Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law

Joseph H. King Jr.
OUTLAWs AND OUTLIER DOCTRINES: THE SERIOUS MISCONDUCT BAR IN TORT LAW

JOSEPH H. KING, JR.*

God fashioned the ship of the world carefully
With the infinite skill of an all-master ....
Then—at fateful time—a wrong called,
And God turned, heeding.
Lo, the ship, at this opportunity, slipped slyly,
Making cunning noiseless travel down the ways.
So that, forever rudderless, it went upon the seas
Going ridiculous voyages,
Making quaint progress,
Turning as with serious purpose
Before stupid winds.

Stephen Crane¹

---

¹ UTK and Walter Bussart Distinguished Professor, University of Tennessee College of Law. J.D., University of Pennsylvania. Research for this Article was supported by a generous summer research grant from the College.


1011
TABLE OF CONTENTS

INTRODUCTION ...................................... 1014

I. CURRENT INCARNATION ................................ 1018
   A. Vague Vestiges ................................... 1018
   B. Factual Permutations ............................ 1023
      1. Defendant Is Actively Injured
         While Engaged in Serious Misconduct ........ 1023
      2. Defendant Actively Contributed to the
         Commission of Serious Misconduct .......... 1025
      3. Defendant Failed to Prevent the Plaintiff
         from Engaging in the Serious Misconduct ... 1027
      4. Defendant Failed to Prevent Adverse
         Consequences from Serious Misconduct ...... 1029
   C. Fuzzy Prerequisites ............................ 1035
      1. “Serious” Misconduct ......................... 1035
      2. Risk Restriction ............................. 1039
      3. Other Prerequisites .......................... 1042
   D. Putative Rationales for the Doctrine .......... 1043
      1. May Not Profit .............................. 1043
      2. Deterrence and Moral Hazard ............... 1044
      3. Appearances ................................. 1046
      4. Nonreciprocal Riskiness ....................... 1048
      5. Common Sense or “Trust Me” ................ 1049
      6. Moral Responsibility ......................... 1050
      7. Not Proper Role for Judicial Branch ....... 1051
      8. Unforseeability and Risk Analysis .......... 1051
      9. Response to Comparative Fault ............ 1052
     10. Undeserving Miscreants ...................... 1053
     11. Participant Consent .......................... 1053
     12. Stealth Comparative Fault ................... 1055
     13. Enhance Criminal Laws ....................... 1056
14. Criminal Malpractice: Avoiding Conflicting Resolutions .................................... 1056
15. Criminal Malpractice: Availability of Defense Attorneys and Costs ...................... 1057
16. Criminal Malpractice: Availability of Postconviction Relief .................................. 1058
17. Criminal Malpractice: Criminals Passing the Time .............................................. 1059
19. Criminal Malpractice: Closure and Proliferation of Lawsuits ................................. 1060

II. TIME TO DEFINITIVELY REPUDIATE THE DOCTRINE ........................................... 1061
A. Subverting the Goals of Tort Law ................................................................. 1061
B. Instrumentally: Straying From the Elemental Framework ................................... 1063
C. Structurally: Absence of Standards ...................................................................... 1070
D. Operationally: Ad Hoc and Selective ..................................................................... 1072

CONCLUSION .............................................................................................................. 1076
INTRODUCTION

In ancient and early English legal lore, continuing into the twelfth century, a serious criminal could be decreed *Wolveseved*, or outlaw. He was thus cast, according to its medieval incantation, as *caput lupinum* or figuratively bearing the head of the wolf. Then, according to Blackstone, he “might be knocked on the head like a wolf, by any one that should meet him.” Other commentators were more vivid in their description, saying “[i]t is the right and duty of every man to pursue him, to ravage his land . . . [and] hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a ‘friendless man,’ he is a wolf.”

The rationale for the harsh *Wolveseved* decree for a transgressor was that “having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him.” Some scholars even purport to find this type of process

---

4. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 315 (Cambridge Univ. Press 1979) (1769).
5. *Id.;* Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2249 (1985); see also Bruce MacDougall, Ex Turpi Causa: *Should a Defence Arise from a Base Cause?*, 55 SASK. L. REV. 1, 4 & n.16 (1991) (defining “caput lupinum” as meaning outlaw or wolf’s head); Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 63 & n.55 (1995) (referring to the phrase as meaning a “wolf’s head” or outlaw). The term, and equivalent *capus lupus* and *caput genere lupinum* phrases, literally mean the “wolf’s head,” and refer to a person who has been outlawed. Leff, *supra*, at 2249; see also Drew v. Drew, 37 Me. 389, 391 (1854) (construing the term outlaw for the purposes of language in a contract, and discussing various meanings of the term outlaw, one of which meant “one who is put out of the law” and was said to be “caput genere lupinum”); ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 19 (1966) (referring to *gerit caput lupinum* as “he bears the head of a wolf”).
6. 4 BLACKSTONE, *supra* note 4, at 315.
7. 2 POLLOCK & MAITLAND, *supra* note 3, at 449.
8. 4 BLACKSTONE, *supra* note 4, at 315. Professor Olson writes:
The medieval knowledge of wrongdoing then was more than the infliction of harm upon another. Wrong’s darkness inhered in its quality of a breaking of faith, *fidelitas*. The outlaw . . . not only declared war upon his community, but also upon himself. By his deed, he broke those bonds that granted him identity. Olson, *supra* note 2, at 13S. With identity fractured, then, it became easier to characterize the criminal as *lupinum*, the wolf. *See id.*
underlying some biblical events. The decree of *caput lupinum* and outlawry was not, however, an expression of a strong legal system. Quite the contrary, such ready recourse to the outlawry mantle was a manifestation of a weak system of laws, and the lack of refined humane legal structures with which to tailor punishments. It has been noted that "recourse to outlawry is . . . one of the tests by which the relative barbarousness of various bodies of ancient law may be measured." But, "[g]radually law learns how to inflict punishment with a discriminating hand." Eventually, outlawry lost its "exterminating character" and was, in that extreme form at least, abandoned "to avoid such inhumanity."

Although the extreme notion of *caput lupinum* has largely lost its legal standing as a general principle, especially in the United States, an artifact remains. An increasing number of courts have, to varying degrees, recognized a special doctrine barring unintentional tort claims arising out of a plaintiff's serious (usually criminal) wrongdoing. This cabalistic and aperiodic

9. See 3 MATTHEW HENRY, A COMMENTARY ON THE OLD AND NEW TESTAMENTS 194 (1904) (interpreting Psalm 58 and referring to the proclamation of "qui caput gerit lupinum—an outlawed wolf," whom "any man might kill and no man might protect").

10. 2 POLLOCK & MAITLAND, supra note 3, at 449.

11. Id. at 450.

12. Id. at 449.

13. Id. at 450.

14. 4 BLACKSTONE, supra note 4, at 315; see also 2 POLLOCK & MAITLAND, supra note 3, at 459. The current state of outlawry under English law is beyond the scope of this Article and is not addressed. For background on American law, see infra note 28.

15. This Article will focus exclusively on United States cases, and primarily on the serious misconduct doctrine in the context of claims for unintentional injuries. The standing and nature of the serious misconduct bar when the defendant is alleged to have committed an intentional tort is not clear and may sometimes be entwined with the analysis of various common law and statutory privileges to protect persons or property. DANB. DOBBS, THE LAW OF TORTS § 78, at 179-80 (2000) (stating that "[i]t does not seem likely that courts would apply any such forfeiture principle so as to permit the possessor [of land] to shoot the felonious intruder intentionally and needlessly"). Suffice it to say that my recommendation in this Article that the serious misconduct doctrine be abandoned as a separate independent defense or bar would logically encompass both intentional as well as unintentional torts.

Various privileges designed to protect persons or property may sometimes shield a defendant from intentional tort claims by persons injured while engaged in serious misconduct. *Id.* §§ 68-81. Liability may also sometimes be affected by issues related to the validity and scope of the plaintiff's consent. *Id.* § 105; see also infra note 202. But, then to that extent, the outcome of such claims would depend on those privileges or on the consent issues, which would operate independently and irrespective of the separate serious misconduct doctrine.
doctrine, which I will refer to as the serious misconduct bar, had for years largely operated below the radar screen of much of the legal community. During the era when traditional contributory negligence and its implied assumption of risk cousin constituted complete bars to tort recovery, the serious misconduct bar was to a great extent subsumed into those more mainstream outcome-determinative defenses. Following the emergence of comparative fault in most jurisdictions, however, contributory negligence no longer necessarily constituted an automatic complete bar to a plaintiff's recovery. Once the complete bar husk of traditional contributory negligence was peeled away by the ascendancy of comparative fault, the question of the previously submerged serious misconduct rule remained. This atavistic doctrine survives today, existing as a torts quintessence apart from the traditional elements and defenses of tort law. It operates as a freestanding construct, lurking in the crawl space beneath both the traditional torts elements and the defenses based on plaintiff's fault, such as contributory and comparative negligence.


17. Thus, one court noted (in a jurisdiction that had replaced contributory negligence with a comparative fault rule) that "in those cases in which recovery is barred on public policy grounds [under the serious misconduct bar], the result mirrors the outcome of the abandoned contributory negligence rule." Ardinger v. Hummell, 982 P.2d 727, 736 (Alaska 1999).

18. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a, reporter's note (2000) (noting that there has been an "avalanche" of jurisdictions that have adopted comparative fault, and that only a few jurisdictions continue to use contributory negligence).

19. DOBBS, supra note 15, at 503. The fall of the complete bar rule has been especially dramatic in jurisdictions adopting a so-called "pure" version of comparative fault in which the plaintiff's recovery is reduced but not barred even if the plaintiff's fault exceeds the level of fault of the defendant. Id. at 505. Where a jurisdiction has adopted some version of a "modified" system, the plaintiff's fault may still operate to completely bar his tort claim if his level of fault crosses the threshold level specified in the version of comparative fault that is applicable. Id. Even in the modified states, however, the likelihood of a complete bar may often be reduced by the fact that relative fault of the parties will usually be up to the jury to decide, and by the rule in most modified states that compares the plaintiff's fault with the aggregate fault of all other contributing tortfeasors. Id. at 531. Most states have also subsumed implied assumption of risk into their comparative negligence scheme. Id. at 539; see infra note 204.

20. See Barker v. Kallash, 468 N.E.2d 39, 43-44 (N.Y. 1984) (noting that the doctrine "has
We are beginning to see signs of renewed interest in the serious misconduct bar as a way for defendants to definitively short-circuit a lawsuit and thus avoid the partial damages awards under comparative fault regimes. Moreover, despite pronouncements of its demise, the serious misconduct doctrine has shown signs of reemergence in a wide spectrum of personal injury cases and legal malpractice claims arising out of defense of criminal prosecutions. Because the serious misconduct bar was, for much of its desultory history, largely subsumed into the contributory negligence defense, it is difficult to reliably gauge its current standing. It has been a torpid doctrine, like a subacute but chronic infection, only partially and temporarily suppressed. It lies dormant for a while at one location, only to rear its head somewhere else.

To further cloud the subject, the courts have not clearly identified or articulated a convincing rationale for the serious misconduct bar. The most common explanation for the doctrine is that the law will not allow a wrongdoer whose injury arises out of his serious misconduct to “benefit” from his wrongdoing by recovering damages from a tortfeasor who otherwise might be liable for causally contributing to the injury. As will be discussed, I believe that these and other ostensible justifications for the doctrine are specious. More centrally, I think the serious misconduct bar is objectionable on more fundamental grounds. First, the doctrine frustrates the policy goals of tort law. Second, it is instrumentally flawed because it moves decision makers out of the established elemental and comparative fault torts framework into an ad hoc and potentially selective process. Third, the serious misconduct bar suffers structurally from the absence of lucid, predictable, or workable standards guiding its application. Finally, the doctrine is

always existed independently from the rule of contributory negligence and its successor, comparative negligence”). The serious misconduct doctrine, focusing exclusively on the plaintiff’s conduct, is also different from various common law and statutory rules that may limit the duty or liability of owners and occupiers of land to entrants injured while committing specified misconduct. These latter rules depend not only on the plaintiff’s status and conduct, but on the interests of defendants as owners and occupiers. See DOBBS, supra note 15, §§ 209, 231-232, 236-237.

21. Prentice, supra note 5, at 82.
22. See infra notes 48-100 and accompanying text.
23. DOBBS, supra note 15, at 525.
24. See infra notes 48-53 and accompanying text.
operationally dangerous because it requires the court to evaluate the plaintiff's conduct through a moral prism trained on an ever-changing social landscape and climate, resulting in the potential for selective and arbitrary application.

The danger of this doctrine lies in its reductive simplicity. It contemplates the kind of ad hoc moral judgments that are inherently subjective. They are also selective, in the sense that we usually do not otherwise inquire into the moral fiber of the plaintiff. The medieval flavor and purple lingo of the serious misconduct doctrine may help explain its slippery survival. Remember Camus's admonition, that when "tricks of language contribute to maintaining an abuse that must be reformed or a suffering that can be relieved, then there is no other solution but to speak out and show the obscenity hidden under the verbal cloak." The serious misconduct doctrine operates not to produce predictability and certainty, but perversely to inject chaos into the process and provide fertile ground for exploitation and abuse.

In the sections that follow I will briefly examine the problematic underpinnings of the serious misconduct bar. My purpose here is not to comprehensively survey the national case law or that of any particular state. Next, I will evaluate some of the manifold arguments that have been advanced in support of the doctrine. I will then explain my thesis that the serious misconduct doctrine should be eliminated as a freestanding bar to liability in tort claims.

I. CURRENT INCARNATION

A. Vague Vestiges

At one time serious criminals were deemed outlaws, figuratively bearing, according to the medieval incantation, "caput lupinum" or the wolf's head. But, over the years, the law and judicial attitudes

25. There are, however, other exceptions such as cases that have rejected defamation claims because the plaintiff was found to be "libel-proof." Joseph H. King, Jr., The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome, 29 HOFSTRA L. REV. 343, 344 (2000).


27. See supra notes 2-5 and accompanying text.
changed, at least in the United States, so that in general persons who have committed crimes do not ipso facto lose the protection of the rule of law for all purposes.\textsuperscript{28} Yet, for the purposes of tort claims arising out of the plaintiff's commission of a serious crime or misconduct, a growing number of cases deem the plaintiff an outlaw of sorts.\textsuperscript{29} According to the doctrine, sometimes a person who violates criminal laws (or perhaps otherwise engages in especially serious misconduct) is "treated as something of an outlaw who ... is disentitled to seek redress through the courts for any injury to which his criminal conduct contributed."\textsuperscript{30}

Most commentators trace the obscure origins of the serious misconduct bar to contract law.\textsuperscript{31} Traditionally, a contract might be deemed unenforceable "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."\textsuperscript{32} Perhaps to lend the doctrine an air of respectability and intellectual standing, the doctrine is often characterized as an emanation of the Latin contract maxim 	extit{ex turpi causa non oritur},\textsuperscript{33} which, as expansively interpreted to reach tort, would mean essentially, "that no lawsuit may be brought by a person who has committed an

\textsuperscript{28} This is true even for prisoners in most states. \textit{See generally} 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 15.1 (2d ed. 1993) (discussing the nearly universal demise of the so-called "civil death laws" for prisoners in the United States, and noting that "civil death laws in modern practice, impose no significant disability on inmates").

\textsuperscript{29} MacDougall, \textit{supra} note 5, at 2 (stating that the doctrine "renders the plaintiff an outlaw for the purposes of the case before the court").

\textsuperscript{30} 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 17.6, at 617 (2d ed. 1986).

\textsuperscript{31} \textit{See} Frances H. Bohlen, Consent As Affecting Civil Liability for Breaches of the Peace, 24 COLUM. L. REV. 819, 819-21 (1924); MacDougall, \textit{supra} note 5, at 2; Prentice, \textit{supra} note 5, at 57-62.

\textsuperscript{32} 2 RESTATEMENT OF CONTRACTS § 512 (1932); \textit{see id.} § 598 (stating that such contracts are unenforceable, subject to exceptions). The current status of modern contract law is beyond the scope of this Article. \textit{See generally} RESTATEMENT (SECOND) OF CONTRACTS § 178 & cmt. b (1979) (adopting an approach based on a "balancing, in light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement," and noting that "[i]n some cases the contravention of public policy is so grave, as when an agreement involves a serious crime or tort, that unenforceability is plain"); E. ALLAN FARNSWORTH, CONTRACTS § 5.1, at 324 (3d ed. 1999) (noting that unless the agreement involves commission of a serious crime or tort or the promise itself offends public policy, "the court's decision must rest on a delicate balancing of factors").

\textsuperscript{33} \textit{See} Bohlen, \textit{supra} note 31, at 819-20; MacDougall, \textit{supra} note 5, at 2. The Latin phrase \textit{ex turpi causa} is typically translated to mean: "No cause of action can arise out of an immoral (or illegal) inducement (or consideration)." BALLENTINE'S LAW DICTIONARY 447 (3d ed. 1969); \textit{see also} BLACK'S LAW DICTIONARY 607 (7th ed. 1999).
illegal or immoral act. In fact, the serious misconduct doctrine is occasionally and variously referred to not only as the "outlaw" doctrine, but also as the "ex turpi" rule.

For decades the serious misconduct doctrine largely lay dormant in tort law with few cases explicitly addressing it. This was probably a function of the fact that contributory negligence operated in binary fashion, either completely barring plaintiff's claim, or not at all. The serious misconduct doctrine had essentially the same effect as contributory negligence, and was thus largely subsumed into the broader contributory negligence defense. With the widespread adoption of comparative fault, one might have expected the doctrine, shorn of the cover of the complete bar rule of contributory negligence, to have withered and died. Indeed, at least one commentator has pronounced that the doctrine has "virtually disappeared" in the United States in recent years. That conclusion is belied by reality and represents wishful thinking. The doctrine commands increasing support in the courts, and even some commentators seem not quite able to let go of it. Although not

34. Prentice, supra note 5, at 55.
35. Flanagan v. Baker, 621 N.E.2d 1190, 1192 (Mass. App. Ct. 1993) (referring to a variation of the serious misconduct bar as the "outlaw" doctrine); DOBBS, supra note 15, at 526; 3 HARPER ET AL., supra note 30, at 633 (referring to the doctrine as the "outlaw theory"); Harold S. Davis, The Plaintiff's Illegal Act as a Defense in Actions of Tort, 18 HARV. L. REV. 505, 518 (1905); MacDougall, supra note 5, at 2 (saying that the rule "renders the plaintiff an outlaw for the purposes of the case before the court"). The serious misconduct bar has also gone under other aliases, such as the "wrongful-conduct rule." Rosenick v. Cham, No. 214298, 2001 WL 776737, at *2 (Mich. Ct. App. Jan. 16, 2001).
36. MacDougall, supra note 5, at 1; Prentice, supra note 5, at 55-56.
37. DOBBS, supra note 15, at 525 (claiming that the serious misconduct bar did not matter before adoption of comparative fault "since both would have barred the plaintiff"); see also Davis, supra note 35, at 518 (implying that there was no difference between the traditional rule of contributory negligence and the serious misconduct bar).
38. DOBBS, supra note 15, at 525.
39. Prentice, supra note 5, at 82. Prentice adds that except for an "occasional" New York or Virginia case, "few U.S. tort claims today are barred by the ... defense." Id. at 87.
40. Although Professor Prentice characterized the doctrine as having "disappeared," he has also been quick to urge preemptively that it not be rekindled as a solvent for a perceived litigation crisis. Id. at 122.
41. See infra notes 48-100 and accompanying text. Indeed, at least one case has gone so far as to refer to the serious misconduct bar as the "prevailing rule in American jurisdictions." Feltner v. Casey Fam. Program, 902 P.2d 206, 208 (Wyo. 1995).
42. E.g., DOBBS, supra note 15, at 527 (saying that "[s]ome cases deserve to be dealt with in that way [on an all or nothing basis], but perhaps not cases in which the defendant is as
focusing on American law, Professor MacDougall’s observation about the doctrine seems apt here. He observes that “[t]he doctrine is occasionally proclaimed dead, but it tends to resurface, each new case typically raising more questions about the nature of the defence [sic] than it answers.”

A general rule of tort law is that the mere fact that a plaintiff violated a criminal statute does not automatically bar his tort claim solely based on the fact that the conduct constituted a crime. Of course, a plaintiff’s violation of a criminal statute might concomitantly constitute contributory or, today, comparative negligence and sometimes might on that basis support a judgment for the defendant, especially in a modified comparative fault state. But, the doctrinal basis for denying relief based on the contributory and sometimes comparative fault of the plaintiff is not dependent upon the fact that a crime may or may not have been committed. The Restatement asserts that a person is not barred “merely because at the time ... he was committing a tort or a crime.” The comments, however, are more ambiguous. Notwithstanding the
general rule, however, when the plaintiff's harm arose out of his commission of especially egregious (often criminal) misconduct, a significant number of courts that have addressed the question treat the mere fact that the plaintiff was engaged in serious misconduct as potentially sufficient to bar the tort claim. Thus, these courts in essence seem to recognize an exception or qualification to that general rule. Accordingly, the serious misconduct bar has evolved as a freestanding construct, both independent of the preceding general rule on criminal violations and separate from the defense of comparative (or contributory) fault.

Getting a bead on the standing of the serious misconduct doctrine is complicated by several factors. First, it was only after the recent parting of the doctrine and contributory negligence (once the latter was replaced by comparative fault) that the serious misconduct doctrine discretely emerged. Second, even today, in many cases in which a plaintiff's criminal conduct may have contributed to his injury, the courts do not focus on the serious misconduct doctrine, but rather analyze the fact of the plaintiff's criminal conduct exclusively within the framework of comparative fault. Third, many jurisdictions adopting comparative fault have opted for a modified version under which a plaintiff whose fault crosses a specified threshold is completely barred, thus obviating the need to invoke an independent serious misconduct bar to achieve a clean kill of the plaintiff's claim. Despite these perturbations, however, a growing number of courts are addressing the doctrine.

Restatement pronouncements favoring the latter interpretation, see infra notes 53, 245, 254.

The ambiguity of section 889 is reflected in some of the authorities. Compare Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984) (relying on comment b to section 889 in support of the serious misconduct bar), with id. at 49 (Simons, J., dissenting) (relying on the black letter of section 889 to support its criticism of the majority opinion), Ashmore v. Cleanweld Prods., Inc., 672 P.2d 1230, 1231 (Or. App. 1983) (relying on section 883 and selective language of comment b to support repudiation of the doctrine), and Prentice, supra note 5, at 87 & n.176 (interpreting section 889 as not supporting the bar).

47. See Dobbs, supra note 15, at 526 (explaining that the doctrine is a departure from the general rule that the "plaintiff's violation of statute is ordinarily relevant . . . as showing contributory negligence, but not as forbidding the claim entirely").
B. Factual Permutations

Cases addressing the serious misconduct doctrine have arisen in several different types of factual settings. These settings are described below.

1. Defendant Is Actively Injured While Engaged in Serious Misconduct

In some cases, the plaintiff was actively injured while he was engaged in serious misconduct. This pattern is illustrated in Oden v. Pepsi Cola Bottling Co. The fourteen-year-old youth was killed when a soft-drink vending machine fell on him while he was attempting to steal soft drinks. The decedent and a friend were attempting to tilt the machine, a technique apparently employed earlier in the evening on other machines. Plaintiff alleged that the machine was defective because it contained no warning or anti-theft device, and was not secured by brackets to anchor it. The court held that the claim was barred, under the rule precluding "any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude." Numerous recent decisions have approved at least some variation of the serious misconduct bar in situations in which the plaintiff-wrongdoer was actively injured by

48. 621 So. 2d 953 (Ala. 1993). The serious misconduct bar has played a prominent role in Alabama cases despite the fact that Alabama was one of the few states in which contributory negligence continued to operate. In some cases the serious misconduct bar was relied on as an alternative ground along with contributory negligence. Dapremont v. Overcash, Walker & Co., No. CIV.A.99-0353-BH-M, 2000 WL 1566532, at *7 (S.D. Ala. Oct. 4, 2000) (applying Alabama law). But, in some other cases, the serious misconduct bar has figured more centrally because, under the particular facts presented, contributory negligence was not applicable. Lemond Constr. Co. v. Wheeler, 669 So.2d 855, 860 (Ala. 1995) (applying the serious misconduct bar and noting that the contributory negligence defense would not work here because the defendant failed to overcome the presumption that a child of the victim's age was incapable of contributory negligence). See generally RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a, reporter's note (2000) (noting that only a few jurisdictions continue to use contributory negligence, and that there has been an "avalanche" of jurisdictions that have adopted comparative fault).

49. Oden, 621 So. 2d at 954.

50. Id.

51. Id. at 955.
allegedly tortious conduct by the defendant.\textsuperscript{52} Many courts, however, simply seem not to have focused on or even considered the bar. And, a few have expressly rejected it.\textsuperscript{53}

\begin{quote}
\textsuperscript{52} E.g., Guadamud v. Dentsply Int'l, Inc., 20 F. Supp. 2d 433, 437 (E.D.N.Y. 1998) (applying New York law to grant the defendant summary judgment in a products liability action alleging that plaintiff was injured by the contents of a plastic syringe for cleaning teeth when, at the time, plaintiff was engaged in a dentistry practice despite the fact that she allegedly was not licensed either in New York or anywhere else in the United States); \textit{Oden}, 621 So. 2d at 965; Ardinger v. Hummell, 982 P.2d 727, 736 (Alaska 1999) (approving bar in principle, but finding it inapplicable to instant case because misconduct not sufficiently "serious"); Gabriel v. Tripp, 576 So.2d 404, 405 (Fla. Dist. Ct. App. 1991) (noting in a negligence claim for alleged transmission of herpes simplex virus, that "if the defendant establishes that the plaintiff was engaged in an illegal act at the time he or she contracted the disease, this will bar any recovery"); Manning v. Brown, 689 N.E.2d 1382 (N.Y. 1997) (barring plaintiff allegedly participating in "joyriding" by unauthorized use of a vehicle that was driven by defendant who was another unauthorized and unlicensed user); Symone T. v. Lieber, 613 N.Y.S.2d 404, 406 (App. Div. 1994) (approving application of the bar to a claim by a twelve-year-old rape victim who underwent an illegal abortion if it were established that "she willfully submitted to an abortion which she knew to be illegal"); Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328 (Va. 1998) (holding that thirteen-year-old plaintiff riding with a sixteen-year-old driver who, along with the daughter of the car's owner, allegedly took the car without the owner's consent, was barred from recovering for injuries suffered as a result of the driver's alleged negligence); Zysk v. Zysk, 404 S.E.2d 721 (Va. 1990) (barring claim by plaintiff who allegedly contracted herpes simplex virus from the defendant with whom she had engaged in consensual sexual intercourse shortly before their marriage thereby committing the crime of fornication); \textit{id.} at 593 (Popovich, J., concurring) (referring to the "unmitigated temerity to demand financial redress for [the] injuries received"). The current posture of the serious misconduct bar may sometimes depend on the interpretation of statutory provisions. In Alaska, for example, two statutory provisions were amended in 1997, subsequent to the date of the injuries in many of the Alaska cases. Compare \textit{ALASKA STAT.} \textsection{09.17.900} (Michie 2000) (stating, inter alia, that fault includes intentional conduct toward the victim or others), with \textit{id.} \textsection{09.65.210} (precluding recovery, inter alia, for harm to person convicted of and injured while engaged in a felony or operating a vehicle or craft while under the influence, or injured while engaged in or avoiding apprehension for specified felonies or operating a vehicle or craft while under the influence).
\end{quote}

\begin{quote}
\textsuperscript{53} See Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (rejecting the bar in a case for allegedly negligent transmission of herpes simplex virus, and stating that "[i]t is well established that a person can recover in tort for injury suffered as a result of his own
2. Defendant Actively Contributed to the Commission of Serious Misconduct

A second factual pattern arises where the defendant's allegedly tortious conduct does not directly inflict a harm on the victim through some physical impact, but does actively contribute to the victim's commission of the serious misconduct from which the victim's harm materialized. The most famous case arising in this factual permutation is Barker v. Kallash. A fifteen-year-old youth was injured when a "pipe bomb" that he was allegedly constructing exploded. A tort claim was asserted against both a

criminal activity”); Adams v. Smith, 201 S.E.2d 639, 642-43 (Ga. Ct. App. 1973) (approving the basic idea that "a person does not become an outlaw and lose all rights" because he was committing an illegal act) (citation omitted); Goldfuss v. Davidson, 679 N.E.2d 1099, 1104 (Ohio 1997) (recognizing ability of a person injured while engaged in criminal conduct to recover in tort); see also RESTATEMENT (THIRD) OF TORTS § 7 cmt. d (2000) (advocating comparative fault "even though a party's conduct violated a statute... unless the purpose of the statute... is to place the entire responsibility for such harm on the party"); id. § 8 cmt. c., reporter's note. The Restatement reporter's note reads, with respect to the violation of statute rules, that

[i]t is highly unlikely that a legislature intended to affect the way a court applies comparative responsibility. Thus, the factfinder should consider circumstances that would be relevant to a finding of negligence in the absence of a statute, even though those circumstances would not be relevant to whether violation of the statute constitutes negligence per se.

Id. For more confusing Restatement language, however, see supra notes 45-46 and accompanying text.

Although the plaintiff in Goldfuss was shot while allegedly trying to break into the defendant's barn in order to steal, plaintiff couched his tort theory as a negligence claim. The court expressly rejected what it referred to as the "public policy" defense. Goldfuss, 679 N.E.2d at 1104. For a discussion of the disagreement among pre-1970 abortion cases, see Leslie Reagan, Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s-1970, 10 COLUM. J. GENDER & L. 311,320-30 (2001) (noting that "[t]hroughout the century of illegal abortion, the courts divided into two camps on the question" of whether someone could recover in tort for harm resulting from an illegal abortion). Georgia courts, however, sometimes seem to come close to the serious misconduct doctrine by characterizing the victim's misconduct as at least a version of assumption of risk. Cf. Mudovan v. McEachern, 523 S.E.2d 566, 570 (Ga. 1999) (barring claim for the death of a person knowingly participating in a game of alleged "Russian Roulette").

54. Not only has the most famous case endorsing the serious misconduct bar been a pipe-bomb case, but the pipe-bomb cases also attest to the unpredictability of the doctrine. See infra notes 281-84 and accompanying text.


56. The device consisted of a metal pipe three to four inches long and one inch wide. Id. at 40.
nine-year-old child who allegedly sold the firecrackers from which the plaintiff extracted the gun powder with which to construct the bomb, and the nine-year-old's parents. The court held that "because the plaintiff's grievous criminal conduct ... was so plainly violative of paramount public safety interests, the public policy of this State dictates that recovery be denied." The court noted that the wrongdoer should not be permitted to "profit" from his wrong, and courts should not "lend assistance" to one seeking compensation under such circumstances.

Two Alaska cases further illustrate application of the bar in this factual pattern. In one case, the third-party plaintiff shot and killed a person with a shotgun, and was convicted of manslaughter for the fatal shooting. He thereafter sued the manufacturer and seller of the shotgun, alleging that the firearm had a defect that caused it to discharge accidentally. Therefore, the shooter asserted, the firearm suppliers should be liable for his conviction and prison sentence for manslaughter. Based on the shooter's criminal conduct of at least intentionally pointing a shotgun toward the victim, the court held, inter alia, that the third-party plaintiff was precluded from recovering from the gun suppliers.

In a later Alaska case, another plaintiff was convicted of kidnapping, raping, and assaulting a woman with whom he had left the Fogcutter bar. He sued the bar and its bartender, contending that they were responsible for his thirty-year prison sentence and incarceration because he was served numerous drinks when he was drunk (which presumably he would contend contributed to his criminal acts). The court held that the plaintiff's serious criminal conduct barred his claim.

57. Id. at 46.
58. Id. at 41.
59. Id. at 43.
61. Adkinson, 659 P.2d at 1240. The court further held that the defendant's duty to the plaintiff-shooter did not encompass protecting him from his intentional criminal conduct. Id. at 1239-40.
63. Id. at 662-63.
64. Id. at 663.
A number of other recent cases reach a similar result in factual scenarios falling within this general factual permutation. A few cases have also expressly rejected the doctrine in these types of circumstances.

3. Defendant Failed to Prevent the Plaintiff from Engaging in the Serious Misconduct

A third type of situation also arises from allegations that the defendant tortiously contributed to the plaintiff's commission of the conduct from which his injury materialized. Here, however, the defendant is not alleged to have actively contributed, but rather to have failed to prevent the plaintiff from committing the acts despite a duty that was otherwise owed to the plaintiff by the defendant. Take, for example, the case of Rimert v. Mortell. The psychotic plaintiff was convicted of killing four people. He thereafter brought a medical malpractice claim, alleging that he was negligently discharged. The court held that plaintiff's claim was barred, stating that a person "convicted of a crime should be precluded from imposing liability upon others ... for the results of his or her own..."

65. See, e.g., Dapremont v. Overcash, Walker & Co., No. CIV.A.99-0353-BH-M, 2000 WL 1566532, at *5-*6 (S.D. Ala. Oct. 4, 2000) (applying Alabama law to bar plaintiff convicted of income tax evasion from recovering from his accountant for malpractice for failure to report income for an entity where plaintiff never disclosed to the accountant that he was a "related party" to the entity although such information was supposed to be disclosed in financial statements and annual audits); Anderson v. Miller, 559 N.W.2d 29, 34 (Iowa 1997) (barring claim for death of person who was killed while driving a truck while intoxicated against the person who allegedly negligently entrusted the vehicle to him); Orzel v. Scott Drug Co., 537 N.W.2d 208, 210 (Mich. 1995) (barring claim by plaintiff, who alleged that defendants negligently supplied him with methamphetamines resulting in his addiction, because plaintiff was violating the Controlled Substances Act by obtaining and using methamphetamines without a valid prescription); Feltner v. Casey Fam. Program, 902 P.2d 206 (Wyo. 1995) (barring claim by nineteen-year-old—who pled guilty to fourth-degree sexual assault for engaging in sexual intercourse with a fourteen-year-old girl who had been placed in the home of plaintiff's parents—against defendant for alleged negligence in placing the child in the home after plaintiff's parents had advised defendant that they would not accept female children allegedly exhibiting overtly sexual behavior).

66. See Ashmore v. Cleanweld Products, Inc., 672 P.2d 1230 (Or. Ct. App. 1983); Kelly v. Moguls, 632 A.2d 360, 363 (Vt. 1993) (rejecting argument that allowing claim for injury to imbibervictim would permit an "individual to profit from his own wrongdoing"); see also supra notes 46, 53; infra notes 246, 255 (same).

criminal conduct" at least if he was "legally responsible for the criminal act." A number of other courts have also applied the bar in cases matching this factual permutation.

Occasionally a court will even apply the bar to claims for failure to prevent suicide, barring the claim based on the perceived misconduct represented by the suicide. For example, in Pappas v. Clark, a malpractice claim was brought by a spouse for the suicide of her husband, alleging that the defendant-physician should have recognized and treated decedent's condition. The court held that the claim was "barred by the public policy ... which generally denies relief to those injured in whole or in part because of their own illegal acts." There have, however, been relatively few cases

68. Id. at 874.

69. Id. The court barred the claim finding that plaintiff was sufficiently responsible for his wrongful conduct for the purposes of the bar despite the fact that the plaintiff had been found "guilty but mentally ill" in the criminal case. Id. at 875. And, to make matters worse, the court acknowledged the unfairness here, stating that "punishment of mentally ill offenders who possess some reduced degree of criminal culpability seems problematic." Id.

70. See, e.g., Burcina v. City of Ketchikan, 902 P.2d 817, 818 (Alaska 1995) (barring recovery by plaintiff, who was convicted of arson, against mental health facility and psychiatrist for alleged negligent treatment that aggravated the mental condition that caused him to set the fire); Cole v. Taylor, 301 N.W.2d 766 (Iowa 1981) (barring malpractice claim by plaintiff against psychiatrist for alleged negligence in failing to prevent plaintiff from killing her former husband); Cork v. St. Charles County, 10 S.W.3d 608, 609 (Mo. Ct. App. 2000) (barring a tort claim by plaintiff convicted of violating environmental law by allowing pollutants from truck to run off, who alleged that defendants failed to properly train him or obtain a disposal permit); Johnson v. State, 687 N.Y.S.2d 761 (App. Div. 1999) (barring recovery, as an alternative holding, by plaintiff's decedent against police for alleged negligence in failing to prevent the escape and accidental death of the decedent, who had been arrested for driving while intoxicated); Tillmon v. New York City Hous. Auth., 609 N.Y.S.2d 239, 240 (App. Div. 1994) (barring claim for alleged negligence in allowing elevator to become dangerous to the minor-decedent who was engaging in "elevator surfing" by climbing out of the elevator car through the escape hatch, and who was decapitated when after urinating into the elevator shaft, he bent over to close his pants and hit a concrete stanchion in the elevator shaft).


72. Id.

73. Id. at 246. Plaintiff also alleged that the defendant-pharmacist should have alerted other defendant-pharmacies that decedent was obtaining illegal prescriptions, and that other pharmacies failed to adequately check decedent's requests for prescriptions. Id.

74. Id. at 247, 248; see also Wackwitz v. Roy, 418 S.E.2d 861 (Va. 1992) (acknowledging possible application of the serious misconduct bar in principle to suicide cases, but saying that it would not apply if the decedent was of unsound mind when he committed suicide). But see Greene v. Guarino, 25 Va. Cir. 162, 163 (1991) (refusing to apply the bar to a wrongful death claim against psychiatrist for allegedly contributing to the decedent's suicide, despite
applying the serious misconduct bar to suicides, and a number of cases have refused to apply it for various reasons. This dearth of case law probably reflects the fact that the courts are not even in agreement on whether to allow application of a comparative fault defense in suicide claims, let alone the complete bar trip-wire rule of the serious misconduct doctrine.

4. Defendant Failed to Prevent Adverse Consequences from Serious Misconduct

A fourth factual setting for the serious misconduct bar arises when plaintiff seeks to recover damages from a defendant who allegedly failed to prevent or mitigate the consequences of the plaintiff's misconduct. This factual pattern can be illustrated by the facts in Hernandez v. Yoon. The plaintiff-patient, who at the time was married, underwent a vasectomy. He thereafter brought a malpractice action against the physician who performed the sterilization procedure. The plaintiff alleged that notwithstanding the fact that the bar is commonly recognized by Virginia cases in other contexts). See generally Molchon v. Tyler, 546 S.E.2d 691, 695 (Va. 2001) (holding that the serious misconduct bar was not applicable if the illegal act consisted of the victim's suicide resulting from the victim's unsoundness of mind).

75. Joseph v. State, 26 P.3d 459 (Alaska 2001) (approving the serious misconduct bar in principle, but requiring inter alia that the misconduct be criminal and intentionally threatening to the safety of others, and thus refusing to apply it to an act of suicide).

76. Compare White v. Lawrence, 975 S.W.2d 525, 530-31 (Tenn. 1998) (holding that comparative fault does not apply "where the defendant's duty of care includes preventing the ... self-destructive acts that caused the plaintiff's injury") (citation omitted), with Hobart v. Shin, 705 N.E.2d 907, 911 (Ill. 1998) (applying comparative fault to suicide except where decedent was so mentally ill that she was incapable of being contributorily negligent). See generally Patricia C. Kussman, Annotation, Liability of Doctor, Psychiatrist, or Psychologist for Failure to Take Steps to Prevent Patient's Suicide, 81 A.L.R.5th 167, §§ 2, 11-13 (2000) (observing that when there is a duty owed to a patient, courts have been reluctant to apply comparative fault, although there is a split of authority); Robert K. Jenner & Bryant Welch, Suicide Watch: Liability for Negligent Psychiatric Care, TRIAL, May 2001, at 20, 22 (noting that most courts refuse to allow the comparative fault defense in suicide cases for negligent psychiatric care).

77. 661 N.Y.S.2d 753 (Sup. Ct. 1997).

78. Id. at 754.
undergo an abortion. The court recognized the applicability of the serious misconduct bar here in principle, but refused to apply it on the merits in the instant case because it believed that adultery did not rise to the level of a “serious crime.” The serious misconduct bar has been applied in the fourth type of situation when the injury arose out of more serious acts of misconduct.

An important subgroup of the fourth factual pattern arises in legal malpractice cases involving criminal prosecutions. Numerous courts have applied a variation of the serious misconduct bar to legal malpractice claims brought by accused persons against their criminal defense attorneys. When a former client claims that he was convicted, entered a guilty plea, or suffered some other adverse legal consequences, and that he would have achieved a less onerous outcome had his criminal defense counsel not been negligent, a clear majority of cases addressing the matter have denied recovery unless evidence establishes that the accused was actually innocent of the crime. As Judge Posner succinctly put it, the plaintiff must

79. Id.
80. Id.
81. Id.
82. E.g., Tate v. Derifield, 510 N.W.2d 885 (Iowa 1994). Here the plaintiff-spouse sued for loss of consortium based on the incarceration of her husband. She alleged that the defendant-informant had provided false information that provided grounds for a search warrant that produced evidence that resulted in her husband’s imprisonment. Id. at 887. The court denied recovery, holding that “it would be wrong as a matter of public policy to allow recovery on a consortium claim which arose from the lawful incarceration of a spouse.” Id. at 888.
83. Levine v. Kling, 123 F.3d 580, 582 (7th Cir. 1997) (applying Illinois law and noting that most cases deny recovery unless the plaintiff can establish that he was innocent of the crime); Wiley v. County of San Diego, 966 P.2d 983, 985 (Cal. 1998) (stating that a “clear majority of courts that have considered the question” require proof of plaintiff’s innocence); Glenn v. Aiken, 569 N.E.2d 783, 785 (Mass. 1991) (stating that “[c]ourts have generally required that a former criminal defendant prove his innocence of the crime charged as an element of his claim that his former trial counsel was negligent in defending him”); Brown v. Theo, 526 S.E.2d 232, 235 (S.C. Ct. App. 1999) (stating that most courts require the client to prove innocence of the crime as an element to the cause of action), aff’d, 550 S.E.2d 304 (S.C. 2001); see, e.g., Howarth v. State, 925 P.2d 1330, 1335 (Alaska 1996) (stating that “[o]ne whose intentional criminal acts result in incarceration cannot recover damages associated with that incarceration from others whose conduct may also have caused or contributed to the incarceration”); Rowe v. Schreiber, 725 So.2d 1245, 1251 (Fla. Dist. Ct. App. 1999) (holding that the plaintiff must “prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceeding”); Moore v. Owens, 698 N.E.2d 707, 709 (Ill. App. Ct. 1998) (adopting a rule requiring “the criminal defendant to prove his innocence in a later legal malpractice action against his criminal defense counsel”);
prove that he was in fact innocent and "not just lucky." Many cases have also required (often in addition to the innocence requirement), in cases involving claims for harms based on convictions, that a plaintiff may not recover damages unless he has successfully sought postconviction relief in the criminal proceedings.
The serious misconduct bar operates somewhat differently here than it normally does outside the legal malpractice setting. Usually, the bar is a defense to be raised by the defendant. When, however, the plaintiff sues his attorney for legal malpractice for substandard representation in a criminal matter, most courts make proof of innocence of the plaintiff-accused an additional prerequisite in the plaintiff's case on which the plaintiff bears the burden of proof.86

Some courts approving the innocence requirement have sought to explain it simply as a manifestation of the causation element87 in

for legal malpractice but still must prove that his damages were proximately caused by the alleged malpractice. Courts requiring that a plaintiff obtain postconviction relief have developed a variety of approaches to the matter of the statute of limitation. Coscia, 25 P.3d at 677-80.

The extent to which the requirement of securing postconviction relief differs from the innocence requirement depends on applicable constitutional law and criminal procedure, and is beyond the scope of this Article. Suffice it to say that to the extent that a person might be entitled to postconviction relief based upon a showing of other than factual innocence, the requirement of securing postconviction relief may differ from the requirement of establishing actual factual innocence. For background on this complex topic, see generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 11.7(d), 11.9, 11.10(d), 27.6, 28.3(g) (3d ed. 2000). Thus, the two requirements may not be completely coterminous. And, indeed, a number of courts addressing the requirements suggest their separateness. See, e.g., Coscia, 25 P.3d at 671 (referring to the two issues as "distinct, but related" questions); Theos, 526 S.E.2d at 235; Gibson, 58 S.W. 3d at 111. Occasionally, a court seems to meld the two requirements into an especially demanding formulation. Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995) (holding that plaintiffs must demonstrate that "they have been exonerated on direct appeal, through post-conviction relief, or otherwise"); Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. Ct. App. 2000) (stating "that a person convicted of a crime cannot pursue a malpractice claim against his attorney unless he has established his innocence by direct appeal, post-conviction relief, or other legal proceedings").

86. Most cases place the burden of proof for the innocence issue on the plaintiff. See, e.g., Rowe, 725 So.2d at 1251; Moore, 698 N.E.2d at 709. At least one case, however, placed the burden of proof on that issue on the defendant in the malpractice claim. See Shaw v. State, 861 P.2d 566, 573 (Alaska 1993) (holding that the burden of proving actual guilt is on the defendant who may raise the issue as an affirmative defense).

87. On the causation requirement in legal malpractice cases, see generally Nielson v. Eisenhower & Carlson, 999 P.2d 42, 47 (Wash. Ct. App. 2000) (noting that "[c]ourts have consistently applied the 'but for' test in legal malpractice cases"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (1998) (noting that an accused suing his attorney for malpractice must prove "that [his] lawyer failed to act properly and that, but for that failure, the result would have been different, for example because a double-jeopardy defense would have prevented conviction"); DOBBS, supra note 15, at 1391 (noting that in legal malpractice based on an adverse outcome judgment, the plaintiff often must essentially prove a "trial within a trial or case within a case"); Lawrence W. Kessler, Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels, 37 SAN DIEGO L. REV. 401 (2000).
That cannot be correct, however. It is clearly a new precondition to recovery in addition to the causation element. Manifestly, a criminal defense attorney’s negligence can cause harm to a client even if the accused did in fact commit the crime as charged. Take for example the case of *Peeler v. Hughes & Luce*. There the plaintiff’s criminal defense attorney allegedly failed to communicate to the plaintiff-accused that the prosecutor had offered her absolute transactional immunity. Thereafter, plaintiff entered into a plea agreement admitting guilt to one count. Obviously, the plaintiff could have suffered a significant loss by the lost opportunity to receive immunity, even if she had in fact committed the offense as charged. Nevertheless, the court denied recovery, holding that the plaintiff must demonstrate that she had “been exonerated on direct appeal, through post-conviction relief, or otherwise.” A number of opinions have accurately explained that

---

88. E.g., *Ray*, 952 S.W.2d at 223. One might question how convinced even the *Ray* court was of its attempt to hang the innocence requirement on the causation element. Why did the court at various times invoke at least three different conceptual foundations for the innocence requirement? It also relied on a proximate cause hook. *Id.* at 244. And, ultimately it gravitated toward the serious misconduct bar. *Id.* Clearly, causation would not work because presumably a plaintiff could, even if actually guilty, still prove that his attorney’s malpractice caused him harm. He might show, for example, that if the attorney had prepared a better defense, he would have received a more favorable sentence at trial or would have pled to a lesser charge. Or, perhaps a defense attorney failed to communicate an offer of a plea bargain or immunity agreement. Similarly, proximate cause does not work because the type of harm was obviously a materialization of the kind of risk (e.g., passing up a plea bargain) that the lawyer was retained to avoid. That leaves the last conceptual hook, the serious misconduct idea, which is the focus of this Article.

89. Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 10 (1995).

90. 909 S.W.2d 494 (Tex. 1995).

91. *Id.* at 496.

92. *Id.*

93. See also *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 676 (Cal. 2001) (stating that “a plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case . . . as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel”). In *Coscia*, the plaintiff pleaded guilty to one felony count of conspiracy to violate federal securities laws. *Id.* at 671. He alleged that he was negligently dissuaded by one of his attorneys from offering to trade information regarding another ongoing securities fraud in exchange for the prosecutor’s agreement to a misdemeanor plea. *Id.* at 671-72.

94. *Peeler*, 909 S.W.2d at 498. The actual innocence requirement and the exoneration rule of *Peeler* may not be coterminous. Proof of exoneration through postconviction procedures is a different process than demonstrating innocence in the malpractice case.
the innocence requirement is additive, imposing a new precondition to recovery in addition to, and that goes beyond, the traditional causation element in legal malpractice.  

Although numerous courts have approved an innocence requirement, they have seldom adequately explained what they mean by "innocence." The concept of innocence could mean legal innocence in the sense that the plaintiff's guilt could not be established on the basis of the evidence that would have been produced had plaintiff's legal representation comported with constitutional and applicable professional standards. Or, the concept of innocence could be equated with factual innocence, meaning that the accused did not engage in the criminal behavior of which he was accused. Most likely, courts invoking an innocence requirement have had the latter, factual innocence, connotation in mind. Thus, the court in Glenn v. Aiken explained the distinction between "guilt in fact and legal guilt" with the following illustrations:

"[I]f a defendant attorney failed to assert a clearly valid defense of the statute of limitations, a client who did commit the crime, but should not have been convicted of it, sustained a real loss, but he may not recover against the attorney defendant.  

... A negligent failure to move to suppress evidence seized in clear violation of the defendant's constitutional or statutory rights could lead to a conviction that would have been totally forestalled by the allowance of a motion to suppress. Such a former criminal defendant might well not be able to prove his

There is also the question of whether an accused who is actually guilty could still be "exonerated" in the criminal proceedings (for example, because of the higher burden on prosecutors in criminal cases). In any event, the court in Peeler seems to assume that these are the same, by referring with approval to the requirement of proof of innocence, and by characterizing the plaintiff as an "admittedly guilty person." Id. at 498.


96. E.g., Kling, 123 F.3d at 582 (applying Illinois law) (approving an innocence requirement and rejecting the view that a malpractice plaintiff who was "guilty in fact" would be entitled to recover); Glenn, 569 N.E.2d at 783; O'Blennis v. Adolf, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985) (stating that the "factual innocence" of the accused is indispensable in a legal malpractice claim based upon representation of an accused in a criminal matter).

97. Glenn, 569 N.E.2d at 783.

98. Id. at 787.
innocence of such a crime and, under the cases that make proof of his innocence an element of his case against his former attorney, the attorney would be free from liability. 99

Legal malpractice cases are notoriously difficult to win, 100 what with the reluctance of attorneys to serve as counsel or as expert witnesses in such cases and the already difficult causation hurdle to overcome. The serious misconduct bar in its innocence requirement incantation adds another formidable, practically insurmountable hurdle for plaintiffs seeking damages for negligent legal representation in a criminal matter.

C. Fuzzy Prerequisites

1. “Serious” Misconduct

The parameters of the serious misconduct doctrine tend to vary from state to state and according to the type of factual setting in which the plaintiff's harm arose. Consider, for example, the special rules developed for legal malpractice claims against criminal defense attorneys. Although the serious misconduct doctrine is generally deemed a defense when applied in personal injury claims, proof of actual innocence is usually considered an element that the plaintiff must establish in legal malpractice claims against attorneys for their defense in criminal prosecutions. 101

The most common prerequisite for the serious misconduct bar is that the plaintiff's misconduct must have been serious. 102

99. Id. (approving the innocence requirement); see also Kling, 123 F.3d at 582 (applying Illinois law) (noting that “because of the heavy burden of proof in a criminal case, an acquittal doesn’t mean that the defendant did not commit the crime ... all it means is that the government was not able to prove beyond a reasonable doubt that he committed it”).

100. Kessler, supra note 87, at 424 (saying that “legal malpractice actions can be some of the most difficult cases to establish”); see also RESTATEMENT(THIRD)OF THE LAW GOVERNING LAWYERS §§ 48, 52 & cmt. g (2000) (discussing the elements of a legal malpractice claim).

101. See supra note 86 and accompanying text.

102. E.g., Orzel v. Scott Drug Co., 537 N.W.2d 208, 214 (Mich. 1995) (applying standard of “serious misconduct sufficient to bar a cause of action”); Manning v. Brown, 689 N.E.2d 1382, 1384 (N.Y. 1997) (stating that conduct must have constituted “such a serious violation of the law that she should be precluded, as a matter of public policy, from recovery”); Barker v. Kallash, 463 N.E.2d 39, 41 (N.Y. 1984) (approving public policy bar in principle when “intentional participation in a criminal act” could be “so serious an offense as to warrant
Unfortunately, the courts have seldom adequately articulated the criteria for determining whether a plaintiff's misconduct has crossed the "serious" threshold. A few cases have attempted to offer some guidance. In **Ardinger v. Hummell**, plaintiff's minor son was killed when the car he was driving, which had been allegedly negligently entrusted to him by defendant's minor daughter, struck a utility pole. Although the court approved the doctrine, it refused to find the conduct of the decedent driver sufficiently serious, holding that the plaintiff's conduct must involve "serious criminal conduct that intentionally threatened the safety of others." Other courts have noted that "[c]ases where recovery has been barred or would be barred because the plaintiff was engaged in criminal activity at the time of injury frequently involve conduct dangerous to physical well-being." And in **Poch v. Anderson**, the court held that the conduct must be prohibited or almost entirely prohibited.

Some cases have offered a boilerplate of purple prose to elaborate on the seriousness requirement, saying in effect that the misconduct must be serious and they "really mean it." For example, in a concurring opinion in the seminal **Barker** case, Justice Jasen

| Denial of recovery | Pfeffer v. Pernick, 268 A.D.2d 262, 262 (N.Y. App. Div. 2000) (approving rule in principle that misconduct could be "so serious as to warrant denial of recovery"); Hernandez v. Yoon, 661 N.Y.S.2d 753, 754 (Sup. Ct. 1997) (recognizing bar in principle, but refusing to apply it to act of adultery because it was not deemed a "serious crime"). In Hernandez, a malpractice action was brought by a patient who underwent a vasectomy. **Id.** The patient sought recovery for psychological injury claiming that he impregnated his girlfriend, and that she subsequently had to undergo an abortion. **Id.** The defendant contended that the claim should be barred because the injuries arose from adultery. **Id.** The court recognized the defense in principle, but refused to apply it in the instant case because adultery did not rise to the level of a "serious crime." **Id.** 103. 982 P.2d 727 (Alaska 1999).
| 104. **Id.** |
| 105. **Id. at 736.** |
| 106. Hernandez, 661 N.Y.S.2d at 754; see also Joseph v. State, 26 P.3d 459, 477-78 (Alaska 2001) (approving the serious misconduct in principle, but requiring inter alia that the misconduct be criminal and intentionally threaten the safety of others, and thus refusing to apply it to the act of suicide). |
| 108. **Id. at 458** (elaborating that the misconduct must have been more than a mere violation of a "safety statute"); see also Orzel, 537 N.W.2d at 214 (stating that the conduct must have been prohibited); Manning, 689 N.E.2d at 1384 (stating that the conduct must have been "entirely prohibited by law" rather than merely regulated as to its manner); **Barker**, 468 N.E.2d at 41 (stating that conduct must not be merely regulated, but must have been entirely prohibited). |
wrote separately to offer boundaries for the rule.\textsuperscript{109} He said the rule applies to “wrongdoing that is morally reprehensible, heinous, or gravely injurious to the public interests”\textsuperscript{110} and that the “violation must be either gravely immoral or grievously injurious to the public interests.”\textsuperscript{111} In \textit{Lemond Construction Co. v. Wheeler},\textsuperscript{112} the court held that plaintiff’s misconduct must have constituted a crime involving moral turpitude.\textsuperscript{113} The court defined this as “one involving conduct with an inherent quality of baseness, vileness, or depravity in regard to the duties one owes to society.”\textsuperscript{114} Although the court recognized the serious misconduct bar in principle, it found it inapplicable to an accident in which the thirteen-year-old decedent was killed while joy riding with an underage driver.\textsuperscript{115} The unpredictability of the doctrine can be readily seen here by the fact that two years earlier the same court applied the serious misconduct bar under the “moral turpitude” rule in a case in which a fourteen-year-old was killed when a vending machine fell on him while he was attempting to steal soft drinks.\textsuperscript{116}

To further confound matters, one court added that the defense was not applicable when “the defendant’s culpability for the damages is greater than the plaintiff’s culpability.”\textsuperscript{117} Moreover, this raises the additional question of how much the bar would add in

\begin{itemize}
\item \textsuperscript{109} \textit{Barker}, 468 N.E.2d at 45 (Jasen, J., concurring).
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} 669 So.2d 855 (Ala. 1995).
\item \textsuperscript{113} \textit{Id.} at 861; \textit{see also} \textit{Oden v. Pepsi Cola Bottling Co.}, 621 So.2d 953, 955 (Ala. 1993) (stating that the doctrine bars “any action seeking damages based on injuries that were a direct result of the injured party’s knowing and intentional participation in a crime involving moral turpitude”).
\item \textsuperscript{114} \textit{Lemond}, 669 So.2d at 861.
\item \textsuperscript{115} \textit{Id.} at 860. The decedent’s father had sued, inter alia, the contractor for road construction in the area for allegedly leaving the roadway in a dangerous condition and without adequate warning signs. \textit{Id.} at 858.
\item \textsuperscript{116} \textit{Oden}, 621 So.2d at 955.
\item \textsuperscript{117} \textit{Poch v. Anderson}, 580 N.W.2d 456, 458 (Mich. Ct. App. 1998); \textit{see also} \textit{Rosenick v. Cham}, No. 214298, 2001 WL 776737 (Mich. Ct. App. Jan. 16, 2001). In \textit{Rosenick}, although approving the serious misconduct rule in principle, the court refused to apply it where the defendant’s culpability was allegedly greater than the plaintiff’s. \textit{Id.} at *2. The plaintiff alleged that the defendant-physician, during the course of providing psychiatric counseling, engaged in sexual relations with the plaintiff and exploited the therapist-patient relationship. \textit{Id.} at *1. The court noted that the plaintiff’s “adultery does not relieve defendant of... greater culpability because the adulterous relationship occurred within the context of a physician-patient relationship.” \textit{Id.} at *4.
\end{itemize}
those jurisdictions that have adopted a modified comparative fault defense.

Some courts state that the plaintiff must have been "legally responsible for the criminal act."\textsuperscript{118} Even this prerequisite is not entirely clear. In \textit{Rimert v. Mortell},\textsuperscript{119} the plaintiff, a psychotic patient, sued for medical malpractice because he was discharged and thereafter killed four people, for which he was later convicted.\textsuperscript{120} Although the court recognized the requirement that the plaintiff must have been legally responsible for his crime, it nevertheless held that it was sufficient that the plaintiff was found "guilty but mentally ill" in the criminal case.\textsuperscript{121} The court acknowledged the unfairness of applying the bar here, saying that "punishment of mentally ill offenders who possess some reduced degree of criminal culpability seems problematic.... [N]evertheless [the plaintiff's] conviction, despite its misleading label, contemplates complete criminal responsibility for the killings."\textsuperscript{122} Other courts have articulated an even more unforgiving construct, emphasizing that the "determination is an objective inquiry."\textsuperscript{123}

There is also some uncertainty as to whether the doctrine is limited to misconduct that violates criminal statutes, or might also include serious "immoral" acts. The vast majority of cases applying the doctrine have involved the former. But, a number of cases, in articulating the serious misconduct bar, couch the rule in broader

\textsuperscript{118} Rimert v. Mortell, 680 N.E.2d 867, 874 (Ind. Ct. App. 1997). Some courts have held that the bar would not apply if the person injured while committing the wrongful act was of unsound mind. Wackwitz v. Roy, 418 S.E.2d 861, 864-65 (Va. 1992) (refusing to apply doctrine where the decedent was of unsound mind when he committed suicide); see also Molchon v. Tyler, 546 S.E.2d 691, 695 (Va. 2001).

\textsuperscript{119} 680 N.E.2d 867 (Ind. Ct. App. 1997).

\textsuperscript{120} \textit{Id.} at 869.

\textsuperscript{121} \textit{Id.} at 875.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328, 330 (Va. 1998) (applying the serious misconduct bar to a thirteen-year-old plaintiff). The court may have softened its rule somewhat, however, by stating that the plaintiff must have been engaged in the illegal conduct voluntarily and that whether he did so may depend on his "maturity, intelligence, and mental capacity." \textit{Id.}
terms of an illegal or immoral act. The lack of clear objective guidelines is, of course, part of the problem with the doctrine.

2. Risk Restriction

Some cases have suggested restrictions on the scope of the serious misconduct bar based on variations of a risk analysis. In Rosenick v. Cham, while approving the serious misconduct rule in principle, the court refused to apply it if the plaintiff's cause of action "can be established without relying on his illegal act." The plaintiff alleged that the defendant-physician, during the course of providing psychiatric counseling, engaged in sexual relations with the plaintiff and exploited the therapist-patient relationship. Specifically, the court held that "because plaintiff can establish her claim for medical malpractice ... without relying on her adultery, that adultery arguably is not causally connected but rather is 'merely incidentally or collaterally connected' to plaintiff's claim, thereby precluding the application of the wrongful-conduct rule." In a similar vein, Justice Kennedy of the Alabama Supreme Court, writing separately in the Oden case, suggested that the bar should apply only if the plaintiff's loss could not have occurred unless plaintiff's acts were criminal in nature. In other words, he suggested that the doctrine may operate only when "an essential part of the claim" was the illegal act. Accordingly, in the instant case where a vending machine fell on the victim when he was tilting

124. Oden v. Pepsi Cola Bottling Co., 621 So.2d 953, 954 (Ala. 1993); Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981) (barring a claim against a psychiatrist for allegedly negligently failing to prevent plaintiff from committing murder); Wackwitz v. Roy, 418 S.E.2d 861, 864 (Va. 1992) (recognizing in principle the rule that recovery may be barred for harm to one injured while engaged in an "immoral or unlawful act," but refusing to apply it if the decedent was of unsound mind when he committed suicide).
126. Id. at *2.
127. Id. at *1.
128. Id. at *3 (quoting Orzel v. Scott Drug Co., 537 N.W.2d 208, 215 (Mich. 1995)). The court also noted that the plaintiff's "adultery does not relieve defendant of his greater culpability because the adulterous relationship occurred within the context of the physician-patient relationship." Id. at *4.
129. Oden, 621 So.2d at 955 (Kennedy, J., concurring in part and dissenting in part).
130. Id. at 956-57.
131. Id. at 957.
it in an attempt to steal, Justice Kennedy would have preferred not to have applied the bar because a youth could have been similarly harmed while tilting the machine for noncriminal reasons. What Justice Kennedy seems to mean here is that the criminal aspect must have been an essential ingredient of the dynamic that engendered the injury. Other courts that have adopted the bar have fashioned a similar limitation.

132. See id.

133. Mischalski v. Ford Motor Co., 935 F. Supp. 203 (E.D.N.Y. 1996) (applying New York law); Poch v. Anderson, 580 N.W.2d 456 (Mich. Ct. App. 1998). In Poch, the plaintiff-passenger allegedly illegally provided the defendant-minor-driver with alcohol, and a wreck ensued. Id. at 457-58. The defendant asserted, inter alia, a wrongful conduct defense. Id. at 458-59. The court approved the serious misconduct bar in principle, but held that it did not apply in the instant case. Id. The court said that there must be a "sufficient causal nexus" between plaintiff's illegal conduct and the harm. Id. at 458. Elaborating, the court explained that if the cause of action could be shown independent of establishing the plaintiff's illegal act, then the plaintiff's violation would be deemed incidental and not a bar. Id. at 460. Thus, the court seemed to contemplate a test wherein the bar would depend on whether the plaintiff has to "prove his violation of the statute to fully plead his cause of action." Id. In other words, it depended on whether this exact type of accident could have happened even if the plaintiff had not broken the law. Id.

In the Mischalski case, the plaintiff was injured when a car jack collapsed while he was servicing a car. Mischalski, 935 F. Supp. at 203. The plaintiff sued Ford, the car manufacturer. Id. at 204. Ford then contended that plaintiff's claim was barred because he was an illegal alien engaged in unlicensed employment, and also that he was working "off the books" on his own time. Id. at 205. The court approved the defense in principle, but found it inapplicable here, holding that "mere commission of an offense ... does not bar a plaintiff." Id. at 206. Rather, the bar may be applied only when the plaintiff's own criminal conduct was a "contributing proximate cause" of his or her injuries. Id. (citation omitted). The court stated that

even assuming for the sake of argument ... that plaintiff may have been working illegally, either because he was an illegal alien or because he was receiving money off the books and thus was not paying taxes on that income [an assumption for which there was no evidence], ... [that would] not cause the work to be dangerous and was not a proximate ... cause of plaintiff's injuries. Id.

Ford attempted to satisfy the proximate cause requirement with the following gambit: plaintiff's employer had hydraulic lifts that were routinely used to conduct air suspension repairs, but since plaintiff was working off the books on his own time, he used the car's tire jack instead, and that decision caused his injury. Id. at 205. The court rejected this argument, noting that plaintiff's method of changing the car's air suspension pillow should be addressed under comparative negligence principles. Id. at 206. What the court seems to mean is that what made the plaintiff's conduct allegedly illegal was not the fact of using a tire jack (people do that all the time), but the alleged efforts to avoid paying income tax. But, tax avoidance strategies are not statistically associated with crushing injuries. See generally Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. CHI. L. REV. 69 (1975) (discussing proximate cause).
Some courts have incorporated a risk-based limitation in the serious misconduct bar even more explicitly. In *Ardinger v. Hummelt*, the court held that a precondition for the serious misconduct bar was that the harm must have been a materialization of a risk the criminal statute was designed to prevent. In *Ardinger*, the defendant-minor was sued for allegedly entrusting her mother’s car to the decedent-driver, who was killed. The defendant asserted a defense based on decedent-driver’s alleged violation of a statute forbidding the operation of a car without the permission of the owner. Relying, inter alia, on the above risk analysis, the court held that the harm suffered did not result from the type of risk the statute was designed to prevent, namely the prevention of theft and consequent damage to property.

It appears that a proximate cause type of limitation on the serious misconduct bar has been a part (albeit an often ill-defined part) of the doctrine from its early evolution. A more sensible approach would have been to eschew the serious misconduct bar.

---

134. 982 P.2d 727, 735 (Alaska 1999).
135. *Id.* at 735-36; see also *Orzel v. Scott Drug Co.*, 537 N.W.2d 208 (Mich. 1995). In *Orzel*, the plaintiff sued several defendants, alleging that they negligently supplied him with methamphetamines resulting in his addiction. *Id.* at 210. The defendant that remained at the time of trial argued that the plaintiff’s illegal conduct, obtaining and using methamphetamine without a valid prescription in violation of the Controlled Substances Act, supported application of the “wrongful-conduct rule.” *Id.* at 213-14. The court seemed to adopt a proximate cause limitation to the doctrine, stating that the plaintiff’s illegal conduct must have been a “direct, immediate, and necessarily proximate cause of his addiction.” *Id.* at 216. In holding that the plaintiff’s criminal conduct was a proximate cause of his addiction, the court’s rationale seemed to be based on a risk analysis whereby it found that addiction was a materialization of a risk of illegal access to prescription drugs. The court distinguished a situation in which the plaintiff, while allegedly engaged in an illegal bingo game, had fallen into a hole on the premises where the game was played and sued the owner. *Id.* at 216. In that type of situation, the bar would not apply because, as the court explained, there the bingo game “merely served as an occasion for the injury.” *Id.* at 217. What the court seems to mean here is that the slip and fall was not part of the reason why it is illegal to play bingo, but addiction is part of the risk in illegal prescriptions.
137. *Id.* at 730.
138. The court also held that the criminal conduct in question did not rise to the level of seriousness required under the serious misconduct bar. *Id.* at 736.
139. *Id.* at 736-37.
140. Davis, *supra* note 35, at 513 (contending that the rule should apply only when the illegal act is “the immediate, active cause” of the harm, rather than “simply a remote link in the chain of causation”).
altogether. Rather than fussing with essentially two proximate cause inquiries—one that asks whether the serious violation by the plaintiff was a proximate cause, and also whether the defendant's negligence was a proximate cause—why not broadly and simply ask whether the harm in question was a proximate result of the defendant's tortious conduct—a materialization of a risk that rendered the defendant's conduct unreasonable?

3. Other Prerequisites

A variety of other limitations on the serious misconduct bar occasionally have been suggested. A few courts may require "joint involvement by the plaintiff and the defendant in the wrongdoing," or at least express more comfort with the doctrine in that type of situation. Although many of the cases applying the serious misconduct bar do involve situations in which the plaintiff and defendant both participated in the illegal conduct, that is seldom said to be a precondition to the bar if otherwise applicable, and many cases have applied the bar in situations in which the

141. Indeed, some commentators have noted the similarity between the serious misconduct bar and a proximate cause analysis. DOBBS, supra note 15, at 527.

142. MacDougall, supra note 5, at 25.

143. See Stinger v. Iskander, 28 Va. Cir. 496 (1992). See generally Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328, 329 (Va. 1998) (stating that the "illegality defense is based on the principle that a party who consents to and participates in an illegal act may not recover from [the] other participants for the consequences of that act"). In Stinger, the decedent died in jail after having previously consumed illegal drugs. Stinger, 28 Va. Cir. at 496. A wrongful death action was brought alleging malpractice in treatment while in jail (presumably treatment in connection with the decedent's ingestion of drugs). Id. at 496-97. In refusing to grant summary judgment for the defendant, the court distinguished some of the serious misconduct cases relied on by the defendants because they involved claims against a "partner-in-crime." Id. at 500.

Notwithstanding the "partner-in-crime" focus of these cases, other cases in the same jurisdiction have applied the bar beyond the partner-in-crime setting, at least in some types of situations. See Adkins v. Dixon, 482 S.E.2d 797 (Va. 1997). In Adkins, a client brought a legal malpractice claim, alleging negligent failure of counsel to raise the speedy trial issue with respect to six criminal charges for which the jury ultimately found the plaintiff guilty and for which it recommended two life sentences plus forty-five years. Id. at 798-99. The court held that the defendant-attorney was entitled to a judgment on various grounds, including a requirement that the plaintiff must allege his actual innocence of the six charges. Id. at 800-01. The court specifically relied on the traditional ground for the serious misconduct bar that "courts will not assist the participant in an illegal act who seeks to profit from the act's commission." Id. at 801 (quoting Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990)).
defendant was not a partner-in-crime.144 Some cases have held that the doctrine is not applicable if the plaintiff's right to recover in the circumstances is explicitly authorized by statute.145

D. Putative Rationales for the Doctrine

A stale smorgasbord of rationales has been offered to explain the serious misconduct bar. Some have been more prevalent in selected contexts than others.

. 1. May Not Profit

Perhaps the most common justification posited for the serious misconduct bar, actually more of a mantra, is that the doctrine prevents the wrongdoer from “profiting” from his misconduct. A typical statement of this idea is that the “policy derives from the rule that one may not profit from one’s own wrongdoing.”146 Numerous cases have invoked this rationale.147 It derives from the

---


145. Poch v. Anderson, 580 N.W.2d 456, 458 (Mich. Ct. App. 1998); see also Orzel v. Scott Drug Co., 537 N.W.2d 208, 219 (Mich. 1995) (suggesting that the doctrine will not apply if the plaintiff’s injury arose out of conduct by the defendant that also violated a statutory prohibition, and either the statute expressly authorized a damages remedy by injured persons similarly situated to the plaintiff, or the plaintiff “clearly” fell within the class of persons the allegedly violated statutes were designed to protect).


147. E.g., Wiley v. County of San Diego, 966 P.2d 983, 986-87 (Cal. 1998) (stating, in a legal malpractice context, that a criminal should not profit from his own wrong); Rowe v. Schreiber, 725 So.2d 1245, 1251 (Fla. Dist. Ct. App. 1999) (stating, in legal malpractice context, that unless the plaintiff were in fact innocent, allowing recovery could indirectly reward the wrongdoer for his crime); Rimert v. Motrell, 680 N.E.2d 867, 874 (Ind. Ct. App. 1997) (stating that rule was at least “correlative with” state’s “public policy against permitting one to profit from his or her wrongdoing”); Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (noting, in legal malpractice context, that rule is based on the “public policy that prohibits financial gain resulting directly or indirectly, from criminal acts”); Orzel, 537 N.W.2d at 213 (stating that otherwise wrongdoers would profit or receive compensation as a result of their illegal acts); Cork v. St. Charles County, 10 S.W.3d 608, 609 (Mo. Ct. App. 2000) (stating as a “fundamental maxim of the common law” that a person should not be permitted to “take advantage of his own wrong”); Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 999 (N.H. 1999) (stating, in legal malpractice context, that “it is wrong to allow a guilty defendant to profit from criminal behavior”); Barker v. Kallash, 468 N.E.2d 39, 43 (N.Y. 1984) (stating that wrongdoer may not profit from own wrongdoing); Symone T.
"principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from ... his own wrong."148

The "may not profit" rationale is conclusory and unconvincing. We are not told why no one may so "profit," nor why the "social interest"149 served by this principle outweighs other interests advanced by allowing a remedy. It all tediously seem to beg the question: If a plaintiff in a tort case is simply entitled to be made whole by the award of compensatory damages, where is the "profit"?150 As Justice Ingram noted with respect to a fourteen-year-old crushed to death trying to tilt a soda machine, the victim is not going to "profit" from his lawsuit.151

2. Deterrence and Moral Hazard

Some courts have reasoned that the bar serves a deterrent purpose, sending a signal that the law must be obeyed.152 Thus, one court stated that to allow recovery would "condone and encourage illegal conduct."153 Some authorities have simply said that the

v. Lieber, 613 N.Y.S.2d 404, 405 (App. Div. 1994) (stating that "[t]he policy has its roots in the rule that one may not profit from one's own wrongdoing"); Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995) (referring, in legal malpractice context, to the public policy against allowing criminals to profit from their illegal acts); Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) (stating that rule is "premised on the idea that courts will not assist the participant in an illegal act who seeks to profit from the act's commission"); Gail D. Hollister, Tort Suits for Injuries Sustained During Illegal Abortions: The Effects of Judicial Bias, 45 VILL. L. REV. 387, 391 (2000); Prentice, supra note 5, at 106.

149. Id. at 43.
150. The dictionary definition of "profit" is a "valuable return" or "the excess of returns over expenditure." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 931 (10th ed. 1993). See also Hollister, supra note 147, at 447 (reasoning that the plaintiffs are not seeking "profit," but compensation); Prentice, supra note 5, at 110 (saying that plaintiffs do not "profit" when they are merely compensated with traditional tort remedies in personal injury litigation). Prentice argues that the doctrine should operate only to the extent necessary to prevent recovery for lost expectations of gain directly from the misconduct in question, and to prevent punitive damages (which are extra profit). Id. at 107-08.
152. Barker, 468 N.E.2d at 43.
153. Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995); see also Wiley v. County of San Diego, 966 P.2d 983, 986 (Cal. 1998) (stating, in a legal malpractice context, that unless the plaintiff were in fact innocent, allowing recovery by the person who committed the
doctrine operates "in the nature of a punishment for the plaintiff's wrongdoing." These rationales seem concerned with the moral hazard potential of allowing those engaging in serious wrongdoing to recover damages from tortfeasors who may also have causally contributed to the victim's injury.

There are several problems with the punishment-deterrent rationales. First, one would assume that most persons engaging in criminal conduct do not expect to be injured in the process, at least not by negligence, and therefore would seldom be influenced by the thought of being barred from suing. Certainly, that would seem true in the case of minors acting impulsively. Second, if there is an apparent risk of injury, why is that not deterrent enough? Third, as a general matter, one might question how much a possible bar from tort recovery adds, at the margins, to the deterrence already in place in the form of potential criminal sanctions. Fourth, the doctrine's unpredictableness undermines its deterrent effect. Fifth, few career criminals would be aware of the tort bar. Sixth, how much deterrence does the serious misconduct bar add to the deterrence that inheres in some situations, such as those involving illegal abortions, with financial costs, psychological impact, and

crime would shift responsibility from the criminal, diminish consequences of the criminal conduct, and undermine the system of criminal justice) (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995)); Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) (saying that a contrary rule would "encourage plaintiffs to engage in or permit criminal conduct, for they would know that recovery is possible if harm results"); Greene v. Guarino, 25 Va. Cir. 162, 163 (1991) (stating that the rule is in the nature of punishment, but declining to apply it to the facts of the instant case); Hollister, supra note 147, at 391-92 (noting the rationale that preventing recovery in such situations deters illegal conduct).


156. See generally Gail D. Hollister, Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault, 46 VAND. L. REV. 121 (1993).

157. MacDougall, supra note 5, at 37. The way various courts treat injuries to children allegedly experimenting with "pipe bombs" illustrates this unpredictableness. See infra notes 281-84 and accompanying text.

158. Hollister, supra note 147, at 393 (noting that women seeking illegal abortions, for example, would be even less likely to be aware of the doctrine).
stigma?\textsuperscript{159} And finally, given the reciprocal nature of defenses, any dilution of the deterrence of plaintiffs from repudiating the serious misconduct bar would be offset by the additional deterrence of defendants that would \textit{pari passu} flow from the added potential liability.\textsuperscript{160}

In general, the assumptions underlying the whole dynamic of moral hazard may be exaggerated. Some commentators have noted that money may well not compensate for many losses.\textsuperscript{161} Moreover, victims are often less in control of forces than defendant-tortfeasors, and therefore in less of an effective position to prevent accidents.\textsuperscript{162} Also, some question whether moral hazard really increases risky behavior, considering its complexity and the fact that its relationship to accidents is unknown.\textsuperscript{163} Also, inordinate concern with moral hazard may ignore “positive externalities” of the benefits that insurance arrangements (and, for present purposes, tort recoveries) provide “to parties who are not directly involved in the insurance relationship.”\textsuperscript{164} Finally, Professor Baker asks rhetorically: “Is insurance only, or mostly, for the ‘moral,’ and who are they?”\textsuperscript{165}

3. \textit{Appearances}

One will often find a concern over public reaction tucked away in discussions of the serious misconduct bar. Allowing tort recovery by one injured in the course of serious misconduct might cause the public to “view the legal system as a mockery of justice,”\textsuperscript{166} and “would indeed shock the public conscience, engender disrespect for

\textsuperscript{159} See \textit{id.} at 394.
\textsuperscript{160} Prentice, \textit{supra} note 5, at 110-13.
\textsuperscript{161} Baker, \textit{supra} note 155, at 276. Moreover, the benefit to defendant-tortfeasors of barring liability is more fully realized and thus “may well present a greater moral hazard ... than does” liability benefits to the victims. \textit{Id.} at 279.
\textsuperscript{162} \textit{Id.} at 280.
\textsuperscript{163} \textit{Id.} at 288.
\textsuperscript{164} \textit{Id.} at 289. Baker elaborates, saying that “[u]nless and until economic theory can bring these public goods into the moral hazard equation, the economics of moral hazard will systematically understimate the benefits of social responsibility, overstate the costs, and, in the process, provide unwarranted support for the current legal and political flight from responsibility.” \textit{Id.}
\textsuperscript{165} \textit{Id.} at 292.
\textsuperscript{166} Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995).
courts and generally discredit the administration of justice.\textsuperscript{167} As Justice Brandeis remarked in another context:

The governing principle ... is that a court will not redress a wrong when he who invokes its aid has unclean hands. ... The court's aid is denied ... when [the plaintiff] has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.\textsuperscript{168}

Unlike some of the other rationales, this one occasionally may be at least operatively accurate in some respects in the sense that allowing recovery may attract the attention of the press and cause public dismay. That does not mean, however, that the possibility of such a public reaction is sufficient to justify the doctrine.

There are two intertwined conceits underlying this rationale. One is that compensating vile criminals for injuries arising out of their misconduct might elicit a negative public reaction. It would be "unseemly."\textsuperscript{169} The response here is that we do it all the time. Many lawsuits are pursued by undeserving, sometimes even fraudulent plaintiffs. The difference here is that conduct perceived as involving serious misconduct is more visible. Even so, the benefit of avoiding

\textsuperscript{167} Wiley v. County of San Diego, 966 P.2d 983, 986 (Cal. 1998) (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995)) (stating, in the context of legal malpractice claims, that unless the plaintiff were in fact innocent, allowing recovery by the person who committed the crime would shock the public conscience and discredit the system of justice); see also Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 999-1000 (N.H. 1999) (stating, in the context of legal malpractice claims, that unless the plaintiff were in fact innocent, allowing recovery by the person who committed the crime would shock the public conscience and cause disrespect to the system of justice, and that the rule "prevents the perversion of our public policy"); Peeler, 909 S.W.2d at 497 (stating, in the context of legal malpractice claims, that allowing recovery by the person who committed the crime would shock the public, causing disrespect for and discrediting the system of justice); Balboni, supra note 42, at 395 (expressing concern over the reaction of members of the public if plaintiffs recovered damages); Davis, supra note 35, at 517-18 (noting that the doctrine was needed because otherwise it would be "unseemly that a person should appeal to the law for redress for an injury caused directly by his own unlawful act, and only remotely by other circumstances").

\textsuperscript{168} Olmstead v. United States, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting) (citations omitted).

\textsuperscript{169} Davis, supra note 35, at 517.
negative public reaction hardly justifies a doctrine that is so subjective and prone to abuse.

The other dimension to this rationale is more insidious. It seems based on a fear that somehow the evil characteristic that produced the misconduct could rub off on the court or judicial system and contaminate them. The hope is that the bar helps to preserve the integrity of the courts. There are several problems with this speculation. First, this rationale ignores the countervailing contamination potential when the bar operates to confer immunity on an equally bad tortfeasor. Also, judges and juries deal with reprehensible conduct every day. Secondly, an established mechanism is already in place, in the form of comparative fault, to address the relative fault of the parties and make appropriate adjustments to the plaintiff’s redress to reflect that fault calculus. As one commentator observed, “the moral characteristics of the parties before a court have little or no relevance to that court’s capacity to do justice or injustice.”

4. Nonreciprocal Riskiness

Occasionally, the serious misconduct bar, or a distorted proximate-cause surrogate for it, has been explained in terms of a fairness rationale. Essentially, it may be unfair, under this rationale, to subject a defendant to potential liability when the plaintiff’s fault went way beyond the level of risk to which the defendant would ever subject himself. Thus, where the plaintiff engages in a nonreciprocal level of self-regarding riskiness, way beyond that in which the defendant engages, the defendant should not have to underwrite the consequences of this outlier conduct.

170. Hollister, supra note 147, at 392, 396; Prentice, supra note 5, at 119-20.
171. Hollister, supra note 147, at 396; Prentice, supra note 5, at 119-20.
172. MacDougall, supra note 5, at 36.
173. Prentice, supra note 5, at 122.
174. Cf. Christopher Dove, Note, Dumb as a Matter of Law: The “Superseding Cause” Modification of Comparative Negligence, 79 TEX. L. REV. 493, 510 (2000) (explaining the tendency of some courts to deny relief on proximate cause grounds to some extremely negligent plaintiffs—rather than simply allowing their fault to be addressed under a comparative fault analysis—as based on the fact that courts do not like “requiring reasonable people to plan for the actions of others that they would never do themselves”).
In some cases, the plaintiff's conduct may be so unforeseeable that perhaps the defendant should prevail on proximate cause grounds. However, that outcome really would be based on proximate cause, one of the traditional elements needed to support recovery, rather than the serious misconduct bar. The problem with a rationale based on the variation of the Golden Rule for the "really dumb plaintiff" is that, unless it can be said that the plaintiff's conduct truly was not a part of the risk calculus that rendered the defendant negligent, the fault of the plaintiff should be addressed by comparative fault.

5. Common Sense or "Trust Me"

Proponents groping for a rationale for the serious misconduct doctrine occasionally invoke what I call the "common sense" or "trust me" rationale. Thus, one commentator writes that "common sense dictates criminals and wrongdoers should be prohibited from taking advantage of the court system to further a criminal scheme." Or, consider the language of the Iowa Supreme Court, stating that allowing a person to recover from her psychiatrist for alleged negligence in failing to prevent her from murdering her former husband "would be, plainly and simply, wrong as a matter of public policy."

Perhaps what we have here is simply an expression of frustration with the task of reconciling in a convincing way the serious misconduct bar with core elements and goals of tort law. It reminds me of Judge Friendly's *apologia* in the *Kinsman* case reacting to the impenetrable nature of proximate cause. There he stated that the many efforts to define the rule "are not very promising," and in the end "what courts do in such cases makes better sense than what they, or others, say." Friendly's candor was a more forthright admission than the less-introspective language of some

175. See infra notes 238-48 and accompanying text.
179. *Id.* at 725.
180. *Id.*
of the courts seeking to justify the serious misconduct doctrine. The facile words of the courts are no less satisfactory despite their confident, reassuring tone. Not only do they fail to provide a thoughtful foundation to guide the application of the rule, but they may mask the underlying personal predilections of the courts. As Albert Camus observed, "[t]he regularity of an impulse or a repulsion in a soul is encountered again in habits of doing or thinking, [and] is reproduced in consequences of which the soul itself knows nothing."\(^1\)

6. Moral Responsibility

Some rationales for the serious misconduct bar focus on individual responsibility, and exude a distinct moral tone.\(^2\) These bad plaintiffs made their bed; let them lie in it. Thus, the Supreme Court of Alabama has reasoned that barring these claims "promotes the desirable public policy objective of preventing those ... engaging in an illegal or immoral act involving moral turpitude from imposing liability in others for the consequences of their own behavior."\(^3\) Numerous other courts have expressed a similar concern about allowing serious wrongdoers to shift responsibility to run-of-the-mill tortfeasors.\(^4\)

---


\(^2\) See Barker v. Kallash, 468 N.E.2d 39, 44-45 (N.Y. 1984) (Jasen, J., concurring) (writing separately to offer "boundaries" for the rule, and saying that the rule applies to "wrongdoing that is morally reprehensible, heinous, or gravely injurious to the public interests"); Prentice, supra note 5, at 82 (noting that "a tone of strong moral outrage permeates many of the cases").

\(^3\) Oden v. Pepsi Cola Bottling Co., 621 So.2d 953, 955 ( Ala. 1993).

\(^4\) E.g., Wiley v. County of San Diego, 966 P.2d 983, 986 (Cal. 1998) (stating, in the context of a legal malpractice case, that unless the plaintiff were in fact innocent, allowing recovery would shift responsibility from the criminal); Rimert v. Mortell, 680 N.E.2d 867, 873 (Ind. Ct. App. 1997) (stating that the rule was based on the "sound public policy that convicted criminals should not be permitted to impose or shift liability for the consequences of their own antisocial conduct"); Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995) (reasoning that without the rule, wrongdoers could thereby shift much of their responsibility to others); Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 999 (N.H. 1999) (stating, in the context of a legal malpractice case, that unless the plaintiff were in fact innocent, allowing recovery "would likely shift the responsibility for the criminal conduct and its associated consequences away from the defendant"); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (stating, in the context of a legal malpractice case, that "allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the
Moral overlays like this one have not been so vivid in tort doctrine since the heyday of exclusively fault-based tort law. The problem is that moral offensiveness is a patently subjective notion. We should be careful before committing these kinds of morality-based judgments exclusively to the discretion of judges and to the exclusion of juries, who would otherwise address such matters in the context of comparative fault. How do we measure the immorality where, for example, a fourteen-year-old boy is crushed to death when a soft drink vending machine falls on him while he was tilting it? Are we so confident of his immorality that we should ignore the entire spectrum of forces that contributed to his death?

7. Not Proper Role for Judicial Branch

A number of courts have suggested that compensating victims whose harm arose in part from their own acts of serious misconduct is not a proper role for the courts. The leading case of Barker v. Kallash stated that "courts should not lend assistance to one who seeks compensation under the law for injuries resulting from his own acts when they involve a substantial violation of the law." This argument, of course, begs the question. Whether it is an appropriate role for the courts depends on the goals of tort law and the role of the courts in achieving those goals.

8. Unforeseeability and Risk Analysis

Some courts suggest that harm suffered in the course of a victim's serious misconduct may not be foreseeable, or at least not a part of the risk the materialization of which renders the

185. Oden, 621 So.2d at 953.
187. Id. at 43; see also Oden, 621 So.2d at 955 (observing that by barring such claims, we help to assure "that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government") (quoting Bonnier v. Chicago B & Q R.R., 113 N.E.2d 615, 622 (Ill. 1953)).
188. Oden, 621 So.2d at 959-60 (Ingram, J., concurring in part and dissenting in part) (identifying and criticizing, in the instant case, the unforeseeability argument).
defendant's conduct negligent. One court, for example, articulated
the risk rationale in the context of a legal malpractice claim against
the plaintiff's criminal defense counsel. In holding that the plaintiff
must prove that he was actually innocent of the criminal conduct
charged, the court said that "constitutional protections are to
safeguard against conviction of the wrongly accused and to
vindicate fundamental values[, but] are not intended to confer any
direct benefit outside the context of the criminal justice system."

There are several difficulties with the foreseeability-risk
rationale. First, if foreseeability means anything, one could
question whether, for example, in the Oden case, it really was
unforeseeable that a teenager might tilt a vending machine, or in
Wiley, whether the risk of losing one's constitutionally guaranteed
protections was not contemplated within the duty owed by a lawyer
to his client. Second, a foreseeability-risk analysis is the
quintessential grist for the proximate cause element rather than
some ill-defined outlier doctrine like the serious misconduct bar.
Finally, issues of foreseeability are usually matters for the jury
rather than the trial judge.

9. Response to Comparative Fault

One of the most telling criticisms of the serious misconduct bar
is that it constitutes an unwarranted and ill-defined circumvention
of the established comparative fault system for allocating damages
among the parties based on their relative fault in contributing to
the injury. Thus, it is peculiar that this very aspect of the doctrine
is occasionally proffered as a justification for it. In the leading
Barker case, for example, the court comments that the serious
misconduct bar might be needed as a tool to respond to the
comparative fault system in order to prevent the "pendulum"
from swinging too far "by going to opposite extremes in the future."\textsuperscript{195}

As an unintended consequence, comparative fault statutes may actually have breathed new life into the serious misconduct bar by offering the courts a handy prop for occasionally ignoring comparative fault rules and simply barring the plaintiff's case. That, of course, represents a selective, ad hoc, and frequently arbitrary subversion of the established system. It also constitutes an encroachment on the traditional prerogatives of the jury.

\textit{10. Undeserving Miscreants}

Courts occasionally use language that harkens back to the "outlaw" roots of the serious misconduct rule. Thus, in the seminal \textit{Barker} case, the court says that the plaintiff had no cause of action "cognizable at law."\textsuperscript{196} The implication here is that plaintiffs barred by the serious misconduct doctrine were deemed outlaws whose interests were therefore outside the remedial ambit of legal beneficence.

This kind of classificatory exclusion of persons from the system of torts remedies is subject to the same objections as other similar exclusions. Thus, for example, those deemed to be unworthy poor have been excluded from the welfare system, and the so-called libel-proof plaintiffs have sometimes been denied defamation recoveries.\textsuperscript{197} Facially deeming persons unworthy may assuage the sensitivities of decision makers by masking the underlying societal dynamic that engendered the conduct that offends the courts. But, we are no closer to solutions.

\textit{11. Participant Consent}

Some cases applying the serious misconduct rule involve situations in which the plaintiff and defendant were both willing participants in the illegal activity. In this type of situation, courts sometimes rationalize the rule with some form of a consent

\textsuperscript{195} \textit{Id.}  
\textsuperscript{196} \textit{Id.} at 43.  
\textsuperscript{197} \textit{King}, \textit{supra} note 25, at 394-99.
argument. In *Lee v. Nationwide Mutual Insurance Co.*,\(^{198}\) the thirteen-year-old plaintiff was riding with a sixteen-year-old driver who, along with the daughter of the car's owner, allegedly borrowed the car without the owner's consent. In holding that recovery was barred, the court stated that "[t]he illegality defense is based on the principle that a party who consents to and participates in an illegal act may not recover from other participants for the consequences of that act."\(^{199}\) And in *Zysk v. Zysk*,\(^{200}\) the plaintiff alleged that shortly before her marriage to the defendant, she and the defendant had engaged in consensual sexual intercourse and as a result she was infected with herpes simplex virus. The Supreme Court of Virginia held that since the plaintiff was participating in the crime of fornication, she was barred from tort recovery.\(^{201}\)

The consent argument, however, makes no sense here. The plaintiff in *Lee* did not consent to the defendant driving negligently, nor did the unsuspecting plaintiff in *Zysk* consent to contracting the herpes virus. As Professor Dobbs explains in another context, "[c]onsent to an illegal abortion ... is not consent to negligent infliction of harm or death."\(^{202}\) The court in *Zysk* even notes that the serious misconduct bar is "not an assumption-of-the-risk concept,"\(^{203}\) and therefore may apply "even though defendant concealed his infection from the plaintiff."\(^{204}\) Thus, the question of

\(^{198}\) 497 S.E.2d 328 (Va. 1998).

\(^{199}\) 404 S.E.2d at 329; see also Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) (stating that since the plaintiff was engaging in crime of fornication, she was barred under the "general rule" that a party who consents and participates in an immoral or illegal act cannot recover damages from other participants, and that the bar was "premised on the idea that courts will not assist the participant in an illegal act who seeks to profit from the act's commission").

\(^{200}\) 404 S.E.2d at 721.

\(^{201}\) Id.

\(^{202}\) DOBBS, supra note 15, at 246 (discussing the question of whether the fact that a plaintiff consents to criminal conduct should invalidate the plaintiff's consent, and noting that irrespective of the answer to that question, the "consent" should not bar a claim on consent grounds for harm beyond the scope of that consent); see also RESTATEMENT (SECOND) OF TORTS § 892C cmt. c (1979) (stating that the plaintiff's consent to engage in criminal conduct does not preclude liability if either the defendant exceeds the scope of consent or the defendant acts negligently); id. illus. 6 (stating that while otherwise valid consent might bar a battery claim for an illegal abortion, it would not bar a claim for negligence if the defendant negligently failed to sterilize his instruments).

\(^{203}\) Zysk, 404 S.E.2d at 722.

\(^{204}\) Id. If an implied assumption-of-risk analysis were to apply here, it would be addressed by traditional rules governing the assumption of risk defense or (as more likely) be subsumed into comparative fault, or occasionally be addressed under traditional elements
whether the particular plaintiff's actions should, on the grounds of consent, bar the plaintiff's claim ought to depend on the validity and scope of the supposed consent as such. And, the question of whether the serious misconduct doctrine should bar a claim should depend on the standing and scope of that doctrine.

12. Stealth Comparative Fault

Some cases try to explain the serious misconduct bar on the basis of the disparate relative fault of the parties. Thus for example, in the context of a malpractice claim against a criminal defense attorney, one court reasoned that if the plaintiff had in fact committed the crime, the plaintiff "ha[d] no redress against his attorney because [the plaintiff's] conduct was intentional and in violation of the criminal law, whereas his attorney's was merely negligent." Some commentators have followed a similar line, saying that some serious misconduct cases can be explained "merely as cases in which, as a matter of law, the plaintiff's fault exceeded the defendant's." This kind of logic seems little more than a stealth version of comparative fault, but with the court in control rather than the jury. As such, it is objectionable because it selectively sidesteps the established comparative fault mechanism in favor of an ad hoc and morally subjective judge-based decision-making process.

defining the nature and scope of the defendant's duty of care owed to the plaintiff. DOBBS, supra note 15, at 539-40.

205. Howarth v. State, 925 P.2d 1330, 1337 (Alaska 1996); cf. Shaw v. State, 861 P.2d 566, 568, 572 (Alaska 1993) (stating, in a case where plaintiff, whose convictions were set aside as "constitutionally defective," sued his former attorney for legal malpractice, that if the plaintiff did in fact commit the crime, then "[a]ny subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct"). In one case in which the court approved the serious misconduct bar in principle, the court refused to apply it to the instant facts when "the defendant's culpability for the damages [was] greater than the plaintiff's culpability." Poch v. Anderson, 580 N.W.2d 456, 458 (Mich. Ct. App. 1998).

206. DOBBS, supra note 15, at 526 n.16.
13. Enhance Criminal Laws

Some commentators have surmised that the serious misconduct bar may have been motivated as a way to impose additional sanctions on a person who violated the criminal laws in order to enhance their punitive effects. The obvious rejoinder to this rationale is that the courts should not be in the business of imposing additional sanctions on conduct denominated as criminal when the legislature has decided not to do so.

14. Criminal Malpractice: Avoiding Conflicting Resolutions

There are a number of rationales that have been relied on to support a variation of the serious misconduct bar in the context of malpractice claims by accused persons against their former criminal defense attorneys. Some cases have expressed concern that, unless actual innocence of the crime is a prerequisite to recovery, a person convicted in a criminal proceeding might thereafter prevail in a civil malpractice lawsuit against his criminal defense attorney. The supposed need here is to avoid what may be perceived as conflicting resolutions arising out of the criminal prosecution.

The imperative of avoiding conflicting resolutions is more apparent than real. Even a person who committed a crime may have been seriously harmed by the negligence of his criminal defense attorney. Thus, to that extent there is not necessarily a conflict between a negative outcome to the criminal proceedings and a subsequent positive outcome in the malpractice case.

207. 3 HARPER ET AL., supra note 30, § 17.6, at 618 (stating that the doctrine’s application “could be justified at all only as a stringent means of imposing additional sanctions to enforce a very important provision of the criminal law”).

208. Id.

209. These are addressed in the present subsection and subsequent subsections. See infra notes 210-27 and accompanying text.

210. See supra notes 77-100 and accompanying text.

211. E.g., Wiley v. County of San Diego, 966 P.2d 983, 990 (Cal. 1998) (stating, in the context of legal malpractice claims, that requiring the plaintiff to prove actual innocence of the charges is consistent with the judicial policy against the creation of conflicting resolutions arising out of the same transaction).

212. See infra notes 221-23 and accompanying text.
15. Criminal Malpractice: Availability of Defense Attorneys and Costs

A common drumbeat to support a rule precluding malpractice recovery against a criminal defense counsel in the absence of proof of the plaintiff's factual innocence of the crime has been a concern that otherwise we would have difficulty attracting defense attorneys.213 Some courts have elaborated on this concern by pointing to a special need to preserve "the pool of legal representation available to criminal defendants, especially indigents."214 There is a related concern that without the limitation on liability in the form of the innocence requirement, attorneys who do serve as defense counsel might practice "defensive" law, generating additional expenditures of resources.215

This rationale is subject to numerous criticisms. It ignores the fact that in one respect the innocence requirement, by eroding the deterrent to malpractice, may undermine the right to effective assistance of counsel. As one judge remarked, "the public not only has an interest in encouraging the representation of criminal defendants, but it also has an interest in making sure that the representation is, at the very least, not negligent."216 Professor Susan Koniak has observed that the need-to-attract-defense-attorneys argument "boils down to nothing more than an admission that we do not pay these lawyers enough to demand that they be competent."217 It may be emblematic of the disjunction of rights and

213. Rowe v. Schreiber, 725 So.2d 1245, 1251-52 (Fla. Dist. Ct. App. 1999) (stating, in the context of legal malpractice claims, that a rule is needed to encourage representation of criminally accused, especially those who are indigent, and that there is no need for more deterrence for criminal defense counsel because they still would have to worry that an accused might be innocent, in which case defense counsel might be subject to liability) (citing Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); Labovitz v. Feinberg, 713 N.E.2d 379, 383 (Mass. App. Ct. 1999) (stating, in the context of legal malpractice claims, that a rule is needed to encourage representation of accused persons, especially indigent persons, by reducing risk of successful legal malpractice claims against criminal defense counsel) (citing Glenn v. Aiken, 569 N.E.2d 783, 783 (Mass. 1991)).

214. Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 999 (N.H. 1999). The court in Mahoney noted that many of the attorneys who represent accused persons "do so on a pro bono or reduced fee basis." Id. at 1000.


217. Koniak, supra note 89, at 12.
obligations, with the "rhetorical emphasis … on the importance of the right … [but with the obligation] a byproduct, an afterthought."\[218\] Not only is the serious misconduct bar in the form of an innocence requirement incompatible with the right to effective assistance of counsel, there is no empirical evidence that threat of malpractice claims has deterred public defenders or retained counsel from defending accused persons.\[219\] The innocence requirement may also create an artificial distinction between attorneys practicing in the civil and criminal law areas.\[220\]

16. Criminal Malpractice: Availability of Postconviction Relief

Some courts supporting an innocence requirement have relied on the availability of postconviction procedural relief with which to address ineffective assistance of counsel.\[221\] Their point is that the accused already has substantial postconviction remedial options available with which to correct mistakes attributable to the ineffectiveness of counsel.

The fallacy in this argument is that it assumes that the standards for postconviction relief would be coterminous with the proof of the elements required for a malpractice claim. More importantly, the fact that postconviction relief may be available might not erase the harm that the victim may already have irrevocably suffered. For example, someone may have been incarcerated for years before achieving postconviction relief, and perhaps the plaintiff could have, but for the negligence of his attorney, completely avoided prison time. Or consider *Peeler v. Hughes & Luce.*\[222\] There the plaintiff alleged that the defendant committed legal malpractice in failing to communicate to the plaintiff-accused an offer of absolute transactional immunity.

---

218. *Id.* at 23-24.
220. *Id.* Justice Mosk does, however, endorse a requirement that plaintiff must obtain postconviction relief before pursuing a malpractice claim in order to screen out frivolous claims. *Id.* at 993-94.
221. Berringer v. Steele, 758 A.2d 574, 592 (Md. Ct. Spec. App. 2000) (noting in the context of legal malpractice claims in criminal defense cases, that "appellate, postconviction, and habeas corpus remedies are available to address ineffective assistance of counsel") (quoting Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999)).
222. 909 S.W.2d 494 (Tex. 1995).
Thereafter, the plaintiff entered into a plea agreement admitting guilt to one count. The court held that plaintiffs must demonstrate that "they have been exonerated on direct appeal, through post-conviction relief, or otherwise." Clearly the plaintiff had suffered serious harm that could not be erased or redressed solely by the exercise of postconviction procedural devices even if the court were to overturn the plaintiff's conviction.

17. Criminal Malpractice: Criminals Passing the Time

Some cases supporting at least some form of special limitation on malpractice claims have worried that all the "free" time on the hands of jailed inmates might otherwise be deployed in lawsuits against criminal defense lawyers. I guess, by this reasoning, an independently wealthy person without the time commitments of a regular job (and therefore lots of spare time) should also be precluded from suing. If we are worried about excessive litigiousness, then that should be addressed nationally (or even globally) rather than by targeting a specific group. This is especially true with respect to indigent persons, whose legal rights (like their civil and economic rights) have been historically neglected in this society.

18. Criminal Malpractice: Procedural Safeguards Sufficient

Some cases have reasoned that legal malpractice claims are less necessary for criminal representation than for civil representation, because defendants in criminal proceedings are already protected by a panoply of additional constitutional and procedural safeguards beyond those applicable to civil litigation.

223. Id. at 497-98.
224. Berringer, 758 A.2d at 592-93, 597 (requiring "appellate, post conviction, or habeas relief, dependent upon attorney error, as a predicate to recovery in a criminal malpractice action, when the claim is based on an alleged deficiency for which appellate, post conviction, or habeas relief would be available," and noting concern that prisoners might occupy their free time litigating against former attorneys).
225. Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 999 (N.H. 1999) (noting, in the context of legal malpractice claims by accused persons, that the criminal justice system itself "affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and
There are obvious problems with this reasoning. The fact that there are additional protections available to accused persons does not mean those safeguards are infallible or even effective. The reasoning is also circular. It says in effect that lawsuits based on failure of the procedural safeguards should be prohibited because these safeguards are sufficient. Nor does the presence of these safeguards mean that the accused has not been harmed by his attorney's negligence.

19. Criminal Malpractice: Closure and Proliferation of Lawsuits

Finally, some courts have intimated that restrictions on malpractice claims by criminally accused persons are appropriate to help bring closure to litigation and avoid proliferation of lawsuits. One judge commented that "[i]f the law did not impose a substantial burden on convicted criminals seeking to sue their attorneys for professional negligence, most criminal convictions might simply be a prelude to a civil malpractice suit."226

Why is it appropriate, however, for this category of lawsuits to be short-circuited and not other types of lawsuits? If such tort reforms are justified, then they should not occur atomistically, but across the board. Nor should the treatment of persons accused of crimes be considered in isolation from the dynamic and polycentric socio-economic setting from which the subject's conduct grew.

In summary, the preceding questionable rationales undergirding the serious misconduct bar are not sufficient to prop up this kind of ad hoc "public policy" limitation on tort liability. Justice James Hopkins, in a law review article, has offered the following cautionary prescription about public-policy-based rules: "To base a decision on the ground of public policy ... brings into the case ... the exercise of community control quite apart from statute, judicial ineffective counsel"); Colbert v. Haydon, 690 N.Y.S.2d 246, 248 (App. Div. 1999) (relying in support of the proof-of-innocence requirement in the context of a legal malpractice claim, on the "extra constitutional and procedural safeguards inherent in criminal proceedings").

226. Peeler, 909 S.W.2d at 501 (Phillips, C.J., dissenting) (endorsing, in principle, a less "absolutist" and less sweeping version of the bar than the majority opinion, and one that would be inapplicable to the instant case).
precedent or doctrine." 227 "[If the elastic theory of public policy] is ever to be used as a ground for judicial decision, then it must be justified by recourse to an analysis of the reasons which are the foundation for the policy." 228 The putative rationales for the serious misconduct bar fail to assuage Hopkins' admonition.

II. TIME TO DEFINITIVELY REPUDIATE THE DOCTRINE

A. Subverting the Goals of Tort Law

Fundamentally, the serious misconduct bar frustrates several important goals of tort liability. 229 In providing a mechanism for compensating victims of accidents, tort liability directly promotes the goals of spreading the costs of accidents and of allocating those costs initially to the activities and enterprises that played a significant role in engendering them. By defeating liability, the serious misconduct bar forecloses compensation, 230 and in so doing, inhibits what should be the paramount ends of tort law, namely the loss-spreading and loss-allocation goals. 231

Proponents of the serious misconduct bar would no doubt counter that without the doctrine, we otherwise would undermine the tort goal of deterrence by rewarding misconduct with damages, and in so doing, erode the deterrence victims would otherwise confront by the prospect of suffering uncompensated harm. This deterrence point is specious. It ignores the fact that creating a bar to liability would, at the same time it forecloses the plaintiff's claim, diminish the deterrence faced by defendants. Moreover, many defendants in these cases are engaging in the types of activities or enterprises

228. Id. at 336.
230. 3 HARPER ET AL., supra note 30, § 17.6, at 617; Prentice, supra note 5, at 123.
231. For a recent thoughtful essay urging the primacy of considerations of distributive justice in tort law, see Gregory C. Keating, Distributive and Corrective Justice in the Tort Law of Accidents, 74 S. CAL. L. REV. 193, 195 (2000) (contending that "[a] conception of justice that places less weight on considerations of corrective justice and more on considerations of distributive justice can help us to make sense of strict liability and to put negligence in its proper place").
that are amenable to systematic risk evaluation and reduction. On the other hand, the plaintiffs impacted by the serious misconduct bar are individuals, often young or vulnerable individuals, who are unsophisticated evaluators of risk and cost-benefit considerations. Moreover, plaintiffs engaging in serious misconduct usually will have violated criminal prohibitions, which have their own deterrent of sanctions that remain unimpaired. More immediately, many activities deemed serious misconduct, by their obvious dangerousness or invasiveness, carry an inherent inhibition. And in any event, focusing solely on the "wrongfulness" of the plaintiff's conduct elevates corrective justice concerns over the distributive-justice function of tort law, when just the opposite should be true. In other words, the serious misconduct bar depreciates what should be the primacy of the distributive role of the tort system.

A fairness goal, as embodied in the proportional-liability rules of comparative fault, may also be undermined by the serious misconduct bar. The nearly universal replacement of the complete bar of the traditional contributory negligence defense with a comparative fault regime was in part based on fairness concerns of proportionality—that the relative blameworthiness of plaintiff's conduct be fairly reflected in the amount of his tort recovery.

232. E.g., Oden v. Pepsi Cola Bottling Co., 621 So.2d 953 (Ala. 1993) (involving a fourteen-year-old victim); Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984) (barring a claim by a fifteen-year-old); Symone T. v. Lieber, 613 N.Y.S.2d 404, 406 (App. Div. 1994) (approving application of the bar to a claim by a twelve-year-old rape victim who underwent an illegal abortion if it were established that she "willfully submitted to an abortion which she knew to be illegal"); Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328 (Va. 1998) (applying bar to a thirteen-year-old plaintiff riding with a sixteen-year-old driver). A tentative draft of the Restatement takes a more forgiving and flexible approach toward children in addressing the question of when a violation of statute may constitute negligence per se. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 15 (Tentative Draft No. 1, 2001) (stating that a violation may be excused and thus not deemed negligent when it is reasonable because, inter alia, of the actor's childhood).

233. E.g., Symone T., 613 N.Y.S.2d at 404. In Symone, the plaintiff was a twelve-year-old victim of rape who underwent an abortion during which she suffered an amniotic fluid embolism causing neurological damage. Id. She sued for medical malpractice. It appeared that her undergoing this abortion was illegal because of the number of weeks she had been pregnant. Id. at 405.

234. For analysis of the distributive and corrective justice dimensions of tort law, see generally Keating, supra note 231.

235. See Prentice, supra note 5, at 124, 128.
Obviously, to the extent that the serious misconduct bar bypasses a rule of comparative fault, it subverts the fairness goals represented by comparative fault.

B. Instrumentally: Straying From the Elemental Framework

The serious misconduct bar, as a freestanding doctrine, lurks like a rusting old tool in the crawl space beneath the core tort elements and defenses. One is never quite sure what its standing is or when its archaic blade will next appear to dispatch a tort claim. As Professor Silver remarked in another context, "[a] rule, which ought never to have been stated, will encyst itself in the fabric of negligence law and undermine its structure." In his modern classic on human error, James Reason has written that "[i]n any given situation, a number of rules may compete for the right to represent the current state of the world." He adds that "the system is extremely 'parallel' in that many rules may be active simultaneously." This parallelism exists in the case of the serious misconduct doctrine, where it coexists with traditional tort elements and defenses. A number of the regular tort concepts are more suitable vehicles for addressing the plaintiff's contributory fault. A universal requirement in tort law is that the defendant's tortious conduct has been a proximate cause of the plaintiff's harm. A second, and often overlapping requirement, is that the duty owed by the defendant has encompassed the harms suffered by the plaintiff. When the plaintiff's injury arose in part from his own misconduct, that fact may be relevant in the overall proximate cause and duty analysis, but it should be considered only as a part of the normal calculus and risk analysis.

Some courts addressing the proximate cause (and duty) question have occasionally accorded undue significance to the perceived

236. Theodore Silver, One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice, 1992 Wis. L. Rev. 1193, 1239. James Reason has discussed the phenomenon of "encysting" in the general context of the causes of human errors. JAMES REASON, HUMAN ERROR 93 (1990). He describes encysting: "Topics are lingered over and small details ... attended to lovingly ... [while] [o]ther more important issues are disregarded. . . . [E]ncysting [i]s mediated by . . . bounded rationality, a poor self-assessment and a desire to escape from the evidence of one's own inadequacy." Id.
237. REASON, supra note 236, at 74.
238. Id.
criminality and wrongfulness of the plaintiff's conduct and have articulated the issue in terms of whether the plaintiff's fault should be deemed the "sole proximate cause." That formulation is confusing and runs the risk that the proximate cause element might be distorted to serve as a surrogate for the serious misconduct bar, but in the guise of the proximate cause element. Indeed, some commentators have advocated that type of expansive role for the proximate cause element. It is appropriate to consider the plaintiff's conduct in the proximate cause analysis, but not in isolation. The plaintiff's conduct should simply be a part of total factual setting on which the court and trier of fact base their proximate cause and duty analyses.

Professor Robertson gets it right, opposing an approach that would deem egregious conduct by a victim as a superseding cause of the harm (and thereby preclude finding a defendant's negligence a proximate cause) "[i]f the only thing that makes the victim's injury unforeseeable was the egregiousness of the victim's fault." He discusses the Restatement's "firestarter" illustration, which

---

239. DOBBS, supra note 15, § 196, at 489; Hayden, supra note 16.

240. See Hayden, supra note 16, at 888-90. Hayden defends use of a proximate cause analysis, focusing on plaintiff's conduct as a superseding cause, as a way of softening effects of pure comparative fault. His thesis is that we need this admittedly legal fiction "to avoid making the slightly faulty defendant pay the overwhelmingly faulty plaintiff a very large sum of money." Id. at 921. He says that "[a]t times ... a theoretically pure and even simple system must have some messy and inconsistent safety valves to prevent it from becoming obsessively pure and simple ... [and thus] some 'rough edges' tend to preserve, not undercut, otherwise theoretically seamless legal systems such as pure comparative responsibility." Id. at 919. I would respond to Hayden that what we need is to change the system to accommodate hard cases.

241. Dove, supra note 174, at 525, 530 (arguing that proximate cause should not be allowed to "trump" use of comparative fault to address plaintiff's negligence unless a person of ordinary prudence in the shoes of the defendant would find the type of harm unforeseeable); id. at 525; see also David W. Robertson, Love and Fury: Recent Radical Revisions to the Law of Comparative Fault, 59 LA. L. REV. 175, 191 (1998).

242. The serious misconduct bar goes beyond the realm of a traditional duty analysis. Professor MacDougall notes the question whether the serious misconduct doctrine "amounts to a denial or negation by the court of a duty of care owed by the defendant to the plaintiff or whether its application simply constitutes a refusal by the court to award damages for a breach of that duty." MacDougall, supra note 5, at 3. He says that the serious misconduct doctrine is probably more accurately characterized in the latter sense. Id. at 4.

243. Robertson, supra note 241, at 190 n.36; see also DOBBS, supra note 15, § 196, at 489 (suggesting that a sole proximate cause analysis focusing too singlemindedly on the plaintiff's fault would, if widely applied, undermine the comparative fault system of fault allocation).
posits a situation in which a defendant negligently spills gasoline on the street and the plaintiff knowingly throws a lighted match into the gasoline. The Restatement asserts that the "unforeseeably egregious aspect" of the plaintiff's conduct is not only relevant to the percentage fault of the plaintiff, but also to the question of whether the plaintiff's conduct "was a superseding cause [of the plaintiff's] injuries." The Restatement adds that "whether a plaintiff's conduct constitutes a superseding cause is beyond the scope of this Restatement." Robertson rejects a test that treats separately (rather than melds) "unforeseeable egregiousness" and "unforeseeable for any other reason." Thus, he offers the following solution for the Restatement illustration:

If B's conduct is such that an innocent bystander could not recover from A—if a fire started by conduct like B's was beyond the scope of the foreseeable risks that made it negligent for A to spill the gasoline—then refusing recovery to B would be a sound application of "normal" legal cause reasoning .... But if an innocent bystander could probably recover, then so must B, although B's recovery should be drastically reduced; the principles of comparative fault call for assigning B a very high percentage, in order to reflect the egregiousness of his fault.

244. Restatement (Third) of Torts: Apportionment of Liability § 3, illus. 7 (2000).
245. Id.
246. Id.
247. Id.; see also id. cmt. c. The reporters' notes accompanying the Restatement observe with respect to proximate cause that (although beyond the scope of that Restatement): Comparative negligence may have an effect on those [complete bar proximate cause type] rules, especially when they are based on a judgment that the egregious culpability of an intervening cause relieves an earlier, less culpable actor from liability. This all-or-nothing approach is undermined by the premise of comparative responsibility: that the factfinder should compare on a sliding scale the responsibility of all actors who caused an injury. Rather than totally absolve an earlier cause under a rule about superseding causes, the factfinder could just adjust the percentages assigned to the parties.

Id. cmt. b, reporter's note.
248. Robertson, supra note 241, at 190 n.36.
249. Id. at 191 n.37; see also Dobbs, supra note 15, § 196 at 490 (suggesting that the sole proximate cause and superseding cause rhetoric be dropped in this context, and reasoning that "the important thing is not that the plaintiff is at fault, or that the plaintiff's fault was a superseding cause, but rather that the harm was outside the scope of the [risk of the] defendant's negligence"); Dove, supra note 174, at 502 n.48 (stating in connection with the firestarter illustration that "if an innocent bystander could recover from the person who spilled the gasoline, then the firestarter should be permitted to recover as well"). Dove
The serious misconduct bar also addresses the same subject as the comparative fault defense. This raises two concerns. First, the serious misconduct bar appears redundant. More crucially, because the serious misconduct doctrine operates as a complete bar foreclosing any recovery, it is an atavistic doctrine that transcends and subverts the compromise inherent in comparative fault systems.\textsuperscript{250} It allows selective resurrection of a contributory negligence defense under the cloak of the serious misconduct bar. The persistence of the serious misconduct bar, despite the widespread adoption of comparative fault, may reflect the doctrine's long lineage. James Reason has observed, in connection with a rule's strength, that:

\begin{quote}
The chances of a particular rule gaining victory in the "race" to provide a description or a prediction for a given problem situation depends critically upon its previous "form," or the number of times it has achieved a successful outcome in the past. The more victories it has to its credit, the stronger will be the rule.\textsuperscript{251}
\end{quote}

The continuing comfort some courts exhibit with the serious misconduct doctrine evinces the subtle staying power of the complete bar mindset that characterized traditional contributory

\begin{footnotes}
\item[250] \textsc{Restatement (Third) of Torts: Apportionment of Liability} § 8 cmt. c, reporter's note (2000) (discussing the fact that an actor's conduct may have violated a statute, and stating that "[i]t is highly unlikely that a legislature intended to affect the way a court applies comparative responsibility" and that "the factfinder should consider circumstances that would be relevant to a finding of negligence in the absence of a statute, even though those circumstances would not be relevant to whether violation of the statute constitutes negligence \textit{per se}"); MacDougall, \textit{supra} note 5, at 40-41 (describing the serious misconduct bar as incompatible with comparative fault); Robertson, \textit{supra} note 241, at 190 n.36 (noting that "the core command of the pure percentage fault system is that the victim takes a very high percentage assignment but is not barred").
\item[251] \textsc{Reason, supra} note 236, at 77.
\end{footnotes}
negligence.252 "To a person with just a hammer, every problem looks like a nail."253

The appropriate doctrine for addressing the fault of a plaintiff that has proximately contributed to his injury is the defense of comparative fault to the extent it has been adopted in the jurisdiction.254 Accordingly, the conduct of the plaintiff should seldom255 justify the court deciding to bar the claimant as a matter of law, especially in jurisdictions adhering to a pure form of comparative fault. Whatever effect the plaintiff's wrongfulness has on the outcome of the claim—including whether the claim will be completely precluded or the damages proportionately reduced—should depend on the relative fault of the plaintiff and the version of comparative fault that is applicable.256 The serious misconduct bar reinvests the effect of the plaintiff's fault with a complete bar potential despite a comparative fault scheme, and thus legitimizes

252. Reason elaborates that “[i]f a rule has been employed successfully in the past, then there is an almost overwhelming tendency to apply it again, even though the circumstances no longer warrant its use.” Id. at 78.
253. Id.
254. Of course, if a state has retained the doctrines of contributory negligence and implied assumption of risk, then those doctrines might apply. Even then, however, the contributory negligence and assumption of risk defenses might not be coterminous with the serious misconduct bar. For example, the issue of contributory negligence typically is decided by the jury rather than the court when reasonable minds could differ on the question, and contributory negligence traditionally has been subjected to an important catalogue of ameliorating doctrines. DOBBS, supra note 15, at 498-502.
255. A court could still dismiss a claim where reasonable minds could not differ that the plaintiff was (in a pure comparative negligence regime) one hundred percent responsible, or whose fault (under a modified comparative fault rule) exceeded the threshold that would allow any relief. Dove, supra note 174, at 528. Notwithstanding the fact, however, that comparative fault might not completely foreclose decisions by the court for the defendant as a matter of law based upon the wrongfulness of the plaintiff's conduct, that approach is still preferable to a serious misconduct option because at least with respect to the former, “it would ... maintain the conceptual integrity of the law of negligence.” Id. at 528 n.187 (arguing against inappropriate application of a superseding cause analysis for addressing the matter of the plaintiff's fault).
256. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. d (2000) (advocating comparative fault “even though a party's conduct violated a statute ... unless the purpose of the statute ... is to place the entire responsibility for such harm on the party”); id. § 8 cmt. c, reporter's note (2000) (stating with respect to the violation of statute rules that “it is highly unlikely that a legislature intended to affect the way a court applies comparative responsibility. Thus, the factfinder should consider circumstances that would be relevant to a finding of negligence in the absence of statute, even though those circumstances would not be relevant to whether violation of the statute constitutes negligence per se.”).
an avenue for the court to end-run the jury. Moreover, the tripwire mechanism of the serious misconduct bar, with its spotlight on the perceived criminality and immorality of the plaintiff's conduct, employs a narrower focus than that contemplated by comparative fault.

In the context of legal malpractice claims against criminal defense attorneys, the role of two of the traditional tort elements deserves some emphasis. The core elements requiring proof of a violation of the standard of care and causation clearly apply. Thus, an accused suing his attorney for malpractice must prove "that the lawyer failed to act properly and that, but for that failure, the result would have been different, for example because a double jeopardy defense would have prevented conviction." In particular, the causation requirement constitutes a very substantial hurdle to be overcome in such claims. In short, the innocence requirement is judicial "overkill" as a way of addressing the concern over frivolous lawsuits by criminally accused persons.

James Reason maintains that "[c]hange in one guise or another is a regular feature of error-producing situations." The serious misconduct bar stands as an example of erroneous reasoning based on a failure to appreciate the realities of change. Not only do patterns of criminal behavior broadly fluctuate, but so do society's sentiments of the nature of wrongfulness. The serious misconduct bar is a facile nostrum that does not thoughtfully deal with the matter of crime in this society. Francis Fukuyama, in his most

257. Professor MacDougall admonishes that the serious misconduct bar may operate as a "convenient way to achieve a result that the more structured and more stringent requirements" of the defenses of contributory and now usually comparative fault may not allow. MacDougall, supra note 5, at 38.
258. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 & cmt. c (2000) (noting that the plaintiff's awareness of the risks of his conduct is relevant to the comparative fault analysis, and that "[i]t is not possible to articulate an algorithm by which a factfinder can determine percentages of responsibility").
260. See supra note 87 and accompanying text.
261. DOBBS, supra note 15, at 1391 (referring to the heavy demands the causation requirement creates on the plaintiff in malpractice claims); Kessler, supra note 87, at 406-07 (stating that the causation element "poses the greatest barrier for those who have received inadequate professional services"). See generally RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 53 (2001) (discussing the causation requirement in legal malpractice cases).
262. Koniak, supra note 89, at 12.
263. REASON, supra note 236, at 60.
recent book, discusses the various manifestations of deteriorating social conditions, one of which he identifies as the increase in crime. Fukuyama posits that changes in societal levels of crime (or serious misconduct) derive from a complex dynamic and are cyclical, or at least not permanent. He says that the "social order, once disrupted, tends to get remade," and that "in the social and moral sphere ... history appears to be cyclical, with social order ebbing and flowing over the space of multiple generations."

Fukuyama notes that "the essence of the shift in values that is at the center of the Great Disruption is, then, the rise of moral individualism and consequent miniaturization of community." Given the sense of a loss of social control that comes with the manifestations of increased individualism and miniaturization of community, there is a temptation to "do something," or "to send a message." The serious misconduct bar is an example of this kind of reflexive response to the perception of a loss of control.

Garrett Hardin, in his now famous essay, has described the relativity of morals, explaining that "morality of an act is a function of the state of the system at the time it is performed." He elaborates, saying: "The morality of an act [sic] cannot be determined from a photograph. One does not know whether a man killing an elephant or setting fire to the grassland is harming others until one knows the total system in which his act appears."

The complex etiology and cyclicity of waves of crime suggest the futility of isolated responses such as the ad hoc and selective applications of the serious misconduct bar. Moreover, such expedients mask the underlying dynamics of the phenomenon of crime.

265. Id. at 4-5.
266. Fukuyama identifies a number of contributing factors. He says increases in crime may be the product of the stresses from transition from an industrial to an information era. Id. at 5. He also notes that intensive individualism and innovation have "spilled over into the realm of social norms, where it corroded virtually all forms of authority and weakened the bonds holding families, neighborhoods, and nations together." Id. at 5-6.
267. See id. at 6.
268. Id.
269. Id. at 282.
270. Id. at 91.
272. Id. at 1245.
C. Structurally: Absence of Standards

The serious misconduct bar is also objectionable on structural grounds. The doctrine lacks clear standards, a common feature of doctrines that have never been convincingly justified by sensible comprehensible rationales nor thoughtfully integrated into a workable analytical framework.

Ronald Dworkin has articulated a distinction between principles and rules, which he says differ operationally "in the character of the direction they give." He would classify the notion that "no man may profit by his own wrong" as a principle rather than a rule. Whereas "[r]ules are applicable in an all-or-nothing fashion," a principle "does not even purport to set out conditions that make its application necessary. ... [Rather, it] states a reason that argues in one direction, but does not necessitate a particular decision.

And therein lies part of the problem. The serious misconduct doctrine is not a workable rule at all, but more of a repackaged reflection of the shall-not-profit principle that supposedly animates it. The dissent in the seminal Barker case complained that "[i]n the past when we have foreclosed relief on public policy grounds, we have done so under circumstances in which objectively determinable facts made application of the rule certain and consistent." But not here.

Virtually no courts have suggested that the serious misconduct bar should automatically preclude recovery by every victim whose injury arises out of criminal conduct. We are left then with deciding what conduct will be deemed "serious" enough to rub a judge the wrong way to cause him to dust off and apply the serious

273. MacDougall, supra note 5, at 21 (commenting that there is "no acceptable or workable method for deciding" when the doctrine should apply); Prentice, supra note 5, at 101-03 (criticizing the doctrine because the legislative intent to bar a civil remedy is not known, and the cases are decided on "ad hoc, subjective basis").


275. Id.

276. Id. at 23.

277. Id. at 25.

278. Id. at 26.

misconduct bar.\textsuperscript{280} How confident are we of the predictability and fairness of the standards for a rule that deems it serious misconduct for a twelve-year-old rape victim to undergo an abortion that was illegal because of the number of weeks of gestation?\textsuperscript{281} Or, consider the trilogy of the three pipe-bomb cases. A New York case held that the conduct of a fifteen-year-old injured while allegedly constructing a three to four inch pipe bomb in his backyard a few days before the Fourth of July constituted serious misconduct.\textsuperscript{282} But, an Oregon court refused to approve the doctrine in a case where a fifteen-year-old plaintiff was injured by the premature explosion of a pipe bomb he was allegedly making.\textsuperscript{283} And in another case, one from Massachusetts involving a fourteen-year-old alleged firecracker-pipe-bomb builder, the court refused to say whether it would even approve the bar in principle.\textsuperscript{284} It held that the bar would not apply here because its application would "offend a countervailing public policy to the extent it could also protect from possible liability those persons from whom the firecrackers were obtained."\textsuperscript{285} What do we have with children who experiment with fireworks—future Timothy McVeighs or the "Rocket Boys\textsuperscript{286} of October Sky\textsuperscript{287} fame?

\textsuperscript{280} The Barker majority downplays the difficulties in drawing lines, saying simply that cases will essentially have to be dealt with one at a time as they present themselves. \textit{Id.} at 44 (citing Corbett v. Scott, 152 N.E. 467, 469 (N.Y. 1926)).

\textsuperscript{281} Symone T. v. Lieber, 613 N.Y.S.2d 404 (App. Div. 1994). Symone T. may be contrasted with the outcome in another New York case several years later involving an allegedly negligently performed vasectomy. Hernandez v. Yoon, 661 N.Y.S.2d 753 (Sup. Ct. 1997). The plaintiff-patient, who was married when he underwent a vasectomy, alleged that notwithstanding the vasectomy, he impregnated his girlfriend. \textit{Id.} at 754. The plaintiff sought damages for psychological injury claiming that not only did he impregnate his girlfriend, but that she subsequently had to undergo an abortion. \textit{Id.} The court recognized the applicability of the serious misconduct bar in principle, but refused to apply it on the merits in the instant case because it believed that adultery did not rise to the level of a "serious crime." \textit{Id.}

\textsuperscript{282} Barker, 468 N.E.2d at 39.

\textsuperscript{283} Ashmore v. Cleanweld Prods., Inc., 672 P.2d 1230, 1231 (Or. Ct. App. 1983).


\textsuperscript{285} \textit{Id.}

\textsuperscript{286} HOMER H. HICKAM, JR., ROCKET BOYS: A MEMOIR (1998).

\textsuperscript{287} OCTOBER SKY (Universal 1999). The acclaimed film was based on the book by Homer Hickam. HICKAM, supra note 286. For those who did not read the book or see the film, they were based on the experiences of a former NASA engineer while a Coalwood, West Virginia high school senior who, with some pals, were prompted in 1957 by Sputnik to make and launch their own small rockets. The Coalwood Way, PUBLISHERS WEEKLY, Sept. 18, 2000, at
Doctrines like the serious misconduct bar are dangerous because they offer deceptive comfort to judges that they are reaching the "right" decision. As the late Charles Black observed (while addressing the arbitrariness of death penalty decisions):  

"Mistake" and "arbitrariness" ... are reciprocally related. As a purported "test" becomes less and less intelligible, and hence more and more a cloak for arbitrariness, "mistake" becomes less and less possible—not, let it be strongly emphasized, because of any certainty of one's being right, but for the exactly contrary reason that there is no "right" or "wrong" discernible.\(^{288}\)  

Without lucid and predictable guidance on what constitutes "serious misconduct," the doctrine creates a sort of roving commission for judges to use to keep the heat on perceived criminals, and to keep the heat off of themselves for creating the appearance of coddling miscreants.

D. Operationally: Ad Hoc and Selective

In addition to the costs inherent in any doctrine lacking meaningful standards,\(^{289}\) the doctrine is subject to selective\(^{290}\) and arbitrary application, further undermining its standing, and the integrity of the torts system. It may also invite judges to vent their moral sensibilities or react to anticipated public indignation based

---

It is not unusual for the Hickam book to be assigned reading in secondary schools. For example, the science of rocketry was the focus of a recent summer institute for a group of ninth graders planning to enter Mount Pleasant High School teacher academy magnet program in Rhode Island. Reginal Duell, A Better Trajectory—Rocket Program Eases Students' Way into High School, PROVIDENCE J., July 17, 2000. The Hickam book was required reading. The goals of the program were to develop students' skill in science, math, critical thinking and literacy, and to reduce the high school dropout rate. Id.


290. Barker v. Kallash, 468 N.E.2d 39, 47 (N.Y. 1984) (Simons, J., dissenting) (stating that "[a] plaintiff's right to maintain an action ... should not rest on a Judge's subjective view of whether the conduct is serious or egregious: Judges will differ in making such an evaluation").
on the moral flavor of the month. Professor MacDougall opines that
the prerequisites for the doctrine are so malleable they are merely
convenient tools applied "to fact situations that the courts find
morally troubling. The result is that on similar fact patterns,
involving different personalities, courts have differed on the
applicability of the doctrine." The moral overlay of the doctrine
makes its indefiniteness and selectivity especially dangerous.
MacDougall warns that "application of public policy by the judges
to deny recovery ... is simply ... [a] moralistic decision ... to treat
certain individuals as not fit for the court to entertain." Professor
Oscar Gray refers to the doctrine as a "barbarous relic of the worst
there was in puritanism."

Some commentators have focused on the danger of selective
application of the serious misconduct bar in particular contexts. The
application of the doctrine is especially worrisome in the abortion
setting. These cases typically have involved malpractice claims by
a patient undergoing what was, at least at the time, an illegal
abortion. Consider the Symone T. case. The patient was a twelve-
year-old victim of rape who apparently underwent an abortion too
late in her pregnancy for it to be legal. During the medical
procedure, she suffered an amniotic fluid embolism resulting in
neurological injury. The court held that if it were determined that
the child had undergone the abortion willingly, she would be barred
from suing the abortionist for malpractice because, as we all know,
"one may not profit from one's own wrongdoing." This is not new.
An early law review article supporting such application of the bar
in illegal abortion cases, expressed a concern that otherwise "right
of action would be used as a means of blackmail by the more

291. MacDougall, supra note 5, at 37; see also id. at 33-34 (noting that the courts'
"emphasis on public policy is a convenient way for a court to avoid the substance of the rule
and ... [to avoid enunciating] some clear and justifiable basis for the existence and
application of the doctrine").
292. Id. at 33.
293. 3 HARPER ET AL., supra note 30, § 17.6, at 617-18.
294. Hollister, supra note 147, at 389, 390 & n.20, 447.
296. Id.
297. Id. at 405.
discreditable class of patient upon whom such operations are most frequent."298

Where is the "profit" here? Is it really necessary to deter preteen Symone? Are not the prospects of this kind of medical intervention for this child terrifying enough, especially with the added threat of criminal sanctions? And what of the need to deter potentially negligent abortionists? Application of the bar in these cases reflects, according to Gail Hollister, "the judicial system's bias against women, especially those whose claims arise in a uniquely female context."299

There also is a danger of other psychological dynamics at play in the serious misconduct cases. Do judges fear contamination from a stigma300 from the wrongdoers? Alex Geisinger describes "courtesy stigma"301 as the perception that "[i]ndividuals normally considered without stigma can, by association with the degraded, acquire some of the socially degrading characteristics of a marked person."302 He adds that "the relationship need not be of an enduring nature for courtesy stigma to occur."303

Some writers have suggested that the mental process of categorization, viewed broadly, may not represent so much a pernicious human character flaw, but rather a basic human mental coping mechanism. According to modern social psychological theory:

298. Bohlen, supra note 31, at 832-33 (articulating the serious misconduct doctrine in terms of a consent defense to bar a victim of negligent abortion); cf. Peter Westen, The Meaning of Equality in Law, Science, Math, and Morals: A Reply, 81 MICH. L. REV. 604, 622 n.32 (1983) (stating that in 1779, Thomas Jefferson tried unsuccessfully to have the Virginia legislature revive the institution of outlawry that would have declared that any white woman who failed to leave the state within the year of having a child by an African-American to be outside the protection of the law). For a useful insight by a nonlawyer into the judicial ambivalence over whether women undergoing illegal abortions were accomplices or victims in criminal and civil abortion cases, see generally Reagan, supra note 53.

299. Hollister, supra note 147, at 452.

300. Alex Geisinger has defined stigma as "a label marking someone (or something) as deviant." Alex Geisinger, Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Logical Implications, 76 NEB. L. REV. 452, 476 (1997). He says that "stigma is the result of a cognitive 'marking' process, completely independent of the potential for future actual harm." Id. at 454.

301. Id. at 477.

302. Id.

303. Id. at 478.
Every person, and perhaps even every object that we encounter in the world, is unique, but to treat each as such would be disastrous. To function at all, we must design strategies for simplifying the perceptual environment and acting on less-than-perfect information. A major way we accomplish both goals is by creating categories.\textsuperscript{304}

The problem with categorization lies in our failure to appreciate its cognitive dynamic, and its simplistic superficiality and incompleteness. Linda Krieger observes that "[c]ognitive psychologists have told us more about the shortcomings of human social inference cognition than about how the various biases they identify can be reduced or controlled."\textsuperscript{305} In some respects, the serious misconduct bar\textsuperscript{306} may be driven by a tendency toward stereotypical categorization—of pregnant women, of persons accused of crimes, of impetuous youths experimenting with fireworks, cars, or elevators. Once we appreciate the human tendency to view the external world categorically, the importance of resisting facile categorically inspired rules becomes evident.

Neal Feigenson has pointed out that "sympathy is more readily aroused the greater the similarity between observer and sufferer."\textsuperscript{307} Feigenson warns that "[t]hese effects may lead to less just decisions."\textsuperscript{308} Not only might the judge perceive the dissonance in his background and that of the serious wrongdoer, but he may sometimes sense a similarity with the defendant. In the context of malpractice claims against their criminal defense attorneys, one article observed that "[n]o judge who, in his day, defended clients accused of crime, can help identifying with the lawyer in the dock

\textsuperscript{305} Id. at 1245.
\textsuperscript{306} See generally Jeffrey J. Rachlinski, \textit{Heuristics and Biases in the Courts: Ignorance or Adaption?}, 79 OR. L. REV. 61, 81-83 (2000) (discussing the cognitive phenomenon known as "representativeness heuristic," which refers to "the reliance on the degree of apparent similarity between the features of the events to the features of the category in judging whether an event is a member of a particular category," and noting that it can potentially influence the way judgments are made in the courts).
\textsuperscript{307} Neal R. Feigenson, \textit{Sympathy and Legal Judgment: A Psychological Analysis}, 65 TENN. L. REV. 1, 53 (1997). Feigenson describes sympathy as involving "the ability to imagine oneself in the sufferer's predicament and, in some sense, to feel the other's pain." \textit{Id.} at 7.
\textsuperscript{308} \textit{Id.} at 54.
whose professional decisions a lay jury is being asked to question.” Feigenson concludes that “no acceptable legal or moral theory makes the similarity of the decision-maker to the litigant or the likability of the litigant relevant to the substantive justice of the outcome.”

CONCLUSION

The serious misconduct bar has proven a slippery and vexing doctrine. Although for years the doctrine seemed submerged in the broader contributory negligence rule, more recently it has surfaced as a freestanding construct. Neither the courts nor commentators have identified a thoughtful rationale for the doctrine. I have attempted to show that the putative justifications commonly associated with the doctrine are neither sound nor convincing. More centrally, I think the serious misconduct bar is objectionable on more fundamental grounds. First, the doctrine frustrates the policy goals of tort law. Second, it is instrumentally flawed because it moves decision makers out of the established elemental tort law framework into an ad hoc and potentially selective process. Third, the serious misconduct bar suffers structurally from the absence of lucid, predictable, or workable standards guiding its application. And, finally, the doctrine is operationally dangerous because it requires the court to evaluate the plaintiff’s conduct through a moral prism trained on an ever changing social landscape and climate, and therefore can be applied selectively and arbitrarily.

In their consummate work on decision making, Irving Janis and Leon Mann have observed that “[u]ntil a person is challenged by some disturbing information or event that calls his attention to a real loss soon to be expected, he will retain an attitude of complacency about whatever course of action (or inaction) he has

310. Feigenson, supra note 307, at 54.
been pursuing."  

311. I hope this Article will serve to focus the courts' attention on the need to repudiate the serious misconduct bar.