that eliminating contributory negligence in all cases should be the proper result. It is also unclear whether inconsistency in the law is even normatively undesirable. It is therefore equally valid for our default solution to be to solve nothing. This Part aims to refute the claim that the distinction drawn in the law is a necessary one.[151] In doing so, it also aims

140. *Id.* at 1171.
141. *Id.* at 1173.
142. *Id.* at 1173-74.
143. STEIN, *supra* note 51, at § 11:1.
144. *See Dillon*, 163 A. 111 at 456-57.
145. *See id.*
146. AM. JUR., *supra* note 62, at § 46.
147. *See Dillon*, 163 A. 111 at 456-457.
148. James, Jr., *supra* note 10, at 693, 696 ("The contributory negligence rule is sometimes sought to be justified as a corollary of principles of proximate cause.").
149. *See supra* Part I.
150. *See infra* Part II.A, II.B, II.C
151. *Id.*

to provide a basis for the assertion that expanding the doctrine of contributory negligence, rather than contracting or holding static, is the best solution.[152]

This Part is organized into three sections, generally reflecting categories of typical arguments in support of the necessity of the eggshell skull rule's differentiation of property and people and my respective counterarguments.[153] Section A. introduces and refutes the underlying rationale of the eggshell skull rule as a logical proof for the distinction. It argues that taking a plaintiff as she comes does not prohibit challenging her state of being.[154] Section B. entertains arguments made through the lens of law and economics and attempts to reframe contributory negligence as an instrument of tort insurance in order to make normative claims about the law and economics analysis.[155] Section C. focuses on arguments grounded in the institutional competence of the judiciary, from questions of justiciability to the potentially intrusive scope of judicial review.[156]

A. Take a Plaintiff as She Comes

The first, and most intuitively attractive, reply to the suggestion of extending contributory negligence to preexisting physical and emotional conditions is the logical dissonance the proposal has with the foundation of the eggshell skull rule.[157] The eggshell skull rule is premised on the assertion that a defendant should take a plaintiff as she comes, broken as she may be.[158] As somewhat of a threshold matter, if challenging a plaintiff's state of being undermines the rule's motive of taking plaintiffs as they come, this proposal should die upon arrival. As formulated here–challenging the plaintiff's state of being as unreasonable–the proposal looks nearly indistinguishable from other (unsuccessful) attempts to allow plaintiffs the recovery of a reasonable or average plaintiff.[159] These proposals have been rejected out of concern for the under-compensation of plaintiffs (an argument which will be discussed further in Section B).[160]

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152. *Id.*
153. *Id.*
154. *See* i*nfra* Part II.A.
155. *See* i*nfra* Part II.B.
156. *See* i*nfra* Part II.C.
157. *See* Bahr & Graham, *supra* note 113, at 410.
158. *Id.*
159. *See, e.g.,* Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 379 (2013) ("[T]he eggshell plaintiff rule significantly misaligns parties' incentives in a socially undesirable way. The rule subjects injurers to unfair surprise, fails to incentivize socially optimal behavior when injurers have imperfect information about expected accident losses, and fails to account for the effect of risk-aversion, moral hazard, and judgment-proof problems.").
160. *See* Bahr & Graham, *supra* note 113, at 430 ("The thin skull principle is an integral part of the law of torts, and . . . [a]s an exception to the doctrine of foreseeability in proximate cause, it is useful in

But the foregoing formulation of this article's proposal misses the point. The point is not to nit-pick a plaintiff's condition or to force the law to assign losses to the imperfections of plaintiffs, but rather to assign fault to those who actually cause a plaintiff's injuries, whether it be the plaintiff or defendant (or some third party). Whereas the rejection of average recovery proposals has been premised on assigning losses to the negligent party,[161] here, both plaintiff and defendant are negligent. In such cases, should the law not treat them accordingly?

The examples given in Part I may overstate the effect of my proposal (in fact, they intentionally do for clarity's sake).[162] Typically, plaintiffs will only be negligent as to part of an injury.[163] Take, as an example of a standard eggshell skull case (where contributory negligence already applies[164]), a Tesla owner who drives around with a rear bumper duct-taped on to the back end of his car. It would be ridiculous to say that taking this plaintiff as she comes requires a defendant who rear-ends her to pay for her bumper falling off.[165] The defendant would certainly be able to claim contributory negligence.[166] Though, if a defendant were to rear-end her driving fifty miles-per-hour, totaling the Tesla, the defendant would not be able to claim contributory negligence as a defense to the whole of the plaintiff's damages.[167]

Compare a more moderate example of a preexisting physical condition. Imagine a skier who breaks her leg crashing into a tree (assume that this crash is not negligent). Her doctor prescribes a cast and instructs her to stay off her leg for six months, but she instead chooses to not wear the cast and walks on her broken leg with the help of painkillers. Her leg heals improperly, and a year later, she is hit by a bicyclist weaving through pedestrians (assume that the bicyclist's behavior is negligent), snapping her brittle leg. This article's

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obtaining recovery for the legitimate suffering of plaintiffs."); *See also* William J. Harte, *Torts: Aggravation of a Pre-Existing Condition: Including the Allergy Factor*, 34 NOTRE DAME L. REV. 224 (1959) ("One of weak physical structure has as much right to protection from bodily harm as a robust athlete."); Anna I. Shinkle, Note, *Taking the Plaintiff as You Find Him*, 16 DRAKE L. REV. 49, 50 (1966) (noting that in eggshell cases, justice is better served if the consequences of the eggshell injury fall upon the negligent defendant rather than the innocent plaintiff).

161. *See* Bahr & Graham, *supra* note 113, at 430; Harte, *supra* note 160, at 224; Shinkle, supra note 160, at 50.

162. *See supra* Part I.

163. James, Jr., *supra* note 10, at 696-97.

164. *See Butterfield*, 11 East at 60-61 (noting that contributory negligence applies when plaintiff did not use ordinary care and may have avoided the injury).

165. And we do not ask defendants to take plaintiffs as they come when they negligently maintain their property. *See, e.g.,* AM. JUR., *supra* note 62, at § 46.

166. *See e.g.*, *id.*

167. The car driving 50 miles-per-hour would be a superseding cause in this case, mooting the plaintiff's contributory negligence. For more on superseding causes, *see* RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW. INST. 1965).

proposal is simply that the bicyclist be allowed to claim that the skier was at least partially at fault for her own snapped leg. If, however, the skier was hit in a crosswalk by a car, breaking both of her legs, the driver would not be able to claim contributory negligence as a defense to both of the plaintiff's broken legs. At most, the driver would be allowed to raise the defense as to the negligently maintained leg, though given that another leg was also broken, the plaintiff's negligence would likely be superseded by the driver's negligence.[168]

While the eggshell skull rule is premised on taking a plaintiff as she comes, this article contends that it is not necessary to overlook a plaintiff's own negligence in order to do so (broken as she may be, though not negligent as she may be).[169] A defendant may still be held liable for the entire extent of a plaintiff's injury, merely discounted by the portion of the plaintiff's injury caused by the plaintiff herself.[170]

B. Plaintiff Compensation

As noted in Section A., another set of challenges to this article's proposal focus on the under-compensation of plaintiffs.[171] The general thrust of these challenges allege that extending contributory negligence to the cause of preexisting conditions would deny plaintiffs adequate recovery for their injuries.[172] One of the underlying rationales for the eggshell skull rule is the concern for undercompensating plaintiffs,[173] but as shown above, that rationale only holds in cases where only the defendant is negligent.[174] Where both parties are negligent, it is unclear to which party the loss should be assigned. This section presents arguments supporting the claim that losses should be assigned to plaintiffs who negligently cause their preexisting conditions.

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168. *See id.*

169. *See* Calandrillo & Buehler, *supra* note 159, at 379 ("[T]he eggshell plaintiff rule significantly misaligns parties' incentives in a socially undesirable way. The rule subjects injurers to unfair surprise, fails to incentivize socially optimal behavior when injurers have imperfect information about expected accident losses, and fails to account for the effect of risk-aversion, moral hazard, and judgment-proof problems.").

170. *Cf. Dillon*, 163 A. 111 at 456-57 (noting that as plaintiff would have inevitably been injured in spite of defendant's negligence, the overall harm is the injury from the defendant's negligence discounted by the injury which would have been suffered otherwise).

171. *See supra* Part II.A.

172. *See* Bahr & Graham, *supra* note 113, at 413, 416-417 (discussing historical justifications for the egg shell rule).

173. *See id.* at 430 ("As an exception to the doctrine of foreseeability in proximate cause, it is useful in obtaining recovery for the legitimate suffering of plaintiffs.").

174. *See supra* Part II.A.

Underscoring this discussion is a tension between a historical resistance to recovery for emotional injuries[175] and the modern trend toward increased recovery for plaintiffs' preexisting and psychological injuries.[176] This modern trend is most evident in the expansion of claims for negligent infliction of emotional distress (NIED) (the claim Peter would likely bring against Robert).[177] Courts over the last century have gradually loosened the barriers to recovery from being purely parasitic (and before then, entirely unavailable) to a claim of actual physical injury to being its own standalone claim.[178] Guiding that expansion of protection has been both an increased understanding of psychological injuries and an increased societal sympathy for victims of emotional harms.[179] Against this backdrop, my proposal to qualify recovery for victims of emotional harms may seem either hopelessly contrarian or sadly regressive. From one view, it may appear to be the sort

175. Torts – Emotional Distress, 2 AM. J. TRIAL ADVOC. 400 (1979) ("Emotional distress alone has not traditionally constituted a basis for recovery absent some element of gross carelessness or willfulness."); *See also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b. (WEST 1965) (stating the justifications for limiting NIED claims: "The reasons for the distinction, as they usually have been stated by the courts, have been three. One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles. It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants. The second is that in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance.").

176. Torts, AM. J. TRIAL ADVOC., *supra* note 175, at 400 ("Recent developments in this area of the law indicate a trend in some jurisdictions to relax the stringent requirements previously necessary in cases where recovery was sought for infliction of mental anguish or emotional distress.").

177. *See, e.g.,* Montinieri v. S. New England Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978) (expanding recognition of NIED claims by holding "that recovery for unintentionally-caused emotional distress does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact.").

178. *Tort Law - Negligent Infliction of Emotional Distress - D.C. Court of Appeals Allows Recovery for Emotional Harm Outside Zone of Danger - Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789 (D.C. 2011) (en banc)*, 125 HARV. L. REV. 642 (2011) ("Beginning in the late nineteenth century, however, many jurisdictions gradually expanded tort liability for negligent infliction of emotional distress (NIED), first through the 'impact' rule, which allowed recovery when even trivial physical contact was made, and later through the 'zone-of-danger' rule, which allowed recovery absent contact when the plaintiff suffered a near miss. Recently, in *Hedgepeth v. Whitman Walker Clinic*, the D.C. Court of Appeals further relaxed restrictions on NIED recovery, allowing a claim by a patient who suffered severe distress, but no physical injury, as a result of being misdiagnosed as HIV positive. With *Hedgepeth*, D.C. joined a growing number of jurisdictions that have extended NIED beyond the traditional zone-of-danger rule.").

179. Many jurisdictions also use the contact rule as an evidentiary shortcut; *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 175, § 436A cmt. b. The growing recognition of NIED claims has led some courts to circumvent the evidentiary shortcut by suggesting that some emotional injuries are so severe that they overcome evidentiary hurdles by their nature; *see, e.g.*, Baker v. Dorfman, 239 F.3d 415, 421 (2d Cir. 2000) ("[T]he erroneous report of an HIV positive finding following blood analysis is a 'special circumstance' that provides assurance that a claim to recover for negligent infliction of emotional distress as a result of the erroneous report is genuine and not spurious." (internal quotations omitted)).

of victim-blaming expressly rejected by the reform movement.[180] But I argue that some level of legitimacy is gained from limitation.[181] In implementing a barrier to recovery for self-created emotional harms, the reform movement may benefit from the constrained recovery.[182] In other words, if the public begins to view preexisting condition recovery as unconstrained, real damage would be done to efforts seeking to expand liability.[183] By limiting recovery, that negative publicity is preempted.[184]

On a very elementary level of analysis, the public is affected by costs from preexisting condition liability.[185] And the public is not only affected directly as individual defendants; it is also affected indirectly through corporate liability.[186] The exact specifics of corporate pass-on are topics for more focused discussions. But the quick-and-dirty of the problem is this: corporate defendants make up a large portion of tort defendants.[187] Liability in tort judgments (and settlements), therefore, imposes massive costs on corporations,[188] which, in turn, pass-on those costs to consumers.[189] In a very real sense, then, the public is subsidizing the private negligence of plaintiffs

180. In rejecting the second restatement's limitations on NIED claims (RESTATEMENT (SECOND) OF TORTS *supra* note 175, § 436A cmt. b), the modern reformers (as typified by *Baker*, 239 F.3d at 421) reject the traditional rule's justifications. Among which are viewing emotional disturbances as trivialities and disbelieving plaintiffs' authenticity in the seriousness of their injuries. RESTATEMENT (SECOND) OF TORTS *supra* note 175, § 436A cmt. b. Implicit in these two justifications is a belief that courts should not attend to psychological injuries because a person of strong character would not be afflicted with such a disability.

181. *See generally* Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform"*, 39 AKRON L. REV. 909 (2006) ("Simplifying matters somewhat, the central argument of current tort-reformers is that the American civil justice system is out of control and unfair to all involved, particularly defendants. These advocates contend that the system is rife with frivolous lawsuits, unethical behavior by plaintiffs' attorneys, and runaway juries. In order to combat these perceived ills, today's tort reform proponents champion a wide array of changes to the civil justice system. These changes range from alterations in substantive tort law, to the imposition of damages caps, to restrictions on attorneys' fees.").

182. *See id.*

183. *See id.*

184. *See id.*

185. Stephen Labaton, *House Panels Begin Work on Torts Law*, N.Y. TIMES (Feb. 23, 1995) (stating the Republican position that "cost of products would come down as business insurance premiums and legal costs decline").

186. *Id.*

187. Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT L. 1, 19-20 (2015) (noting the prominence of corporate tort defendants).

188. Charles T. Kimmett, *Rethinking Mass Tort* Law, 105 YALE L.J. 1713 (1996) (noting that the costs to corporate defendants are magnified by the prevalence of mass tort suits).

189. Emily Clark et al., *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Analysis of Economic Models for the Calculation of Damages* (Aug. 31, 2004), at 32 (available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf) (noting that where the downstream market is competitive, pass-on should be 100%; where the downstream market is a monopoly, monopolists will pass-on some of their costs; and where the downstream market is characterized by imperfect competition, pass-on will be somewhere in between a monopoly market and a perfectly competitive market).

recovering for preexisting conditions, at least to the extent that plaintiffs are in fact negligent and corporations do pass-on their costs to the public.[190]

Two brief caveats: first, it is not certain that my proposal will, in fact, meaningfully reduce costs to eggshell tort defendants. The increase in litigation costs due to having to litigate an additional issue may offset any savings of the rule. It is clear, however, that costs to defendants will not increase. In the event that litigating the plaintiff's contributory negligence exceeds liability saved, defendants will simply choose to not litigate the claim. We should, therefore, expect defendants to invoke contributory negligence only when it saves them money.[191] For that reason, it is safe to assume that costs to defendants will not increase if they are given the discretionary affirmative defense of contributory negligence in cases of preexisting injuries. While costs, en masse, should decrease, it is impossible to say by how much they will decrease. For now, I will operate under the assumption that my proposal will decrease costs to defendants to a meaningful degree.

Second, we may be concerned that plaintiffs will be "priced-out" of court by the imposition of costs of litigating their own negligent self-maintenance.[192] If we assume that plaintiffs are rational actors, they will only bring claims when their expected payout at trial is greater than the costs of litigation.[193] This problem is compounded by plaintiff attorneys working on contingency.[194] Where a lawyer is compensated by only one third of the actual payout at trial, her expected return is diminished in kind.[195] And because she incurs all of the costs associated with litigation and receives only one third of any returns, an increase to litigation costs is bound to decrease the range of cases (including meritorious cases) she is willing to take to court.[196] Therefore, some plaintiffs with meritorious claims will almost

190. *See* Labaton, *supra* note 185.

191. I have obviously accepted a rationalist view of human behavior. Behavioral economists would pick a fight with the assumptions I have made about rational human behavior; *see, e.g.*, Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (arguing generally that the limits of human cognition limit us from behaving in purely rational ways).

192. *See* Cameron T. Norris, *Symposium: The Future of Discovery: One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117, 2119, 2123 (2018) ("As litigation expenses increase, the parties become more likely to settle. And the more one party can increase the other side's litigation expenses, the more likely she can negotiate a settlement on better terms. This result is remarkable. It means there are cases in which a rational defendant would settle with a rational plaintiff even though the plaintiff's suit has zero chance of success. Indeed, it is rational for a plaintiff to file such a case whenever her litigation expenses are less than the defendant's litigation expenses.").

193. *Id.* at 2123.

194. *See* Lester Brickman*, Special Issue Institutional Choices in the Regulation of Lawyers: Article and Response: ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries").

195. *See id.*

196. *See* Norris, *supra* note 192, at 2119, 2123.

necessarily be "priced-out" of court due to the expansion of available defenses.[197] For now, I will operate under the assumption that the benefits of decreasing liability to defendants will outweigh the costs of pricing plaintiffs with meritorious claims out of court.

So far, I have made the claim that allowing defendants to raise contributory defense as to the cause of plaintiffs' preexisting conditions would decrease costs to private and corporate defendants, thereby reducing public subsidies to plaintiffs with self-caused preexisting conditions.[198] In light of the modern trend toward increased social recognition, however, it may not be clear that public subsidies of contributorily negligent plaintiffs are normatively undesirable (at least to those pushing for increased recognition).[199] While I have made the case that some legitimacy is gained from responsible limitation, others may still view the limitation as excessive or punitive towards eggshell tort victims – a penalty for being suboptimal.[200] This impasse is not obviously overcome, but perhaps some progress can be made by reframing self-care (which is the antithesis of contributory negligence in these settings) as a sort of common law tort insurance.[201]

Viewed as analogous to tort insurance, a duty of self-care may be more immediately palatable.[202] Imposing a duty on plaintiffs to behave reasonably toward their preexisting conditions, in this view, would be analogous to asking tort claimants to buy tort insurance. Those who behave reasonably toward themselves have bought insurance and can thereby recover when they are wronged.[203] They are then paid by defendants who, en masse, pass on their costs to society at large.[204] Those who do not behave reasonably toward themselves are considered to not be insured and may not recover for the harms caused by themselves, as recovery in these circumstances would be tantamount to subsidizing a tort claimant for failure to insure herself.[205]

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197. *See id.* at 2123.

198. *See supra* notes 185-190 and accompanying text.

199. *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 558-59 (1985) (advocating replacing tort law with a universal tort insurance).

200. *See supra* notes 181-184 and accompanying text.

201. *See* Sugarman, *supra* note 199, at 558, 661. (Professor Sugarman and his contemporaries have emphasized this analogy to tort insurance and gone a step further by replacing tort law with a universal tort insurance system. This article borrows the analogy without descending the rings of socialist policies – opting instead for a free-market counterpart where the decision to purchase and not purchase insurance is left with each individual.).

202. *But see* Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820, 820, 821 (1995) (arguing that the "tort as insurance fallacy" confines our ability to determine individually which injuries deserve redress from defendants and proposing instead a rebranding of tort as a more nuanced system of mediating interests between parties and society at large).

203. STEIN, *supra* note 51, at § 11:1; *see also* DOBBS ET AL., *supra* note 3, at § 219, 764.

204. *See id.*; *see also* Labaton, *supra* note 185.

205. *See, e.g., Butterfield*, 11 East at 60 (noting that this is the typical outcome with the rule of contributory negligence).

More appeasing to the equitable reformers, the cost of this insurance scales with ability to pay.[206] Given that reasonableness in this context is judged based on the plaintiff's circumstances, the insurance is never prohibitively expensive.[207] An obese person who cannot afford to hire a nutritionist will not be required to.[208] Concerns that the imposition of a contributory negligence defense for preexisting conditions would unduly penalize those with the least ability to shoulder the burden are therefore misguided.[209] The availability of the defense would impose a duty on all plaintiffs to care for themselves to the extent a reasonable person in their circumstances would, and no further.[210]

Finally, if a plaintiff chooses to behave unreasonably toward herself (the equivalent of not buying insurance), there is no penalty beyond withholding recovery.[211] A plaintiff's failure to insure herself merely forgoes the insurance payout. The loss is not assigned to the defendant, and the public, thereby, is not asked to subsidize the plaintiff's negligence. Cast in this light, a duty of self-care avoids any analogy to a penalty for being suboptimal. It instead appears more fairly analogous to the logical outcome of an informed decision to assume the risk of forgoing judicial redress in exchange for more immediate benefits.

C. Justiciability.

A final set of challenges to this article's proposal stem from the institutional competence of the judiciary.[212] They ask whether the judiciary is really up to the task of determining whether a plaintiff has behaved reasonably toward herself. Because these challenges rely so heavily on the nature of the contributory negligence claim, this section will focus on the validity of the challenges which apply to extending contributory negligence to psychological injuries. As you read this section, consider whether we should feel differently about courts as arbiters of psychological well-being

206. Should we be concerned that this is an unfair burden on the rich? Does the magnitude of the duty scale infinitely?

207. *See Hainlin*, 47 So. at 832-33 (discussing reasonably prudent man as variable).

208. *See generally id.* (noting reasonableness varies from individual to individual).

209. Concerns that the imposition of a contributory negligence defense would unduly burden those with the greatest ability to shoulder the burden, however, have some merit.

210. *See Hainlin*, 47 So. at 832-33 (describing the reasonably prudent person standard); *see also* DOBBS ET AL., *supra* note 3, at § 219, 764.

211. *See* DOBBS ET AL., *supra* note 3, at § 219, 764 n.4; *See also* Bennett v. Radlick, 145 N.E.2d 334, 339 (Ohio Ct. App. 1957) (noting that defendants cannot recover from negligent plaintiffs except through counterclaim).

212. *See supra* Part II.B (Recall from our discussion that many courts were hesitant to allow recovery for emotional distress claims because of the court's general inability to assess the validity of such claims – these challenges point to that general inability as justification for keeping a distinct rule for contributory negligence in the context of preexisting conditions.).

and as arbiters of physical well-being. If you think we should feel differently about the court acting in those two roles, is that difference due to the institutional competency of court? The availability of proof? The uncertainty of psychological cause and effect? Or is it due to a more normative desire for a more limited role of courts? These questions cannot be answered definitively and would take too much space to discuss at length here, but they are worth thinking about in this context.[213]

Recall from Part I, Section C that in the wake of Peter's family's untimely demise, teachers and counselors recommended that Peter go to either counseling or church, but he instead chose to go to the gym.[214] I made the assertion in that hypothetical that Peter's choice to ignore his teachers' advice could be considered negligent.[215] This section analyzes whether that assertion is sustainable.

Consider the most basic implication of the assertion. If Robert (the defendant rear-ender) can successfully argue that Peter's choice to turn to powerlifting rather than go to counseling was a negligent maintenance of his psyche, it necessarily follows that the court must find counseling to be an objectively more reasonable response to tragedy than weightlifting.[216] Not only more reasonable, the court must also find weightlifting to be an objectively unreasonable response to tragedy in Peter's circumstances.[217]

Notice, also, that church was a recommendation for Peter's recovery.[218] If we consider counseling as preferable to weightlifting, must we also consider it preferable to church? Regardless of how we answer that last question, the question itself seems to presuppose an objective hierarchy of psychological care.[219] Is that fair? Does it overlook psychological variance among individuals who experience tragedy? Is it safe to assume that an option like counseling is the most objectively reasonable option? Even if we suppose such a hierarchy, is it desirable to punish people who choose one over another?

These challenges raise a larger set of questions: What does objectively reasonable psychological care look like? What does objective psychological

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213. *Supra* note 106.

214. *See supra* Part I.C.

215. *See supra* Part I.C.

216. *See supra* Part I.C; *See also Hainlin*, 47 So. at 832-833 (discussing a reasonably prudent person). A reasonably prudent person must have some reasonable options. In a situation where no reasonable actions exist, the mythical reasonably prudent person herself would be necessarily unreasonable. This outcome is absurd and necessitates some ability for reasonable behavior. To hold some behavior unreasonable, therefore, a court must also be able to point to some reasonable behavior. This article assumes counseling as an objectively reasonable option.

217. Are these kinds of objections to methods of self-care distinguishable from typical objections to what we consider reasonable in other contexts?

218. *See supra* Part I.C.

219. At the very least, it presupposes an objective reasonableness binary of psychological care.

well-being look like? It may very well be impossible to label an objectively healthy psyche.[220] If that is the case, what business does a court have enforcing its own vision of psychological reasonableness on tort victims with psychological injuries?

I argue, however, that it is unnecessarily defeatist to throw our hands up in resignation at these questions. Juries make hierarchical decisions about the reasonableness of all kinds of things.[221] Why should they not be capable of determining the reasonableness of psychological self-care?[222] The response that there is no objective image of reasonableness is undermined by the availability of infliction of emotional distress claims.[223] That we have claims for emotional distress necessitates a recognition of psychological injury. The claim itself requires a jury to quantify the dollar value of the decrease in the plaintiff's psychological health and attribute that decrease to the actions of the parties.[224] While that does not necessarily require a jury to pinpoint reasonableness, it is not a far stretch for a jury to decide which actions promote psychological health to a reasonable degree and which do not.[225] Realistically, it should be easier, not harder, to determine objective reasonableness than exactly quantifying psychological injuries. If juries are up to the latter task, they should also be up to the former.[226]

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220. In fact, most psychologists would support the assertion that there is no objectively healthy psyche. *But see* GEORGE E. VAILLANT, *Positively Aging*, *in* POSITIVE PSYCHOLOGY IN PRACTICE 561, 562-63 (2004) (arguing that there are some objective markers which can be used to quantitatively measure psychological health).

221. *See Hainlin*, 47 So. at 832-33. Indeed, it is the role of the jury to make every determination of reasonableness except for those so objectively clear that they may be determined by a judge as a matter of law. *Id.*

222. But are they capable of determining psychological cause and effect? Can there ever be sufficient evidence to determine causal apportionment? In such cases, comparative fault should be used. *See, e.g.*, Owens-Corning Fiberglas v. Parrish, 58 S.W.3d 467, 478-79 (Ky. 2001) (holding that "[b]ecause no apportionment between the separate causes of this shortness of breath, i.e., asbestosis exposure and smoking, was possible, the trial court acted within its discretion when it allowed the jury to consider Appellees' smoking as comparative fault.").

223. *See, e.g.*, *Steinhauser*, 421 F.2d at 1172 (noting that regardless of courts' limitations on emotional distress claims, they undoubtedly exist to some extent; schizophrenia).

224. *Id.* at 1173 (noting that where the jury was asked to determine both the exact damages the plaintiff suffered as a result of her schizophrenic condition and the likelihood that it would have onset but for the defendant's negligence).

225. Much in the same way reasonable housekeeping is not a stationary target, but the outer bounds of reasonableness are narrowed down by determinations of unreasonableness.

226. And where juries are not up to the task or where evidence at trial does not support causal apportionment to a plaintiff, defendants' claims of contributory negligence will simply fail as they always did – that is just too bad!

PART III – CHALLENGES APPLYING CONTRIBUTORY NEGLIGENCE TO PREEXISTING CONDITIONS

The brunt of this article so far has sought to make a case for the application of contributory negligence to preexisting conditions. That is, the article has focused on whether or not we should apply contributory negligence, rather than how contributory negligence would apply if applied at all. This part explores the second of these two inquiries. Because a different set of rules may need to apply to preexisting conditions than those which apply to standard eggshell skull injuries (which will be discussed in Section C below), the first hurdle to clear is to determine which set of rules to apply.[227] Section A begins by shedding light on the opaque distinction between triggering events and susceptibility to injury.[228] Once negligently induced preexisting conditions are isolated from triggering events, it is worth further distinguishing between two subsets of negligent inducement of preexisting susceptibilities: injuries and rehab. Section B asks whether different standards are required for negligent injuries resulting in susceptibility and negligent maintenance resulting in susceptibility.[229] Section C then concludes by highlighting the difficulty in applying a uniform negligence standard and proposes a solution.[230]

A. Distinguishing triggering events from susceptibility

It may seem simple to say that contributory negligence should be invocable as a defense in the case of an aggravation of a preexisting condition.[231] If the same rule applies (that is, if contributory negligence applies in the same way), the inquiry could end there: Contributory negligence applies in every case and there is no need to distinguish which subset of contributory negligence cases we are applying contributory negligence to. Unfortunately, there is good cause to believe that different rules should apply to negligence resulting in preexisting susceptibilities on one hand and causing triggering events on the other. Those causes for concern will be discussed in Section C, but for now it is sufficient to understand that different rules may require a distinction between the two classes of negligent behaviors.[232]

Before problematizing the distinction between preexisting susceptibilities and triggering events, it is important to have a working

227. *See infra* Part III.C.
228. *See infra* Part III.A.
229. *See infra* Part III.B
230. *See infra* Part III.C.
231. That is, as you may have noticed, the brunt of this article.
232. *See infra* Part III.C.

understanding of the two categories in straightforward cases. Consider the example of Olivia in Part I B.[233] Olivia ate too much food, causing cardiovascular strain and susceptibility to heart attacks.[234] Her obesity, in this terminology, was a preexisting condition which risked being aggravated into a heart attack.[235] Randal rear-ended Olivia while texting in traffic, causing shock, which caused Olivia's heart attack.[236] The car accident was the triggering event which aggravated Olivia's preexisting condition into a heart attack.[237] Had Olivia's own negligence caused the car accident (the triggering event), contributory negligence would currently limit her recovery.[238] But, in the hypothetical above, she instead caused her preexisting condition (her preexisting susceptibility to heart attacks), so contributory negligence is unavailable to limit her recovery.[239] For a basic distinction, triggering events cause injuries, and preexisting conditions cause susceptibility to injuries, but do not cause the injuries themselves. On this basis, negligence which causes the triggering event is distinguishable from negligence which causes the preexisting condition.

This example is useful for setting a foundational understanding of the distinction but does not capture the intricacies required to answer more difficult puzzles. Consider a cigarette smoker who is negligently exposed to asbestos and later develops cancer.[240] As the Pennsylvania Supreme Court held in *Martin v. Owens-Corning Fiberglas Corp.*,[241] the defendant was

233. *See supra* Part I.B.

234. *Id.*

235. *See* STEIN, *supra* note 51, at § 11:1 ("Cases involving pre-existing conditions can be divided into three parts, the prior condition, the recovery period (if any), and the subsequent injury. The defense will blame the plaintiff's current damages on the continuation of the pre-existing condition. Plaintiff's counsel must discover and present evidence that clearly circumscribes the extent of damages and disability from the prior condition.").

236. *See supra* Part I.B.

237. *See* STEIN, *supra* note 51, at § 11:1 ("Distinguishing the Damages Caused By the Defendant's Negligence From A Pre-existing Condition—Legal and medical issues in pre-existing injury cases are often complex. The jury must decide whether the plaintiff's current condition comes as a result of the normal progression of a pre-existing condition, the 'aggravation' of a pre-existing condition by defendant's negligence or the unexpected susceptibility of the plaintiff to injury because of a pre-existing injury. They must also try to understand complicated medical issues involving the interaction of two injuries. Plaintiff's counsel must somehow make all of this understandable for a lay jury. There are a number of fundamental ways to do this. The plaintiff can show that his or her current condition is different from the pre-existing condition. A pre-existing problem with the left arm has nothing to do with an injury to the right arm. The plaintiff may also show that his or her current injuries are different in degree from the pre-existing condition. The plaintiff may have had a problem with the same arm previously but the previous injury was not disabling. The plaintiff may also want to show that he or she had completely recovered from the pre-existing condition and the negligence of the defendant caused a new, separate injury.").

238. *See Butterfield*, 11 East at 60.

239. *See* STEIN, *supra* note 51, at § 11:5.

240. *See e.g.*, *Martin v. Owens-Corning Fiberglas Corp.*, 528 A.2d 947 (Pa. 1987).

241. *Id.*

entitled to raise a contributory negligence defense because the plaintiff's own negligence was a contributing trigger of his own cancer; his cancer was not an aggravation of some preexisting condition.[242] The injury was said to be indivisible, and the jury was instructed to apportion liability based on the fault of each party in causing the plaintiff's cancer.[243]

The outcome of this case, while sensible, is not immediately obvious. Compare Martin's injury to Olivia's from Part I, Section B.[244] It would be reasonable to view these two cases side by side and suggest that a plaintiff's smoking causing his own cancer and a plaintiff's eating causing her own heart attack are indistinguishable. But the important distinction is the level of removal from injury.[245] In *Martin*, where both cigarettes and asbestos caused the plaintiff's cancer, there was no cognizable triggering event.[246] Therefore, the cigarettes and the asbestos were both treated as directly causing the plaintiff's cancer.[247] However, in Olivia's case, there was a cognizable triggering event–the car accident.[248] Therefore, Olivia's over-eating was one level removed from her heart attack.[249] It contributed to her injury in the sense that her eating made her heart attack a more likely result of the car accident but did not directly cause the heart attack.[250]

While this "level of removal from injury" test seems to adequately reverse-engineer a correct motivation for the outcomes of otherwise inconsistent cases, it is still difficult to apply: It is easy to conflate levels of removal with superseding and intervening causes,[251] and to call some things direct which are indirect, for example.[252] These distinctions would take too

242. *Id.* at 948.

243. *Id.*

244. *See supra* Part I.B.

245. The court in *Borman* (which reviewed *Martin*) discussed a "reasonable basis for determining the contribution of each cause to a single harm" test to determine whether the injuries could be causally apportioned. *Borman*, 960 F.2d at 332, 335. A "level of removal" test is necessary for the inquiry of whether the plaintiff's negligence has caused her preexisting susceptibility or the triggering event itself; the "reasonable basis for determining contribution" test adds nothing to such an inquiry.

246. *See id.* at 334-35

247. *Id.* at 334.

248. *See supra* Part I.B.

249. *Id.*

250. *Id.*

251. Superseding causes are distinct in that they "bring[] about harm different in kind from that which would otherwise have resulted from the actor's negligence." RESTATEMENT (SECOND) OF TORTS § 442, *supra* note 167. However, this distinction quickly becomes murky. Imagine a negligently obese plaintiff who is negligently surprised, causing her to suffer a heart attack. If she then falls and breaks her arm, is the surprise now a superseding cause of the broken arm and an aggravation of her preexisting obesity into a heart attack?

252. Olivia's heart attack, for instance, may eventually have been directly caused by her own negligent eating habits without any outside influences. It may be tempting to use authorities referring to heart attacks which are aggravated from obesity as indirect, overlooking the causal relationship. Consider also how we would describe Olivia's heart attack if she had heart palpitations which caused her to lose control of her car, and as a result of that loss of control, she swerved into another lane, which Randal also

much time to evaluate meaningfully here and for the purposes of this article are beside the point. For now, it is enough that we have a somewhat workable test.

B. Distinguishing Negligent Injury from Negligent Rehab

Now that we have a workable test for differentiating preexisting conditions and triggering events, we can further narrow our scope to subsets of preexisting conditions. This section contrasts two more hypotheticals to build a further distinction within negligently caused preexisting conditions between what I refer to as negligent injuries and negligent maintenance.[253] The first hypothetical explores negligent injuries while the second explores negligent maintenance.[254] As you read the rest of this section, consider whether the two categories should be afforded different treatment.

1. Negligent Injury.

Neil is a novice skier. He has lived in California for his entire life and never had the financial ability to travel to the snow. For his thirtieth birthday, he and several of his friends decide to save up enough money to strike skiing off their bucket lists. They fly to Colorado, rent gear, and make their way to a ski resort. Because they only have a short weekend to make the most of their experience, they decide to forgo the learning slopes in favor of more exciting skiing. Neil, driven by an infrequently checked ego, chooses to take his first run down a double black diamond slope. While plenty athletic, he is wholly unprepared for such a challenge and loses control shortly into the route. Neil crashes into a tree, snapping his femur. He has surgery on his leg and is put into a cast that day. His friends also are all injured somehow. Neil and his friends make their way back to California dejected by their injuries.

As Neil gets out of the taxi from the airport to his home, he is visibly struggling to remove his luggage from the trunk. The driver puts the car into park to get out to help, but because he does not use his parking break, the car rolls backwards, nudging Neil enough to knock him off-balance. Neil falls, and his luggage lands on top of him, re-breaking his susceptible femur. If

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entered negligently as a result of texting while driving, causing her heart palpitations to aggravate into a full-blown heart attack, killing her. Her negligent eating habits would have caused her heart palpitations, which in turn contributed to causing the car accident, which itself aggravated her palpitations into a heart attack. A strong case could be made that none of her injuries are removed from her own negligent eating habits. On the other hand, the car accident itself caused her heart attack and her negligent eating habits only contributed to the palpitations. *See supra* Part I.B.

253. *See infra* Part III.B.1, III.B.2, III.B.3. These categories speak to a deeper division – between moments of negligence and negligent habits or trends.

254. *See infra* Part III.B.1.

Neil sues the driver for negligently breaking his leg, what result?[255] Should the driver be able to invoke contributory negligence as a defense to Neil's claim?[256] Suppose instead that his secondary break takes place a year after his initial skiing mishap. In this year, Neil follows all of his doctor's instructions, goes through all of his physical therapy, and adheres perfectly to a bone-strengthening diet. What result now?[257] Think about what the proper outcome should be in each of the two counterfactuals above while we move on to the next hypothetical.

2. Negligent Maintenance.

Xavier is an expert skier. He has been skiing for his entire life and has several sponsorships. His goal is to compete in the winter Olympics–an attainable goal for someone of his skill level. On one training day, Xavier attempts a double black diamond, which is something he does with ease and frequency. This day, however, he catches an edge on one of the skis, loses control, and crashes into a tree, snapping his femur. He has surgery and is put into a cast that day.

Obviously, if he is re-injured that day, a defendant would be unable to raise contributory negligence as to Xavier's preexisting susceptibility to injury because he was not negligent in causing it. But if Xavier does not follow his doctor's advice, does not go to physical therapy, and does not stock up on bone-strengthening calcium and is re-injured a year later, should a defendant be able to raise a claim of contributory negligence for Xavier's negligent maintenance?

3. What Gives?

Picture a simple matrix of possibilities. On one axis, separate negligent and non-negligent injury. On the other, separate negligent and non-negligent maintenance. Let us first dispose of the easy examples. In the case of non-negligent injury and non-negligent maintenance, the plaintiff has no relevant negligence to point to in order to sustain a contributory negligence defense. Likewise, in the case of negligent injury and negligent maintenance, if contributory negligence is available at all (and this article argues that it should

255. *Cf.* Sowinski v. Walker, 198 P.3d 1134, 1140 (Alaska 2008) (noting that where the estates of underage minors who died in an alcohol-induced accident could bring a dram shop action against the liquor store that sold them alcohol, but comparative negligence and several liability applied). *See also* DOBBS ET AL. II, *supra* note 9, at n.18. In the case of drinking and driving, the preexisting susceptibility (the drunkenness) is the triggering event for the injury at bar (the death by car accident). In the case of negligent injury, the preexisting susceptibility does not itself cause the accident (unless not being able to withstand being nudged by a car is causing the accident). Is this a meaningful distinction?

256. *Cf. Sowinski*, 198 P.3d at 1140 (If not, how then do we distinguish Sowinski?).

257. *Cf. id.* (But assume the children, after consuming the alcohol, sober up to within the legal limit – for adults – and get in an accident while driving relatively responsibly. What result?).

be), the plaintiff's recovery should be limited by his own negligence.[258] We are left with just the difficult examples: negligent injury with non-negligent maintenance and non-negligent injury with negligent maintenance. That is, Neil's day-of re-break and Xavier's year-later re-break, respectively. The question is: what is doing the work? Is it the injury, maintenance, or both? This article argues that both should serve as bases for contributory negligence.

It may seem intuitively repugnant to treat the two injuries the same by subjecting them both to contributory negligence. Xavier's injury, being nearly identical to Olivia's above, is familiar and acceptable for most.[259] He actively and continuously disregarded his doctor's orders and generally neglected his body – denying some recovery on this basis is easily stomached. Neil, however, has behaved negligently once and has already suffered a broken leg as a result. Treating his momentary overconfidence as a bar to his recovery for the entire time his leg is weakened unduly punishes him for his cavalier relationship with his limbs. At its core, this innate hostility is the momentum which carries the current rule: No contributory negligence in cases of aggravated preexisting conditions.[260] But, as this article has explained above and will continue to argue, where a plaintiff takes unreasonably inadequate care of himself, the law should treat his lack of self-responsibility as the rational choice of forgoing some recovery for his self-induced injuries in exchange for more immediate benefits.[261]

Recall Peter's (the powerlifter) story from Part I, Section C above.[262] Remember that he lost control of his 1978 Ford Pinto and drove his family into a lake, and then ameliorated his troubled mind by lifting progressively heavier objects for three decades.[263] To further highlight, and perhaps problematize, the claim this article has made, that both negligent injury and negligent rehabilitation should serve as the foundation for contributory negligence, consider two more hypothetical counterfactuals. First, consider a universe where Peter does not drive his parents and sister off the bridge but

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258. *See e.g.,* DOBBS ET AL., *supra* note 3, § 219, 764-65 n.4 ("[T]he plaintiff owes a duty to use reasonable care for her own safety, a duty enforceable by a reduction in or a bar to her damages.").

259. *See supra* Part I.B. The distinction between Xavier and Olivia is that Olivia's negligent eating affirmatively causes her susceptibility to heart attacks. Xavier's negligent rehabilitation, on the other hand, does not cause his susceptibility to re-breaking his leg, but merely passively fails to address his existing susceptibility. Is this distinction meaningful?

260. *See* STEIN, *supra* note 51, at § 11:5; *See also Montinieri* v., 398 A.2d at 1184 (expanding NIED without expanding contributory negligence implies a desire to undo punishment for plaintiffs' cavalier relationships with themselves).

261. Is this treatment warranted? Does Neil really choose to forgo recovery for further injuries to his leg by having been careless in the past? Can we accept that he failed to "buy insurance" for his initial injury, but the moment he is deprived of recovery, is the tax on his negligence still justified?

262. *See supra* Part I.C.

263. *Id.*

instead is rear-ended in traffic. Being a 1978 Ford Pinto, the car bursts into flames, incinerating Peter's family. Second, consider a separate universe where Peter still drives his family off the bridge, drowning them, but goes to psychological therapy as he is advised to by teachers and counselors.

Let us start with the first of these two counterfactuals. Peter wakes up every morning in a cold sweat, screaming himself awake from visions of the inferno he lost everything to. As he reels from his nightly terrors, he makes his way to his porch where he smokes a cigarette. Drags, like white flags, drift above him, as he surrenders to his closeted demons and awakes to his bleak reality. He eats more than he wants to, but he finds it numbing and his goal is to be larger anyway, so he does not bother to stop. He spends his days heaving incrementally heavier blocks of metal coated in plastic to give him a sense of control over his life, a sense of agency, of resilience. At the end of his day, he makes his way home, where he eats large amounts of nondescript pre-prepared foods in front of the television, ignoring the note on his end-table reminding him to call a psychiatrist about his night terrors, left there by his girlfriend. Should we consider Peter less responsible for his vulnerable emotional state given that he was not responsible for the crash which still haunts him thirty years later?[264] Is his failure to address his trauma suddenly excusable where it was not before? It would be outlandish to hold Peter accountable for his failure to maintain his psyche when thirty years of emotional avoidance follows his own negligent driving but to capitulate personal responsibility because the same decades-long self-evasion followed someone else's negligence. The point is this: Peter's thirty years of unreasonable self-care is itself sufficient to establish his negligence, regardless of what it followed.

Now consider the second counterfactual. Peter runs his family into the river and is the only survivor. He tries to outwork the turmoil of his subconscious at the gym but finds that no matter how hard he pulls and pushes gym equipment, and no matter how large he becomes, he simply cannot appease his subconscious. The thin veneer of self-possession cracks and gives way to a sea of unresolved anxieties. Peter finds that powerlifting is not a rescue boat, but a life raft, separating him only transiently from the neglected undercurrents of his own despair. He decides that he needs to talk to a therapist and begins to face his fears head on with her help. After thirty years of responsible self-care, he is rear-ended and has his psychological breakdown. How should we treat this injury? Should his one negligent drive

264. This question somewhat intentionally foreshadows a statute of limitations on contributory negligence to be discussed later in this article. If the accident is caused by Peter, how long should it serve as a limitation to Peter's recovery? If the accident is not caused by Peter, for how long should he be credited for his bad luck?

forbid him from recovering for his psychological injuries for the rest of his life?[265] Or should some amount of self-care be sufficient to outweigh his one negligent act?[266] I hope the answer is apparent; some level of reasonable and responsible rehabilitation should be sufficient to cure a negligent injury.[267]

C. A New Reasonableness Standard

Animating the intuitive response above is viscerally obvious, yet perceptively elusive: the distinction between accumulating reasonableness and accumulating unreasonableness. In the case of negligent injury, unreasonableness is immediately established. In order for a plaintiff to recover after negligently injuring herself, she must accumulate enough reasonableness through productive self-maintenance to overcome her unreasonable starting point. In other words, her overall condition becomes more and more reasonable as she takes care of herself over time.[268] On the other hand, in the case of negligent rehabilitation, the plaintiff begins in a not unreasonable state.[269] Through counterproductive self-maintenance, she accumulates enough unreasonableness to transform her injury into something which will limit her own recovery through contributory negligence.[270]

1. Super-Reasonableness.

This accumulation of reasonableness and unreasonableness should strike you as awkward; it is not typically what lawyers mean when they use reasonableness in the negligence context. Compare a standard example of contributory negligence–one I've used several times already–of texting while driving.[271] Whether the party has breached a duty owed to another depends

265. Further, if we accept any bit of tort law as incentive-setting, how can we incentivize plaintiffs to take care of themselves if they will never recover for their injuries due to one moment of negligence. *See generally* Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975) (arguing generally that the law of torts operates to set incentives to guide the behavior of responsive and rational actors).

266. *See id.*

267. *See* LOWNDES, *supra* note 25, at 682 ("[I]f punishing a man for his negligence makes men careful, then the failure to punish negligence encourages carelessness."). This is true even if you do not accept the premise of tort law as setting a system of incentives. This article, in fact, expressly rejects tort law as a system of incentives in favor of a post-hoc system of proximate remediation.

268. Think Neil, the novice skier above. He broke his leg negligently, but accumulated reasonableness through productive self-care. *See supra* Part III.B.

269. This is not necessarily true. A plaintiff could begin by negligently injuring herself and proceed to negligently make herself more susceptible to injury. I use this instance as it provides the clearest example of the distinction I am drawing.

270. Keep in mind, however, that this counterproductive self-maintenance need not create the susceptibility. Recall our hypothetical Xavier who broke his leg and his subsequent negligent rehabilitation kept his leg from healing but did not worsen the injury. *See supra* Part III.B.

271. *See Heaven*, 11 All E.R. Rep. at 38 ("Two drivers meeting have no contract with each other, but under certain circumstances they have reciprocal duty towards each other."); *See Hainlin*, 47 So. at 831 (viewing favorably on the jury instruction "that the driver or operator of an automobile upon a public

on whether her actions are reasonable.[272] But when we inquire into reasonableness, we ask whether, in one moment, her actions are objectively prudent.[273] It is entirely irrelevant whether or not she has texted while driving in the past or will continue to in the future.[274] We are solely concerned with whether a particular instance of texting while driving is unreasonable.[275] Perhaps more importantly, reasonableness in this traditional context is judged in binary.[276] Either the plaintiff's actions were reasonable, in which case she has not breached her duty, or they were unreasonable, in which case she has breached her duty.[277] There is no in-between.[278] Whether the plaintiff sends "On my way" to her mother, or transcribes a Shakespeare play on two monitors in her passenger seat, she is in breach all the same.[279]

But preexisting conditions do not fit neatly into the traditional reasonableness binary. Consider broken leg rehabilitation from the skiing examples above.[280] In those examples, the plaintiffs either entirely disregarded their doctors' orders or followed them perfectly to a T.[281] But imagine the far more realistic example of a plaintiff who follows some, but not all, of her doctor's orders to varying levels of completion. Some days she completes her entire physical therapy routine, some days she stops half-way, and some days she skips it entirely. Some days she does not wear her leg-brace. Some days she wears her leg brace but tries to run in it. Some days she does not wear her leg brace but respects her injury and does not push herself. What this section attempts to convey is that, in the case of maintenance or rehabilitation, a binary reasonableness analysis is not easily applied. Sure, it is possible to classify every interaction she has with her leg as either reasonable or unreasonable, but we are then left with one pile of reasonable actions and one pile of unreasonable actions, wondering what to do with ourselves.

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highway, must use ordinary care in its management, and is liable for all damages occasioned by his careless driving or running of said machine."). Together supporting that texting while driving breaches a duty owed to others on or nearby a road to use reasonable care in operating a motor vehicle.

272. *See Hainlin*, 47 So. at 832-333 (establishing the reasonably prudent person (RPP) standard for determining objective reasonableness).

273. *See id.* (noting that the RPP is temporally stationary, though it is not clear that it must be so constrained).

274. *See id.*

275. *See id.*

276. *See id.* (noting that reasonableness under the RPP standard is binary, there is no option to be somewhat reasonable and somewhat unreasonable).

277. *See Hainlin*, 47 So. at 832-333.

278. *See id.*

279. *See id.* at 832-333 (describing what is reasonable or unreasonable at that moment).

280. *See supra* Part III.B.

281. These were created to be purposefully simple to fit neatly into the restrictive reasonableness standard.

This problem can be solved with super-reasonableness. While a binary reasonableness analysis can be employed to great effect with individual actions,[282] it leaves exactly what we have above: Two distinct sets of actions, one reasonable, the other unreasonable. Super-reasonableness (or meta-reasonableness for those who would confuse super-reasonableness with extreme reasonableness) looks to the emergent trend of reasonableness when contrasting the two sets of actions. Where the set of reasonable actions outweighs the set of unreasonable actions, the super-reasonableness analysis should reflect the emergent trend of reasonableness.[283] Likewise, where the set of unreasonable actions outweighs the set of reasonable actions, the super-reasonableness analysis should reflect the emergent trend of unreasonableness. What is unclear, however, is whether this super-reasonableness should be measured on a binary scale as well. Later in this section, this article will lay out both sides of that argument.[284] For now, consider which you think is preferable.

Let us apply this concept to some simple examples before problematizing its application with more complicated examples. We will start with Neil, our novice skier.[285] Recall that Neil injured his leg while attempting a double black diamond on his very first ski outing.[286] After injuring his leg, he followed his doctor's orders perfectly, completed all of his physical therapy, and ate a bone-strengthening diet for the entire duration of his recovery.[287] The main goal of super-reasonableness is to mirror the incremental growth and reduction in susceptibility. Think of it as a corollary of divisibility of injury or comparative fault.[288] Super-reasonableness, in this view, assigns weight to actions based on their level of contribution to the preexisting susceptibility.[289] Those actions which contribute the most to the preexisting susceptibility are weighed the most heavily in our super-reasonableness analysis.[290] What is important to note, however, is that it is not entirely necessary that the preexisting susceptibility is actually affected by the plaintiff's negligent or reasonable behavior. A plaintiff who behaves

282. As it has been in the tort system so far without much of a fuss.

283. Is this just a standard binary reasonableness analysis with unnecessary formalism or is there something valuable here? *See infra* Part III.C.4

284. *See infra* Part III.C.4.

285. *See supra* Part III.B.

286. *Id.*

287. *Id.*

288. Working, still, under our assumption that contributory negligence is most aptly justified as a corollary to proximate cause. *See* James, Jr., *supra* note 10, at 696.

289. *See id.* at 693 (super-reasonableness analysis allows for a fine-toothed proximate cause analysis); *cf.* DOBBS II ET AL., supra note 9, § 220 (noting that comparative fault "reduc[es] the plaintiff's recovery in proportion to the plaintiff's fault).

290. James, Jr., *supra* note 10, at 693; *cf.* DOBBS II ET AL., supra note 9, § 220 (noting that comparative fault "reduc[es] the plaintiff's recovery in proportion to the plaintiff's fault).

reasonably with respect to her preexisting susceptibility will not have her recovery reduced due to a lack of effectiveness.[291] This is the point of the eggshell skull rule.[292] Where plaintiffs are not negligent and still have preexisting susceptibilities, we want them to recover for the whole of their injuries.[293] This paper is only concerned with limiting recovery for self-created harms, not for those which, through diligent efforts are incurable.[294] Contribution to the susceptibility is a useful shorthand, but not a requirement for efficacy.

Here, we have one negligent act of injury and three categories of reasonable rehabilitation. The negligent injury created the entirety of the preexisting susceptibility. It will therefore be weighed to the extent the injury explains (or should explain—remember, reasonable self-care, even if ineffective is credited toward the plaintiff) the current state of Neil's preexisting susceptibility.[295] The reasonable rehabilitation explains a majority of the decrease in susceptibility and will be weighed to the extent the susceptibility is decreased as a result of the rehabilitation.[296] Finally, and not to be overlooked, some of the decrease in susceptibility is due to a combination of time and Neil's body's neither reasonable nor negligent natural processes. This article will revisit this last point later in this section.[297] For now, it is enough to weigh reasonableness against unreasonableness and omit those acts which fall into neither category.

Consider a second example: that of Xavier, our expert skier.[298] Notice above that this article made the claim that it is unnecessary for a plaintiff's preexisting susceptibility to actually be affected by the plaintiffs *negligent or reasonable* behavior.[299] Does that sound right? What if Xavier behaves unreasonably, but his leg somehow gets better? Should his negligence still

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291. *See Hainlin*, 47 So. at 832-33 (rejecting a results-oriented negligence standard. If the behavior is reasonable, the outcome is of no legal consequence.).

292. *See e.g.*, STEIN, *supra* note 51, at § 11:5 ("[T]he fact that the plaintiff's system was weakened . . . does not relieve the defendant of the responsibility for the consequences of his or her act.").

293. *Id.* at § 11:1.

294. This assertion is somewhat misleading. Recall Xavier's leg, which was negligently maintained, but not negligently injured. The negligent maintenance did not create the susceptibility, it merely failed to eliminate the susceptibility. This article is concerned with limiting recovery for injuries which are the proximate cause of a plaintiff's negligence. *See supra* Part III.B.

295. The weight being assigned makes instrumental use of proximate cause as a source of analytical heft. This is in contrast to the scope-of-the-risk principle used in the Restatement (Third) of Torts § 29, which limits proximate cause to a box to check or a hurdle to jump in establishing a negligence claim. RESTATEMENT (THIRD) OF TORTS, *supra* note 80, at § 29. This view is inspired by, and hopes to reignite the analytical optimism of, Justice Andrews' dissent (which ultimately prevailed in time) in *Palsgraf*. 162 N.E. at 103-04.

296. *Compare* RESTATEMENT (THIRD) OF TORTS, *supra* note 80, at § 29, *with Palsgraf*, 162 N.E. at 103-04.

297. *See infra* Part III.C.2.

298. *See supra* Part III.B.2

299. *See supra* notes 289-293 and accompanying text.

be credited against him?[300] Suppose his leg becomes half as brittle as it was after he broke it, but he behaved in a way which may be expected to double its susceptibility to injury, not reduce it by half. Is it inconsistent to credit the plaintiff's reasonableness even if ineffective, but not a plaintiff's unreasonableness if similarly ineffective?[301] Refer back to our justifications for contributory negligence.[302] Blameworthiness seems to fit best here and would suggest negligence should be punished and reasonableness should be rewarded.[303] That is also the most intuitively attractive rationale for limiting liability for plaintiffs who behave reasonably but are unsuccessful at reducing their susceptibilities.[304] It would also support reducing recovery for plaintiffs who behave unreasonably but do not increase their susceptibilities through their unreasonableness.[305] But this article's goal is to reject blameworthiness, not to use it to justify quirks in rules. Let us turn instead to proximate cause for our answer.[306] The key is to determine super-reasonableness with respect to the susceptibility and without regard for the efficacy of the individual acts.[307] A plaintiff who, on the whole, behaves unreasonably with regard to her susceptibility will have her recovery reduced by the extent her susceptibility proximately causes her injury.[308] The opposite is true of a plaintiff who behaves reasonably toward her susceptibility.[309] Regardless of the efficacy of her actions, she will not have her recovery reduced by her susceptibility because her injury is not proximately caused by a susceptibility with regard to which she is negligent.[310] Therefore, in order to be consistent with either justification, negligence must be credited against a plaintiff even if ineffective at worsening the plaintiff's susceptibility.[311]

Now the rubber can really hit the road. We will use the example of Olivia to further problematize this super-reasonableness analysis.[312] Partially to

300. The analytical heft of proximate cause comes at the cost of confusion when the world does not behave as we expect it to. One action certainly causes another even though it was not the most likely outcome. *But see Hainlin*, 47 So. at 830-31 (rejecting a results-oriented negligence standard).

301. *See id.* (rejecting a results-oriented negligence standard).

302. *See supra* Introduction.

303. *See Davis*, 15 N.E. at 360 ("The doctrine of contributory negligence . . . is founded upon . . . [t]he principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong.").

304. *See id.* ("[E]very suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong.").

305. *See id.* ("[E]very suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong.").

306. James, Jr., *supra* note 10, at 696.

307. *See Hainlin*, 47 So. 832-33 (rejecting a results-oriented negligence standard for reasonableness standard).

308. *See* discussion of the analytical heft of proximate cause, *supra* note 295.

309. *Id.*

310. *Id.*

311. *Id.*

312. *See supra* Part I.B.

avoid having to make this point earlier, this article has not mentioned what Olivia ate during her twenty-four years of comfort-eating. Instead, the example merely stated that her eating was unreasonable and moved on. But we are now in a position to scrutinize this claim. Let us assume for now that her entire diet for twenty-four years was cheeseburgers, girl scout cookies, and soda. A skeptical reader may doubt that she would still be alive to have a heart attack in the first place with a diet this atrocious.[313] But that bit of skepticism sheds light on a more profound point: she was alive.[314] Some eating must have been required to keep her alive until this point. We, therefore, cannot assume everything she ate for her entire twenty-four years was unreasonable. Certainly, some of it was reasonable or she would not have been alive to have a heart attack.[315]

Given that she ate identical meals every day, how do we separate the reasonable days from the unreasonable days to even begin the super-reasonableness analysis? If her problem was merely eating too much of an okay thing, would we have to separate the first half of her meal from the second? Or, would the second half merge with the first half to create one unreasonable meal? If we follow this second approach, how would we distinguish separate meals? What if her breakfast were massive, but she fasted for lunch and dinner in response? Is that one day of reasonable eating? Is it one meal of unreasonably ample consumption and two skipped meals?[316]

Keep in mind, also, that reasonableness is determined using a reasonably prudent person standard, not a perfectly reasonable robot standard.[317] We should, therefore, expect a reasonably prudent person to slip-up from time-to-time.[318] In order to accommodate that reality, does our super-reasonableness calculus need to embody a more holistic determination method?[319] The point this tangent is making is that these kinds of reasonableness determinations do not make a whole lot of sense outside of

313. *See* Clare M. Hasler, *Functional Foods: Benefits, Concerns and Challenges – A Position Paper from the American Council on Science and Health*, 132 J. OF NUTRITION 3772, 3773 (2002).

314. *Cf.* Byrne v. Boadle, 2 Hurl. & C. 722 (1863) (establishing a three-part test for res ipsa loquitur: the accident is of a kind that ordinarily does not occur in the absence of someone's negligence, the accident was caused by an instrumentality within defendant's exclusive control, and the plaintiff's behavior did not contribute to the accident). Can we use the logic of inverse res ipsa loquitur? That is, can we assume reasonable behavior given that she was in control of herself and people do not live without some reasonableness? But someone else has probably behaved reasonably toward her.

315. Certainly this assumption is sound, but we do not have a mechanism for using it currently. *See* discussion on inverse res ipsa loquitur, supra note 314.

316. This speaks to an even deeper trend of being unable to even first identify the proper denominator. *Cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15, 419-20, 422 (1922) (discussing where the majority and dissent disagreed over the proper denominator with which to evaluate the extent of a regulatory taking).

317. *See Hainlin*, 47 So. at 832-33.

318. John Gardner, *The Many Faces of the Reasonable Person*, 131 LAW Q. REV. 563, 569 (2015).

319. Once we have the proper denominator, we do not know what to do with it! *See supra* note 316.

context and do not lend themselves well to a binary in the first place.[320] Our super-reasonableness standard may need to transcend the one-action-at-a-time analysis and look more comprehensively at the entire relationship between a plaintiff and her preexisting susceptibility.[321]

It may be striking how much legal innovation is required to undo a rule which is so intuitively attractive (note the current rule refusing to apply contributory negligence to plaintiffs' preexisting conditions[322]). In light of the effort, it may be tempting to abandon ship and stick with the status quo.[323] But keep in mind that the law currently allows defendants to invoke contributory negligence in cases of preexisting conditions of property.[324] Why then should we separate preexisting conditions of people from preexisting conditions of property?[325] Is the justification that we cannot assume people behave entirely unreasonably toward themselves where we may be able to in relation to property? Is that it? If so, how persuasive a justification is that?

2. Temporal Reasonableness.

Recall from the super-reasonableness analysis of Neil's preexisting susceptibility above that factors contributing to his overall susceptibility were broken down into three categories.[326] The first category included his negligent self-injury which created the susceptibility at issue.[327] That negligent self-injury weighed on the negligent side of the super-reasonableness scale to the extent it contributed (or should have contributed) to his overall susceptibility to injury.[328] The second category included all of the positive actions Neil took to mend his injured leg.[329] Those attempts at rehabilitating and ameliorating his susceptibility were placed on the reasonable side of the super-reasonableness scale to the extent that they contributed (or should have contributed) to his overall decrease in susceptibility to injury.[330] The third category included the portion of Neil's diminution in susceptibility to injury attributable to the passage of time.[331]

320. Is it still a binary? *See supra* Part III.B.; *infra* Part III.C.4. A holistic comprehensive binary? *See supra* Part III.B.; *infra* Part III.C.4. *See* discussion of whether this is all actually worthless formalism, Part III.B.; *infra* Part III.C.4.

321. *See supra* Part III.B.

322. STEIN, *supra* note 51, at § 11:5.

323. *See* Calandrillo & Buehler, *supra* note 159, at 375.

324. AM. JUR., *supra* note 62, at § 46.

325. *Compare* STEIN, *supra* note 51, at § 11:5, *with* AM. JUR., *supra* note 62, at § 46.

326. *See supra* Part III.C.1.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

This subsection considers whether and how that temporal element should factor into the super-reasonableness analysis.

The first and most obvious response is to not factor temporal impacts on susceptibility into super-reasonableness at all.[332] That is, weigh negligence against a plaintiff's super-reasonableness, reasonableness in favor of a plaintiff's super-reasonableness, and omit everything else.[333] This makes good sense and has some intuitive appeal.[334] Where a plaintiff has not behaved reasonably or unreasonably (in fact, where the plaintiff has not behaved at all), her overall reasonableness evaluation should not be affected in the slightest.[335] This also comports well with a morality justification for contributory negligence.[336] If the goal of contributory negligence is purely to credit morally laudable behavior and demerit morally culpable behavior, it seems no treatment should be afforded to morally neutral behavior (or lack of behavior, as the case may be).[337] But this article aims to reject the morally motivated justification for contributory negligence in favor of the proximate cause corollary justification for contributory negligence.[338]

How temporal impacts on susceptibility comport with proximate cause depends on how a proximate cause analogy applies to super-reasonableness. One of two approaches are possible: Either a plaintiff's reasonableness is determined separately from her susceptibility or it is determined in conjunction with it. If you do not understand yet, do not worry. That last sentence is sufficiently esoteric to warrant a deeper explanation. We will start with the first approach. Think about the goal of proximate cause as pairing actions with their consequences.[339] In this view, we can choose either to pair macro actions with macro consequences or micro actions with micro consequences.[340] The first approach, determining reasonableness separately

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332. A guilt-based justification for contributory negligence in particular would support such a move. *See Davis,* 15 N.E. at 360. As time does not reflect on a litigant's blameworthiness, it would have no place. *See id.*

333. *See generally id.* (plaintiff must have clean hands).

334. *See id.*

335. *Id.*

336. *See Davis,* 15 N.E. at 360; *see* Sisk, *supra* note 16, at 35 ("Even in those circumstances where the plaintiff's negligence has posed a risk only to himself and not to others . . . society may properly take full account of the contributorily negligent behavior by treating the plaintiff as a blameworthy actor, together with the defendant.").

337. *See Davis,* 15 N.E. at 360 (plaintiff must have clean hands); *See generally* Sisk, *supra* note 16, at 35 ("Even in those circumstances where the plaintiff's negligence has posed a risk only to himself and not to other . . . society may properly take full account of the contributorily negligent behavior by treating the plaintiff as a blameworthy actor, together with the defendant").

338. *See* James, Jr., *supra* note 10, at 696-97.

339. *See* discussion of the analytical heft of proximate cause, *supra* note 295. Ultimately, this article leverages that heft to develop a new system of reasonableness – understanding the tactical move of treating proximate cause as rich with analytical resources is necessary to understand the whole of this project.

340. *Id.*

from susceptibility, pairs macro actions with macro consequences.[341] That is, it pairs sets of behaviors with sets of outcomes.[342] Under this approach, the whole of a plaintiff's actions is weighed reasonable or unreasonable and then paired with the whole of the plaintiff's resulting susceptibility.[343] As outlined in the previous subsection with Neil, a plaintiff's self-care is judged reasonable or unreasonable en masse.[344] Then, if found unreasonable, every bit of loss due to injury caused by the preexisting susceptibility is assigned to the unreasonable plaintiff.[345] This is the approach assumed above and would support, just as the morality justification did, not factoring temporal effects into a super-reasonableness analysis.[346] They do not factor into a plaintiff's reasonableness (or lack thereof) and therefore have no place in the analysis except for the impact they have on injury.[347] But this outcome is not necessarily unavoidable.

The second approach provides an avenue for considering temporal effects. As above, this approach views proximate cause as pairing actions with their consequences, but instead pairs individual actions with their individual consequences.[348] Whereas the previous approach paired on a macro basis, this is a micro pairing.[349] In other words, this view credits plaintiffs for all events (or, in this context, non-events such as time itself) which are expected to reduce their overall susceptibility and penalizes plaintiffs for all events (again, non-events as well) which are expected to increase their overall susceptibility.[350] To ground this explanation in a concrete example, let us use Neil again.[351] Rather than determining reasonableness of the whole of his self-care, however, this approach determines the reasonableness of each action (or non-actions) individually with respect to the effect they have on his susceptibility.[352] It may be difficult to see how this approach differs from the former; the distinction is a narrow

341. *Id.*
342. *Id.*
343. *Supra* note 295.
344. *See supra* Part III.C.1 ("Super-reasonableness (or meta-reasonableness for those who would confuse super-reasonableness with extreme reasonableness) looks to the emergent trend of reasonableness when contrasting the two sets of actions. Where the set of reasonable actions outweighs the set of unreasonable actions, the super-reasonableness analysis should reflect the emergent trend of reasonableness. Likewise, where the set of unreasonable actions outweighs the set of reasonable actions, the super-reasonableness analysis should reflect the emergent trend of unreasonableness.").
345. *Id.*; STEIN, *supra* note 51, at § 11:1.
346. *See supra* Part III.C.1.
347. *Id.*
348. *See* discussions of proximate cause, *supra* note 295, 339.
349. *Supra* notes 239-243 and accompanying text.
350. *See supra* note 295.
351. *See supra* Part III.B.1.
352. *See* discussions of proximate cause, *supra* note 295,339 (proportionately linking causal proximity to liability).

one. This approach credits expected effect as a proxy for reasonableness and then determines total reasonableness by the total expected effect.[353] The only difference in outcome is that those morally or aspirationally neutral are credited to plaintiffs based on their expected effect on the plaintiff's preexisting susceptibilities.[354] Time, which heals all wounds, therefore also reduces a plaintiff's culpability.[355]

This second approach, however, creates a dangerous precedent and requires some arbitrary line-drawing to avoid crediting the slow creep of death and entropy against plaintiffs.[356] It is for this reason this article hesitates hesitant to endorse the second approach. It is nonetheless worth discussing the approach because it forces us to confront a more profound set of questions: To what extent should time mend our mistakes? Should we view the healing hands of time as evidence of a larger trend in favor of moving on from our past indiscretions?

3. A Statute of Limitations.

This article has argued that a negligently caused preexisting susceptibility should deny recovery for the portion of an injury resulting from the susceptibility.[357] But how do we reconcile our desire for holding plaintiffs accountable for their own self-harm with a desire for finality and ultimately with the eggshell skull rule itself? Above, this article has made the case that extending contributory negligence to plaintiffs' preexisting susceptibilities does not conflict with justifications for the eggshell skull rule.[358] That is, taking a plaintiff as she comes does not require holding a defendant accountable for the plaintiff's self-caused injuries.[359] At some point, however, that stops being true. For an extreme example, imagine a middle-aged woman who, when she was in elementary school, negligently injured her knee by jumping out of a window. Assuming this middle-aged woman has had a weakened knee for decades, at some point we should be willing to forgive her childhood carelessness and allow her to recover for aggravations of her susceptible knee.[360]

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353. *Id.*

354. *Id.*

355. *Id.*

356. I am not convinced there is a principled line to draw, but arbitrary lines are drawn all the time in cases of proximate cause. *See, e.g.*, Ryan v. New York Central R.R. Co., 35 N.Y. 210, 212-213 (N.Y. 1866) (drawing an arbitrary line in proximate cause after the first house burned by a negligently started fire because the chain of causation must stop somewhere).

357. *See supra* Part II.A, II.B, II.C.

358. *See supra* Part II.

359. *See supra* Part II.A.

360. Surely the weakened knee is no longer "proximate" to the initial injury. *See* discussions of proximate cause, *supra* note 295, 339.

For another example, recall Peter from Part I, Section C.[361] Peter negligently drove his family into a river and then negligently tended to his own grief, leaving himself vulnerable to emotional trauma.[362] Decades later, Peter was rear-ended, causing him to spiral into a full-blown psychotic breakdown.[363] This article made the claim that denying Peter recovery for the aggravation of his preexisting vulnerability to emotional trauma required either accepting that he had taken legally inadequate care of himself or that his negligent injury (driving his family into the lake) should serve as a bar to recovery for the rest of his life.[364] What would it mean to hold Peter accountable for his negligent injury indefinitely? At a minimum, it means that we consider his negligence legally relevant so long as it continues to impact his life.[365] More dramatically, it signals a view of contributory negligence borne out of determinism.[366] While this view may be attractive to those accepting the original justification for contributory negligence (that of pure legal causation), it fails to comport with modern justifications.[367] Consider, alternatively, the proximate cause justification.[368] While we may be able to say that Peter's negligent car accident continued to cause his preexisting susceptibility thirty years later, it would be outlandish to say this outcome was proximate to the negligence.[369] Even if the analysis is guided by a moral justification, it would be unnecessarily unforgiving to say Peter's hands are forever dirtied because of one single negligent act, regardless of its consequences.[370] To find him morally culpable at forty-five for a mistake he made at fifteen would be to entirely reject any possibility of clemency.[371]

While it is fairly clear that some statutes of limitations for contributory negligence should exist,[372] many questions of how it should be implemented remain. This section subsection will discuss two of those questions. First,

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361. *See supra* Part I.C.

362. *See supra* Part I.C.

363. *Id.*

364. *Id.*

365. But if we take our proximate cause approach to super-reasonableness seriously, should we not weigh life-long injuries such that they are represented for life? *See supra* note 295.

366. This view is similar to the view of contributory negligence as borne out of sole legal cause, rejected by James, Jr., *supra* note 10, at 692-93, 696.

367. *See* James, Jr., *supra* note 10, at 692-93, 696.

368. As is the focus of this paper. *See supra* notes 13-17 and accompanying text; *see also* discussions of proximate cause, supra note 295.

369. *See supra* notes 13-17 and accompanying text; *see also* discussions of proximate cause, *supra* note 295.

370. *See Davis,* 15 N.E. at 360.

371. *Id.* Could we justifiably reject such clemency? Is that the role of maintenance and rehabilitation? Should those who take no steps toward bettering themselves actually be let off easy just because they have done nothing for long enough?

372. Or some other way of conforming our new theories of contributory negligence to the doctrinal engine of proximate cause. This article assumes a statute of limitations, but another method could be substituted. The ideal substitute is beyond the scope of this article.

how should a statute of limitations apply to negligent rehabilitation? Second, should the statute of limitations be a traditional bright line all-or-nothing rule, or does it make more sense to gradually decrease culpability for the duration of the statutory period?

Before getting to those questions, there are two preliminary asides that are important to make. First, it may be awkward to talk about a statute of limitations for contributory negligence. Typically, a statutory period begins tolling when another party gains standing to sue.[373] In this context, however, the statutory period begins tolling at the moment of breach, even though nobody has been injured by the negligent behavior and there is no possibility of litigation.[374] But there cannot even be a breach without a duty owed to someone.[375] The duty of contributory negligence is a duty owed to another to avoid injuring oneself.[376] How can there be breach without knowing to whom a duty will, if ever, be owed? The distinction here is that, whereas most statutory periods begin running at the moment of breach, these statutory periods are applied retroactively once breach is established by the existence of a duty owed to a defendant.[377] In practice, the period will begin accruing at the moment of the unreasonable behavior just as any typical statute of limitation, but technically, the statutory period will not exist until the moment of breach.[378]

Second, if we accept a statute of limitations for contributory negligence, we should also assume a similar temporal bar on admission of reasonable actions to establish a lack of negligence.[379] If Peter, for example, is protected from having his thirty-year-old negligence used against him, defendants should likewise be protected from Peter's invocation of thirty-year-old self-care to defend the contributory negligence claim.[380] Moving forward, this

373. *See* In re Ross, 548 B.R. 632, 638 (Bankr. E.D.N.Y. 2016), *aff'd sub nom.* Mendelsohn v. Ross, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) ("In common parlance, a right accrues when it comes into existence, and the standard rule is that a claim accrues when the plaintiff has a complete and present cause of action." (internal quotations and citations omitted)).

374. This statute of limitations begins accruing at the moment of breach, prior to any injury. This should strike you as odd because no cause of action exists for either party, but the statutory period accrues nonetheless. *See id.* ("In common parlance, a right accrues when it comes into existence, and the standard rule is that a claim accrues when the plaintiff has a complete and present cause of action." (internal quotations and citations omitted)).

375. *See Heaven*, 11 All E.R. Rep. at 35 (noting that there can be no liability for neglect of a duty which is not owed).

376. DOBBS AT EL., *supra* note 3, at § 219, 764.

377. *See In re Ross* 548 B.R. at 638. Retroactive accrual is unique in this area, but many statutory periods begin accruing at some date later than the injury. *See, e.g.*, True v. Monteith, 489 S.E.2d 615, 617 (S.C. 1997) (holding that the statutory period did not begin to accrue for legal malpractice claims until the client discovered the conflict of interest).

378. *See True*, 489 S.E.2d at 617; *In re Ross*, 548 B.R. at 638.

379. A proximate cause justification mandates such consistency. *See* discussions of proximate cause, supra note 295, 339.

380. *See* discussions of proximate cause, *supra* note 295, 339.

article will treat the statute of limitations as a temporal bar to the admission of all evidence relevant to negligence or reasonableness, not just a bar to establishing negligence.[381] This article will refer to the statute of limitations as that barring the admission of evidence of negligence, but keep in mind that the same limitation also applies to the admission of evidence of reasonableness.[382]

To analyze how we should treat the statute of limitations in the context of negligent rehabilitation, let us use the example of Olivia.[383] Recall that Olivia began a disastrous relationship with food in elementary school and maintained the dependency for twenty-four years over objections from her doctor until she was rear-ended in traffic, causing a massive heart failure, killing her.[384] The large question is: How much of the twenty-four years should be counted against her? In the example given, it seems to make little difference, being that there is no healthy eating to speak of. But in a world where Olivia began eating healthy for the last year of her life, how much unhealthy eating would weigh against her efforts? The obvious answer, and the one this article asserts should control, is that only the negligent eating within one statutory period of the accident should count toward her contributory negligence.[385] This approach benefits from its clarity, from being consistent with values of clemency, and from being analytically parallel to the statutory analysis of negligent injuries.[386]

That solution, however, is not the only option. Just as above, when discussing the proper treatment for temporal effects, we have the option of treating the whole of Olivia's negligent eating as one unit.[387] We could tack acts of negligence outside of the statutory period onto acts of negligence inside the statutory period by treating them as related.[388] This is not a revolutionary idea. In cases of fraud, for example, statutes of limitations do

381. Notice that the statute of limitations acts as a bar to admittance of evidence here and not to the claim itself because the contributory negligence claim is still allowed, rather behavior which occurred outside of the statutory period cannot serve as the basis for the defense.

382. *Supra* note 381.

383. *See supra* Part I.B.

384. *Id.*

385. A statutory period barring evidence inside of the statutory period is perverse. One not barring evidence outside the statutory period is worthless.

386. Consistency with proximate cause. *Cf. Haynes*, 883 S.W.2d at 612 (Proximate cause is addressed with a three-prong test: "(1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.")

387. *See supra* Part III.C.2.

388. *Cf.* Howard v. Kunto, 477 P.2d 210, 213-14 (Wash. Ct. App. 1970) (noting that where multiple consecutive owners, each without sufficient occupancy to satisfy adverse possession, were allowed to combine their residencies into a period which did satisfy the continuous residency requirement of adverse possession).

not start to run until the fraud terminates.[389] The whole of a twenty-year-long fraud, in spite a five-year statute of limitations, could be litigated in one proceeding given that the individual fraudulent acts are sufficiently interrelated to establish one ongoing fraud.[390] As problematic as an analogy to fraud may be in the case of an eating disorder, the underlying rule could provide a basis for treating an ongoing practice of unhealthy eating as a connected chain of related behaviors worthy of collective disposition.[391] This approach, however, seems to be an offshoot of a moral justification.[392] Individuals who perpetrate ongoing frauds waive finality by continuing to misbehave.[393] Individuals who simply eat poorly can hardly be said to have misbehaved in a way that would similarly waive their expectations of finality.[394]

One of the downsides of a statute of limitations is the apparent arbitrariness of the time limit.[395] If Peter had not negligently maintained his psyche after his negligent car accident,[396] it would be easy to imagine two scenarios which would make a mockery of the application of the statute of limitations.[397] Consider a statutory period of five years.[398] If Peter is rear-ended in traffic one day shy of five years after driving his family into the river, he will be denied recovery.[399] If the same accident takes place the very next day, however, he will be able to recover for the entirety of his injury.[400] Such a disparity in outcome due to the hypothetical accidents taking place

389. *See e.g.,* Cusimano v. Schnurr, 137 A.D.3d 527, 529 (N.Y. App. Div. 2016) (holding that the statutory period for a breach of fiduciary duty on the basis of fraud began to run at the moment the defendant employee stopped working for the plaintiff owner, but may toll to the extent the plaintiff is unable to discover the fraud).

390. *Id.* at 529.

391. *Cf. id.*

392. *See Davis,* 15 N.E. at 360.

393. *See Cusimano*, 137 A.D.3d at 529 (holding that the statutory period for a breach of fiduciary duty on the basis of fraud began to run at the moment the defendant employee stopped working for the plaintiff owner).

394. *See* Schwartz, *supra* note 43, at 722-23 ("Foolish behavior is of course disadvantageous to the actor, but it is difficult to identify any clear moral principle that it contravenes.").

395. *Cf. Ryan*, 35 N.Y. at 212-13 (noting the arbitrary line drawn in the case of proximate cause).

396. *See supra* Part I.C.

397. This is the necessary downside of drawing arbitrary lines. *See Ryan,* 35 N.Y. at 212-13 (Otherwise identically situated plaintiffs on either side of the line receive diametrically opposite treatment).

398. This article makes no claim about the desirability of different length statutory periods beyond the general bounds of the argument – that too short a period obfuscates the rule of holding plaintiffs accountable for their actions and too long a period obfuscates the statute of limitation's justification by denying clemency for unnecessarily long times.

399. Because the defendant will raise contributory negligence as an affirmative defense and will succeed because the crash will be admissible.

400. Because the defendant will not have enough evidence to support the affirmative defense.

one day apart screams of absurdity.[401] This is the inherent defect in statutes of limitations: bright lines cut too sharply.[402] And it is for this reason we may prefer a statutory gradient.[403]

As opposed to the all-or-nothing bright line rule, which creates such wild disparities around arbitrary cut-off points, we could instead opt for a steadier decrease in liability—imagine a gradient of colors rather than one bright line.[404] This system could gradually decrease culpability for the duration of the statutory period.[405] More concretely, in the case of a five-year statutory period, a plaintiff could have his negligent actions weigh toward his overall negligence twenty percent less every year.[406] After five years, the result is the same, but we avoid such stark disparities by implementing a gradual implementation of the evidentiary bar.[407] This approach also builds in a recency bias.[408] It gives full weight to only the most recent actions and discounts the weight of those actions fading into the past.[409] In this way, it allows partial and incremental clemency, which seems to comport well with the idea of proximate cause.[410] There is nothing special about the end-date of the statutory period – it is chosen arbitrarily anyway[411] – so to justify having clemency withheld entirely until the end of the statutory period would require an all-or-nothing view of forgiveness and finality in a way that makes little sense in this context.[412] This gradated approach comports well with our proximate cause justification for contributory negligence as the most recent actions are the most proximate to the plaintiff's current condition and should therefore be given the most weight.[413]

To clarify before moving on, the statute of limitations proposed in this subsection serves as a bar to the consideration of evidence in determining a

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401. This is the necessary downside of drawing arbitrary lines. *See Ryan*, 35 N.Y. at 212-13 (Otherwise identically situated plaintiffs on either side of the line receive diametrically opposite treatment).

402. *See id.*

403. *See id.*

404. Do gradated statutes of limitations exist? No, they do not seem to. But they are desirable in this instance because of how closely they comport with our proximate cause justification for contributory negligence. *See* discussions of proximate cause, *supra* note 295, 339.

405. *See* discussions of proximate cause, *supra* notes 13-17 and accompanying text; *see also supra* note 295, 339.

406. *Id.*

407. *Id.*

408. Recency bias also conforms well to our proximate cause justifications. *See* discussions of proximate cause, *supra* notes 13-17 and accompanying text*; see* also supra note 295, 339.

409. *Id.*

410. *Id.*

411. *See cf. Ryan*, 35 N.Y. at 213.

412. *See* discussions of proximate cause, *supra* notes 13-17 and accompanying text; *see also supra* note 195; *supra* note 234.

413. *See* discussions of proximate cause, *supra* note 295, 339.

plaintiff's reasonableness or lack thereof.[414] An action which falls outside of the statutory period cannot be factored into the reasonableness analysis.[415] In the gradated approach, actions which are partially barred will be admitted, but their contributions to the super-reasonableness analysis will be discounted by the portion of the statutory period which has elapsed.[416] Notice that the gradated approach is only relevant in a super-reasonableness analysis. In a binary reasonableness analysis, actions are either reasonable or negligent and nothing else;[417] the degree to which they are either reasonable or negligent is entirely irrelevant.[418]

4. Super-Reasonableness Binary versus Spectrum.

What ought to be apparent upon closer inspection is that clemency, especially the incremental clemency from the gradated statute of limitations, is meaningless if it does not decrease a plaintiff's ultimate liability.[419] Suppose we are in a jurisdiction which has adopted a gradated statute of limitations like the one hypothesized above (a five-year total with twenty percent decreasing weight every year).[420] Further suppose that a plaintiff negligently injured herself one year ago and has behaved evenly negligently and reasonably in rehabilitating her injury since (the rehabilitation is therefore a wash). Is it of any value to this plaintiff that her negligent injury is now only weighed in her super-reasonableness analysis at eighty-percent force?[421] If super-reasonableness is measured on a binary, as standard reasonableness is, it is of no value to this plaintiff at all.[422] It is therefore worth asking whether we should consider a spectrum of reasonableness to better reflect the clemency which we desire to grant plaintiffs over time.[423] That is, if unreasonableness with regard to a preexisting susceptibility diminishes over time, why should the plaintiff's resulting liability not also diminish?[424] This subsection focuses on these competing arguments.

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414. *See* discussion of this statute of limitations as an evidentiary bar, s*upra* note 281.

415. *Id.*

416. *See* discussions of proximate cause, *supra* note 295, 339.

417. *See* Hainlin, 47 So. at 832-33.

418. *See id.* For more practice applying statutes of limitations, consider the following hypothetical: Peter has his accident, goes to counseling and church for a decade. Later gives up and goes to the gym instead because he did not think counseling was working.

419. Such empty clemency may serve academics' career trajectories but does little for the people for whom the clemency is meaningless.

420. *See* discussions of proximate cause, supra note 295, 339.

421. The question is rhetorical. Of course, it is not.

422. So long as she is determined negligent, she is denied the same recovery. *Cf. Hainlin*, 47 So. at 832-33.

423. This is a stark departure from the reasonableness binary which has been the staple of negligence cases for the last hundred years. *See id.*

424. *See* discussions of proximate cause, *supra* note 295, 339.

We will start with what should be our default: a binary approach to super-reasonableness.[425] It is obvious why this should be our default, since it is the rule used in every other reasonableness analysis.[426] Recall from subsection 1 above that in the typical case of texting while driving, it is irrelevant whether the plaintiff was texting "On my way" to her mother or transcribing Shakespeare on two monitors in her passenger seat; she is equally negligent in either case.[427] This outcome, in the super-reasonableness context, comports well with our proximate cause justification for contributory negligence.[428] If a plaintiff is only either negligent or not with regard to the thing which proximately causes her injury, proximate cause then determines the plaintiff's liability and/or recovery without having to coexist with any collateral force.[429] If proximate cause coexisting with collateral forces is nebulously esoteric, imagine the opposite, where a plaintiff is said to be seventy-five percent negligent. We would have to determine how much of the plaintiff's injury were proximately caused by her own negligently-caused susceptibility and then discount that value by seventy-five percent in order to determine the portion of the loss assignable to the plaintiff.[430] Moreover, given the difficulty of applying such an involved standard, it may be better to stick to an easily applied bright-line rule.[431] The costs of a difficult rule are easy to overlook, but are nonetheless real.[432] Jury confusion risks predictability of outcome at trial.[433] It also wastes time and precious judicial as well as litigant resources in the event of a jury (or even a judge) misapplying the rule.[434]

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425. *See Hainlin*, 47 So. at 832-33.

426. *Id.* It may be the case that a binary reasonableness is adopted in other cases because 100% negligence would either have to be unattainably severe negligence or just a threshold above which degrees of negligence are indistinguishable – which undermines the spectrum of reasonableness itself.

427. *See supra* Section III.C.1; *Hainlin*, 47 So. at 832-33.

428. *See* discussions of proximate cause notes 13-17 and accompanying text; *see also supra* note 295, 339.

429. *Id.*

430. It is also unclear whether a 75% discount is the correct discount. A plaintiff who is less than 50% negligent with regard to her preexisting susceptibility will likely not be considered negligent at all. Should we, therefore, discount the value by 50%? By the portion of difference between 100% and the maximum at which a plaintiff's recovery can be limited? Should it change based on how many parties are assigned fault?

431. *See Ryan*, 35 N.Y. at 213 (Otherwise identically situated plaintiffs on either side of the line receive diametrically opposite treatment).

432. *Id.*

433. *See generally* John D. Egnal, *Risk of Jury Confusion as the Ground for Discretionary Dismissals of Supplemental Claims*, 34 W. NEW ENG. L. REV. 85 (2012) (arguing generally that jury confusion is a legitimate threat to fair judicial administration and that it may justify reducing the number of claims – and implicitly, affirmative defenses – which the jury should be allowed to hear at once).

434. *See generally* James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993) (arguing generally that unnecessary litigation - like relitigating cases wrongfully handles by a confused judge or jury - is a meaningful cost to our nation's severely limited judicial resources).

But the case for a super-reasonableness spectrum is compelling—at least compelling enough to elaborate. Note that at the outset of this section, this article asserted that as a plaintiff engages in productive self-care, she becomes more and more reasonable with respect to her preexisting susceptibility over time.[435] That 'becoming more and more reasonable over time' language highlights the reality of a continuum of reasonableness in this context.[436] Does judging super-reasonableness on a binary, then, superimpose an artificial and arbitrary bright line over a spectrum which more closely tracks reality?[437] As noted above, is partial clemency in a gradated statute of limitations really only an illusion if the ultimate outcome is still a binary reasonableness analysis?[438]

The notion that more reasonableness should entitle a plaintiff to more recovery also feels intuitively correct. It obviously comports well with the moral justification for contributory negligence; those who behave more responsibly should be entitled to more recovery and vice versa.[439] But it is unclear how well it comports with a proximate cause justification.[440] On first inspection, it seems to contradict a proximate cause justification.[441] As shown above, a spectrum of reasonableness may undercut the role of actual proximate cause. But it seems unclear why working in conjunction with the actual proximate cause analysis would be considered to undermine a proximate-cause-based justification for contributory negligence.[442] Aside from potential jury confusion and rule-redundancy, it is hard to see how adding a more precise pairing between a plaintiff's actions and her liability undermines the goal of proximate cause of paring actions to their consequences. Is it possible that both alternatives accord with proximate cause?

Perhaps the most obvious strength of a super-reasonableness spectrum is that it solves cases where a plaintiff's reasonable efforts to decrease her susceptibility to injury are ineffective (recall that these efforts are still credited toward her overall reasonableness), and the plaintiff is still

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435. *Supra* Introduction to Part III.C.

436. *Id.*

437. *See* discussions of proximate cause, *supra* note 295, 339. Empowering proximate cause with the analytical force necessary to justify this creation of doctrine also allows us to shape the law to the reality to which it attempts to respond.

438. *See* the uselessness of empty clemency, *supra* note 419.

439. *See Davis,* 15 N.E. at 360.

440. *See* discussions of proximate cause, *supra* note 295, 339. This paper uses proximate cause as its engine and cannot operate without it. For the spectrum of super-reasonableness to be useful, it must comport with proximate cause.

441. *See* discussions of proximate cause notes 13-17 and accompanying text; *see also* supra note 295, 339.

442. But are we obfuscating the actual mechanism by making this self-referential proximate cause clock wind-up and tick itself?

unreasonable with regard to her susceptibility on the whole. In these cases, the loss assigned to her may be massive while the portion of her injury which she has actually "caused" may be relatively minute. Consider Neil, our novice skier.[443] Recall that Neil negligently broke his leg but did everything right with regard to the rehabilitation of his leg.[444] Suppose his leg unexplainably got worse, not better. While Neil's super-reasonableness calculation may come out leaning barely negligent, the loss assigned to him could be the entirety of an inexplicably large injury.[445] Does solving cases like these justify the use of a spectrum rather than a binary in a super-reasonableness context?

Finally, recall from our discussion of Olivia's super-reasonableness that we may be in over our heads in attempting to determine the reasonableness or lack thereof of every individual action in the context of preexisting susceptibilities.[446] In that case, while we were able to identify a general trend of unhealthy eating habits, we were unable to identify which individual meals (or individual bites or entire days of eating, for example) were reasonable and which were negligent.[447] This article pointed out that we may need a more holistic or comprehensive approach to our reasonableness determination.[448] It is not clear that a spectrum of reasonableness would necessarily produce a more holistic super-reasonableness approach. But a super-reasonableness spectrum may lighten the burden on the factfinder of making close calls without clear standards. Where the choice is between a binary reasonable or unreasonable standard and the stakes are severe liability, the burden on the factfinder may be unnecessarily large.[449] In cases where the plaintiff's reasonableness is unclear, being able to assign a number closer to fifty-percent could alleviate the pressure and allow a factfinder to elect for a middle-path.[450]

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443. *See supra* Part III.B.1.

444. *Id.*

445. *See* discussion of proximate cause, supra note 295, 339.

446. *See supra* Part III.C.1; *Cf. Pennsylvania Coal Co*., 260 U.S. at 414-15, 419-20, 422; (noting that the majority and dissent disagreed over the proper denominator with which to evaluate the extent of a regulatory taking). This demonstrates the trend of being unable to even first identify the proper denominator.

447. *Cf. Pennsylvania Coal Co*., 260 U.S. at 414-15, 419-20, 422 (noting the inability to identify a common denominator).

448. *Supra* Part III.C.1; *see also* discussion of whether a holistic approach is meaningless formalism, Part III.B.; *infra* Part III.C.4.

449. *But see Ryan*, 35 N.Y. at 213 (deciding on which side of an all-or-nothing arbitrary line to place a plaintiff is stressful for juries when the stakes are life-changing amounts of money).

450. *Id.* (such a choice may be made easier by lowering the stakes from all-or-nothing to merely one percent of the total recovery).

CONCLUSION

We have graduated from a view of tort liability as a proxy for absolute culpability for an injury to a view of tort liability as a proxy for a more realistic contribution to an injury with innumerable causes. This article has attempted to push that graduation one step further and to provide the tools necessary to see that graduation come to fruition. This article began by identifying an inconsistency in the application of contributory negligence—that it is applicable to plaintiffs' behavior with regard to the preexisting conditions of their property, but inapplicable to plaintiffs' behavior with regard to themselves.[451] Through endowing proximate cause with affirmative analytical power, this article made the case that contributory negligence should apply in both circumstances.[452] It quickly became evident, however, that the tools required to support such a move are problematically absent, both with regard to preexisting conditions of people and of property.

In response to this dilemma, this article set out to propose a set of rules sufficient to adequately evaluate reasonableness over time.[453] After several differentiations, this article proposed a new reasonableness standard: Super-reasonableness.[454] In order to conform this new standard to our driving force of proximate cause, this article proposed a gradated statute of limitations and a spectrum of reasonableness.[455] While it is not clear whether this change is viable, or even desirable, I hope this article can serve to start a conversation about the proper role of proximate cause in negligence cases.

What becomes unmistakable upon closer analysis is that the word "reasonable" means nothing when it is most needed.[456] When the proper outcome is clear, "reasonable" is a feckless binary which adds no value to our pursuit of the truth.[457] But when the proper outcome is hidden, "reasonable" is hopelessly out of sight.[458] It abandons the jury to stumble blindly through the dark before throwing up their hands guessing questioningly: "sure."[459] This article unlocks proximate cause's true potential as a light to help locate this ethereal reasonableness in the dark and treacherous night through which the law so valiantly scours for the truth.

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451. *See supra* Introduction.
452. *See supra* Part II.
453. *See supra* Part III.
454. *See supra* Part III.C.1.
455. *See supra* Part III.C.3.
456. *See supra* note 216.
457. *See supra* Part III.C.1.
458. *Id.*
459. *See supra* Part III.C.4.