COMPARATIVE FAULT AND FRAUD

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INTRODUCTION

The comparative fault "revolution"[1] is among this generation's most important tort law developments. Today, forty-six states apply some form of the rule, each seeking to better align liability with culpability.[2] Despite this guiding premise, states have struggled to define comparative fault's boundaries within the context of doctrine that developed in an earlier era.[3] Courts have addressed many issues as part of this effort. One question that has escaped significant attention, however, is whether comparative fault should apply in a fraud action.

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1. *See* James A. Henderson Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 398 n.134 (2002).

2. Only four states (Alabama, Maryland, North Carolina, and Virginia) and the District of Columbia still retain contributory negligence. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporter's note (2000).

3. *See* Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002) (discussing how courts have struggled with a number of rules that evolved in the pre-comparative fault era, including the rule of last clear chance, the doctrine of joint and several liability, and the issue of pro rata contribution); David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 414–16 (1985) (noting that comparative fault has "swept the common law world," but recognizing that "a workable system of comparative fault requires resolution of a host a [sic] troubling issues, ignored by most of the states in the general rush to adopt comparative fault").

Fraud is essentially an intentional tort, requiring proof of "scienter."[4] So, in one sense, a discussion about whether comparative fault should apply in fraud might be subsumed in a broader discussion about whether comparative fault should apply in any intentional tort action.[5] But in another sense fraud is different. Unlike other intentional torts, fraud requires proof of a plaintiff's *lack* of fault—not just reliance on a defendant's representation, but *justifiable* (or reasonable) reliance as well.[6] If one takes this element seriously,[7] a plaintiff who is not careful in her reliance on the defendant's representations will have no opportunity to ask a jury to compare her conduct with that of the defendant.

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4. *See* RESTATEMENT (SECOND) OF TORTS § 526 (1977) (scienter exists if the person who makes the misrepresentation "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies").

5. *See infra* note 32 and accompanying text.

6. Some debate exists concerning whether this element of fraud should be described as "justifiable" or "reasonable" reliance. The current Restatement uses "justifiable", and this Article also will—for the most part—use that term. RESTATEMENT (SECOND) OF TORTS §§ 525, 537 (1977). A comment to the Restatement explains that "[a]lthough the plaintiff's reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." RESTATEMENT (SECOND) OF TORTS § 545A cmt. b (1977). That said, some courts use the terms interchangeably, suggesting that, in practice, courts attach no distinction to the terms in the context of fraud litigation. *See, e.g.*, Crigger v. Fahnestock & Co., No. 01 Civ. 07819JFK, 2003 WL 22170607, at *7 (S.D.N.Y. Sept. 18, 2003) (suggesting that courts use terms interchangeably in fraud actions); Nowaczyk v. Matingas, 146 F.R.D. 169, 174 (N.D. Ill. 1993) (using the terms interchangeably); Or. Pub. Employees' Ret. Bd. *ex rel.* Or. Pub. Employees' Ret. Fund v. Simat, Helliesen & Eichner, 83 P.3d 350, 428–29 (Or. App. 2004) (using the terms interchangeably). *But see* Field v. Mans, 516 U.S. 59, 73 (1995) (suggesting that justifiable reliance is an intermediate standard between reasonable and mere reliance); Gordon & Co. v. Ross, 84 F.3d 542, 546 (2d Cir. 1996) ("The proper test of reliance in a fraud case is not 'reasonable' reliance, it is 'justifiable' reliance, a clearly less burdensome test."); Kanellis v. Pac. Indem. Co., 917 So. 2d 149, 153–54 (Ala. Civ. App. 2005) (preferring a reasonable reliance standard to a justifiable reliance standard because the latter allows for more flexible consideration of factors like "mental capacity, educational background, relative sophistication, and bargaining power of the parties"). *See also infra notes* 59–60 and accompanying text (discussing plaintiff incapacity). For purposes of this paper, the distinction is largely unimportant. Either standard suggests a level of culpability that, conceptually, could be compared to a defendant's scienter in making an affirmative misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS § 545A cmt. b (1977) (The Restatement distinguishes an individual's justifiable reliance from reasonable reliance: "When he proceeds in the face of this knowledge, his conduct is more analogous to assumption of the risk than to contributory negligence."). Today, of course, most jurisdictions have subsumed implied assumption of risk into comparative fault schemes. This blurs the distinction made in the preceding comment, thus strengthening the position that one can interpret "reasonable" or "justifiable" reliance in a similar fashion.

7. Some prominent scholars do not view justifiable reliance as a truly independent element of fraud. *See infra* notes 22–23 and accompanying text.

This Article asserts that comparative fault jurisdictions should not bar plaintiffs from recovering in fraud when they fail to establish justifiable reliance on a misrepresentation.[8] Rather, courts should apply comparative fault principles and evaluate all parties' conduct in assessing damages. The Article begins by providing a brief overview of fraud, including the traditional element of justifiable reliance.[9] It then considers the forces arrayed against the extension of comparative fault to fraud. These include the argument that justifiable reliance is merely a proxy for other elements of fraud, as well as courts' historical hesitation to apply comparative fault in any intentional tort claim or actions for purely economic harm.[10] From there, the Article questions the status quo. It suggests that, in fact, some courts do take justifiable reliance seriously. It also notes that historical barriers to comparative fault's application in the area might be eroding.[11] The Article then asserts that the application of comparative fault in fraud actions makes sense. It notes that policies relied upon by scholars who would limit the extension of comparative fault do not inherently apply in the area of fraud.[12] More positively, the Article suggests that extending comparative fault to fraud would serve policies that led courts and legislatures to adopt comparative fault in the first place, as well as policies that underlie tort law generally.[13] In sum, the refusal of courts to apply comparative fault to fraud is a vestige of an earlier day in which "all-or-nothing" rules dominated tort law. The policies that led to the development of comparative fault in almost every other area of tort law also deserve consideration in fraud.

I. FRAUD BACKGROUND

Fraud is an ancient cause of action with a history dating back to the early 1200s and roots in the writ of deceit.[14] The action has taken many different forms over the years, making it difficult to precisely describe. In general, it includes

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8. This thesis assumes that justifiable, or reasonable, reliance will remain an element of the claim.

9. *See infra* Part I.

10. *See infra* Part II.B; notes 32–34 and accompanying text.

11. *See infra* notes 24–30 and accompanying text; Part II.C.

12. *See infra* Part III.A.

13. *See infra* Part III.B.

14. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 726–27 (5th ed. 1984). Prosser notes that the writ of deceit was originally narrow, permitting only an action against a defendant who manipulated legal procedure to defraud another. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 685 (4th ed. 1971). Later, the writ was essentially superseded by an action on the case in the nature of deceit, which permitted a cause of action for any misrepresentation that resulted in actual damage. *Id.*; JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 1014 (9th ed. 1994). Such actions, however, were limited to situations in which parties were in a contractual relationship. PROSSER, *supra*. Indeed, it was not until the late 18th century that a distinct action in tort developed. *Id.* In this regard, scholars point to *Pasley v. Freeman*, (1789) 100 ENG. REP. 450 as the pivotal case. *See id.* In *Pasley*, the action of deceit was extended to a case where a plaintiff was permitted recovery after being induced by a defendant's misrepresentations, even though the parties had no direct dealings with one another. *Id.* After *Pasley*, courts began to recognize deceit as a tort law cause of action, and the modern tort of fraudulent misrepresentation began to emerge. *Id.*; 9 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS 211 n.5 (1992).

"anything calculated to deceive, including all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another or by which an undue and unconscionable advantage is taken of another."[15]

Today, section 525 of the Restatement (Second) of Torts defines fraud as making "a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."[16] The definition can be divided into five elements: (1) a false representation; (2) knowledge that the representation is false (scienter); (3) intent to induce the plaintiff to act or refrain from acting in reliance on the representation; (4) plaintiff's justifiable reliance on the representation; and (5) resulting damage to the plaintiff.[17]

A plaintiff's reliance on a misrepresentation, therefore, is at the core of the claim. But as the elements state, and as Professor Dobbs emphasizes, "bare reliance is not enough. The plaintiff must go on to show that she justifiably relied."[18] Given the long history of fraud, this is not surprising. Until very recently, a plaintiff's lack of care would bar recovery in many tort cases as a matter of contributory negligence. Thus, inclusion of a plaintiff's justifiable reliance as an element of fraud might be unusual as a matter of burden of proof, but not as a matter of basic doctrine.[19]

In an era of comparative fault, however, it is worth asking why a lack of justifiable reliance should completely bar a claim. After all, in most other cases, one of comparative fault's primary purposes is to mitigate the harshness of all-or-nothing-rules.[20] But the question of whether this should hold true for economic torts such as fraud is without a clear answer. Indeed, the issue is one that the

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15. SPEISER ET AL., THE AMERICAN LAW OF TORTS, *supra* note 14, at 211.

16. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

17. PROSSER, *supra* note 14, at 685–86. *See also* Tenneco Oil Co. v. Joiner, 696 F.2d 768, 773 (10th Cir. 1982); Baughman v. State Farm Mut. Auto. Ins. Co., No. 22204, 2005 WL 3556406, at *3 (Ohio Ct. App. Dec. 30, 2005); Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 524 (Tex. 1998).

18. DAN B. DOBBS, THE LAW OF TORTS 1359 (2000); *see also supra* note 6 (discussing reasonable as opposed to justifiable reliance).

19. That said, plaintiff fault has not historically been a defense to intentional tort claims. *See, e.g.*, DOBBS, *supra* note 18, at 517–18.

20. KEETON ET AL., *supra* note 14, at 468–69; *see also* DOBBS, *supra* note 18, at 504. In a recent article, Christopher M. Brown and Kirk A. Morgan make this very point:

> Jurisdictions adopted comparative fault principles to alleviate the harshness of the contributory negligence doctrine. Courts and legislatures decided that the doctrine was unfair to the plaintiff because the plaintiff had to bear the burden of the entire loss if he was only slightly negligent. Jurisdictions also concluded it was unjust to allow a defendant to escape liability when he contributed to the loss and was in a better position to bear the loss.

Christopher M. Brown & Kirk A. Morgan, Comment, *Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect Against Intentional Conduct*, 2 WYO. L. REV. 483, 510 (2002).

Reporters for the Restatement (Third) of Torts: Apportionment of Liability specifically deferred for the project on which the Institute now embarks. While discussing their work in a symposium, one of the Reporters said,

> [W]e were quite reluctant to think that there might not be some special considerations such that there would have to be exceptions to the rules we came up with. For example, what about justifiable reliance in a fraud case? There traditionally has been an absolute bar to the plaintiff's recovery. Is that affected by comparative fault? Should it now just be a percentage reduction or limit part of the prima facie case? There are cases out there that seem to address that issue so we left the economic torts . . . cases alone.[21]

II. FORCES OPPOSED TO COMPARATIVE FAULT IN FRAUD

A. Justifiable Reliance as Proxy for Other Fraud Elements

A starting point for this discussion is the extent to which justifiable reliance actually drives decisions in fraud litigation. According to some scholars, courts do not actually view justifiable reliance as an independent element. Indeed, some scholars assert that justifiable reliance overlaps with other elements of the claim to the point of simply being an "indirect way" of assessing those other issues.[22] Professor Dan B. Dobbs, for example, states that justifiable reliance "seems less like a separate issue and more like evidence about the plaintiff's actual reliance or the defendant's culpability. . . . Courts could, in other words, abolish the separate requirement of justified reliance without changing the outcomes of

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21. Michael Green & William Charles Powers, Jr., *Apportionment of Liability*, 10 KAN. J. L. & PUB. POL'Y 30, 32 (2000); *see also* Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 428 (2003) [hereinafter Bublick, *End Game of Tort Reform*] ("[T]he Restatement drafters wisely noted that individual policy considerations might shape the advisability of comparisons in the case of economic harms.").

22. DOBBS, *supra* note 18, at 1360; David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 72 (2000). The authors of the Prosser and Keeton text note that this overlap causes substantial confusion:

> There has been a vast amount of misunderstanding regarding the basis for the requirement of justifiability of reliance, especially when plaintiff is required to prove or at least does prove an intent to deceive and therefore intentional misconduct on the part of the misrepresenter . . . . [The basis for the justifiable reliance requirement] would seem to be that of providing some objective corroboration to plaintiff's claim that he did rely. If the plaintiff can claim reliance on the basis of the kind of statement on which no reasonable person would rely . . . then it is quite likely that plaintiff did not rely . . . [and] then it will be too easy for a party to a contract to escape the consequences of his own bad judgment . . . .

KEETON ET AL., *supra* note 14, at 749–50.

cases, only the mode of analysis."[23] This is undoubtedly true in many cases. But one imagines that somewhere in fraud cases, fact finders at least implicitly consider a plaintiff's lack of care. Indeed, most courts still pay homage to the formal requirement, and some do appear to take it seriously.

In *Schlaifer Nance & Co. v. Estate of Warhol*,[24] for example, the plaintiff negotiated a licensing agreement with the estate of artist Andy Warhol. Relying on the executor's representations that the estate controlled all rights to Warhol's work, the plaintiff and the estate subsequently entered into an "exclusive" licensing program. Many of Warhol's works, however, were in the public domain, and the artist himself had entered into agreements giving others rights to some of his work. The plaintiff filed suit, alleging that the estate had fraudulently represented the extent of its control over Warhol's work, and asserting that it had reasonably relied on those representations in entering into the licensing agreement.[25] A jury returned a verdict for the plaintiff. The court, however, invalidated the verdict by granting the estate's post-trial motion for judgment as a matter of law.[26]

In so doing, the court analyzed several allegations of misrepresentation in the context of the elements of fraud under New York law. It placed particular emphasis on the element of "reasonable or justifiable" reliance.[27] The court noted that, although the defendant did misrepresent certain facts, the licensing company "entered into the licensing agreement without conducting any due diligence and without making any reasonable effort to determine the truth or falsity of [some of] the purported representations."[28] At least with respect to some aspects of the claim, therefore, the plaintiff failed specifically because of a lack of justifiable reliance on the estate's misrepresentations.

For another recent example of a court taking justifiable reliance seriously, consider the Georgia Court of Appeals' decision in *Arp v. United Community Bank*.[29] In *Arp*, the plaintiff sued a bank, asserting that the bank had fraudulently informed him that it had obtained an insurance policy on his wife's life. The trial

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23. DOBBS, *supra* note 18, at 1360–61; *see also* Owen, *supra* note 22, at 72 ("[J]ustifiability of a plaintiff's reliance overlaps several other elements of fraud (fact, materiality, plaintiff's ignorance of falsity, and reliance).").

24. 927 F. Supp. 650 (S.D.N.Y. 1996).

25. *Id.* at 651–55.

26. *Id.* at 652.

27. The court described the element of reliance at some length:

> Of particular concern in this case is the fourth element: reasonable reliance. To prevail on a claim of fraud, a plaintiff must show that it actually relied on the purported fraudulent statements or omissions and that its reliance was reasonable or justifiable. A party's reliance on false statements or omissions is *not* reasonable or justifiable if the party has reason to believe that the representations may be false but fails to inquire into their accuracy. . . .

Id. at 660 (citing Keywell Corp. v. Weinstein, 33 F.3d 159, 164 (2d Cir. 1994); *see also* Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984); Mallis v. Bankers Trust Co., 615 F.2d 68, 80–81 (2d Cir. 1980)).

28. *Id.* at 652; *see also id.* at 662–63.

29. 612 S.E.2d 534 (Ga. Ct. App. 2005).

court granted summary judgment to the bank, in part because the plaintiff did not review documents that would have demonstrated the insurance did not exist. The Court of Appeals affirmed:

> [J]ustifiable reliance by [the plaintiff] on the alleged statements by [bank employees] is an essential element of his fraud claim. As he admits that he could have read the insurance documents if he had wanted to do so and that he did not, he cannot establish that he justifiably relied upon the statements by the Bank's employees.[30]

It is possible that the court might have come to the same conclusion even if justifiable reliance had not been an element of the plaintiff's claim. Perhaps the court would have found that the bank simply was not culpable. Or perhaps it would have decided that the plaintiff did not actually rely on the statements. But the court's revealed basis for its decision was clear: The plaintiff's lack of justifiable reliance completely bars his claim.[31]

B. Hesitance to Use Comparative Fault in Intentional Tort and Economic Loss Cases

This Article, therefore, will proceed on the assumption that justifiable reliance will remain a consideration in fraud. From this perspective, we return to the question of why so few jurisdictions permit a jury to compare a plaintiff's lack of justifiable reliance with the defendant's tortious conduct.

Perhaps the most important reason is that courts have traditionally hesitated to apply comparative fault principles in *any* intentional tort case. As Professor William J. McNichols wrote more than twenty years ago,

> A primary reason for this lack of enthusiasm seems to be the general assumption that comparative negligence evolved to provide compensation to accident victims who were barred by the harsh doctrine of contributory negligence and should not be used to diminish recovery where common law had previously treated a victim's contributory fault as irrelevant to liability.[32]

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30. *Id.* at 537–38.

31. *Id.* Other recent examples abound. *E.g.*, D.O.P. Invs., Inc. v. Oakland Hills Joint Venture, 909 So. 2d 355, 356 (Fla. Dist. Ct. App. 2005) (plaintiff could not demonstrate justifiable reliance when he became aware of a sewage problem prior to closing of a property purchase and still closed after seller assured him that the problem would be fixed); Dyer v. Honea, 557 S.E.2d 20, 26 (Ga. Ct. App. 2001) (plaintiff did not justifiably rely on representation regarding security interests on property in purchase agreement because of a failure to conduct a public records search); *see also* Kennedy v. Josephthal & Co., 814 F.2d 798, 805 (1st Cir. 1987); Hillcrest Pac. Corp. v. Yamamura, 727 So. 2d 1053, 1057 (Fla. Dist. Ct. App. 1999); Reeves v. Edge, 484 S.E.2d 498, 501–02 (Ga. Ct. App. 1997); Sharma v. Sahota, No. 2000-G-2290, 2001 WL 1480731, at *4 (Ohio Ct. App. Nov. 21, 2001); Amerifirst Sav. Bank of Xenia v. Krug, 737 N.E.2d 68, 88 (Ohio Ct. App. 1999); Drelles v. Mfrs. Life Ins. Co., 881 A.2d 822, 836 (Pa. Super. Ct. 2005).

32. William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641, 647 (1984); *see also* Bublick, *End Game of Tort Reform*, *supra* note 21, at 373 (arguing that the refusal to apply comparative fault to intentional torts is normally based on three rationales: "the requirements of state statutes,

Beyond the general reluctance to apply comparative fault to intentional tort actions, courts have been hesitant to apply comparative fault to economic loss actions.[33] This is sometimes true even in cases when the plaintiff is alleged to have behaved negligently, rather than with intent or scienter.[34] Thus, when one combines the long-held bias against using comparative fault in intentional tort cases with the hesitancy to use the doctrine in economic loss cases, those who might argue for its use in fraud appear to face a "double-whammy" in opposition.

C. Signs of Acceptance

Times, however, may have begun to change.[35] As Professor Ellen Bublick has pointed out, courts recently have split on the issue of whether to compare intentional and non-intentional fault in some tort actions. Indeed, Professor Bublick's work shows that within the last ten years, approximately fourteen states have decided that a tortfeasor's negligent conduct can be compared to another tortfeasor's intentional conduct.[36] Professor Bublick found eight states during this time period that continued to bar these comparisons, though she notes that "[m]any other states may have chosen not to reconsider the issue because of a desire to maintain their existing bans on such comparisons."[37]

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the importance of the negligent defendant's duty, and the belief that intentional and negligent conduct are 'different in kind'"); Allan L. Schwartz, Annotation, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R.5TH 525, at § 2[a] (1994) ("The rationale . . . rests on the general assumption that comparative negligence evolved to provide compensation to tort victims, who were barred by the harsh doctrine of contributory fault, and should not be used to diminish recovery where the common law had previously treated an intentional tort victim's contributory fault as irrelevant . . . ."). *See generally* Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984).

33. *See* Mark A. Olthoff, *If You Don't Know Where You're Going, You'll End Up Somewhere Else: Applicability of Comparative Fault Principles In Purely Economic Loss Cases*, 49 DRAKE L. REV. 589, 590, 607–08 (2001) ("Although comparative fault principles applied in court decisions reflect a fairly developed body of law in areas of personal injury, wrongful death, and property damage cases, the same cannot be said for cases in which the damages are limited to economic losses.").

34. *Id.* at 608 ("Questions arise whether [a plaintiff] can, or should, be held to a standard of reasonable conduct in attorney, accountant, or other professional liability cases. Also, should the recipient of an alleged negligent misrepresentation be responsible when its fault has caused at least some of the damage?"). Nonetheless, "[m]ost courts that have considered the question have held that principles of comparative responsibility apply to negligence claims for economic loss." Mark P. Gergen, Prospectus for the Restatement Third of Economic Torts 17 (undated) (on file with author).

35. *See* Gergen, *supra* note 34 ("It generally is assumed that principles of comparative responsibility do not apply to intentional torts . . . . This position is likely to erode.").

36. Bublick, *End Game of Tort Reform*, *supra* note 21, at 371 n.55 (listing Arizona, California, Colorado, Hawaii, Idaho, Indiana, Kentucky, Louisiana, New Jersey, New Mexico, New York, North Dakota, Utah, and Wyoming); *see also* Brown & Morgan, *supra* note 20, at 503–05 & n.100.

37. Bublick, *End Game of Tort Reform*, *supra* note 21, at 371 n.56 (listing Connecticut, Florida, Kansas, Massachusetts, Mississippi, Nebraska, Tennessee, and

Other states broadly recognize the ability of plaintiffs to use comparative fault in economic loss cases. Kansas's comparative fault statute, for example, specifically applies to such cases: "The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or *economic loss* . . . ."[38]

Even courts in states without such clear statutes keep the door open to this possibility.[39] For example, in *Williams Ford, Inc. v. Hartford Courant Co.*,[40] the Ohio Supreme Court considered a case involving several automobile dealerships that had filed an action against a local newspaper raising, among other claims, an allegation of negligent misrepresentation regarding advertising rates. The defendant argued that the plaintiffs' own negligent conduct should have barred them from recovering because Ohio's comparative fault statute did not apply to "purely commercial losses, unaccompanied by damages to or loss of the use of some tangible property."[41] As a matter of statutory construction, the court conceded that this type of loss was not the equivalent of "damage to property," as that phrase was used in the state's comparative law statute. Nonetheless, the court rejected the defendant's suggestion that any amount of negligence on the part of the plaintiffs should bar their recovery simply because they sought recovery only for economic or commercial damage.[42] The court explained as follows:

> Where possible, courts should, as a matter of common law adjudication, "assure that the body of the law—both common and statutory—remains coherent and consistent." . . . It would be consistent with that goal for the doctrine of comparative negligence, which by statute applies to actions based on negligence resulting in damage to person or property, also to apply to the tort of negligent misrepresentation resulting in commercial loss. Furthermore, it would undermine the legislative purpose of [the Ohio statute] if we

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Washington); *see also* Brown & Morgan, *supra* note 20, at 501–03. *But cf.* Sobelsohn, *supra* note 3, at 442 ("A tort called 'intentional' may involve 'simply a conflict between legitimate activities.' . . . [R]ather than bar comparative fault in all cases of intentional tort, a comparative fault system should at least permit the court, in individual cases, to instruct the jury to compare the parties' fault." (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.1, at 120 (2d ed. 1977))).

38. KAN STAT. ANN. § 60-258a (2004) (emphasis added). Olthoff states that the Kansas legislature amended the statute to include the emphasized language after "a decision by the Kansas Supreme Court that had narrowly held that the Kansas statute would not permit comparative fault in a purely economic loss case involving breaches of fiduciary duty by officers of a savings and loan institution." Olthoff, *supra* note 33, at 607 (citing Fed. Sav. & Loan Ins. Corp. v. Huff, 704 P.2d 372, 377 (Kan. 1985)).

39. *E.g.*, Olthoff, *supra* note 33, at 607 n.120 (applying comparative fault when a "person suffers death or damage as a result partly of that person's own fault") (citing ME. REV. STAT. title 14 § 156 (2005)); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (2005) (referring to personal injury, death, property damage or "other harm"); FLA. STAT. § 768.81(4)(a) (2006) (applying comparative fault to negligence cases whether couched in terms of tort or other theories).

40. 657 A.2d 212 (Conn. 1995).

41. *Id.* at 223.

42. *Id.* at 225.

> were to require a plaintiff to be free from contributory negligence as a prerequisite to recovery under a theory of negligent misrepresentation merely because the damages sought were commercial losses rather than property damage. The doctrine of contributory negligence should not, therefore, consistent with our entire body of law, both statutory and common, act as an absolute bar to recovery for plaintiffs seeking recovery for negligent misrepresentation.[43]

Going further, sources from a handful of jurisdictions suggest the use of comparative fault in fraud actions themselves.[44] For example, in *Banks v. New York Life Ins. Co.*,[45] the Louisiana Supreme Court decertified a class of plaintiffs who claimed that an insurance company had committed fraud against a group of policy purchasers in regard to the company's life insurance pricing structure. Among the grounds for decertification were the varying individual issues concerning the plaintiffs' attention to the policies themselves. The court stated,

> The conduct of many of the named plaintiffs in this case demonstrates *their own comparative fault could reduce or even eliminate the potential for recovery*. Some were sophisticated life insurance buyers, while others admitted they failed to read their policies and pay attention to the illustrations given to them by their agents.[46]

One Louisiana Supreme Court Justice recently picked up on this language, flatly stating that "this Court [has] held that comparative fault can be used as a defense in an intentional tort case involving claims of fraud . . . ."[47]

Arkansas is another jurisdiction where some have suggested that comparative fault might apply to fraud actions. In a 1997 law review article, two Arkansas attorneys and a federal district judge proposed new model fraud jury instructions.[48] The proposals included a charge that would allow jurors to compare the fault of a plaintiff and defendant in awarding damages in a fraud case.[49] In a comment to this proposed instruction, the authors noted that "some Arkansas trial

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43. *Id.*

44. Certainly, many jurisdictions do so in *negligent* misrepresentation cases. *See* Gergen, *supra* note 34; *see also* Williams Ford, Inc. v. Hartford Courant Co., 657 A.2d 212, 225 (applying comparative fault to negligent misrepresentation); Staggs v. Sells, 86 S.W.3d 219, 224 (Tenn. Ct. App. 2001) (holding that the doctrine of comparative fault applies in negligent misrepresentation cases); Alejandre v. Bull, 98 P.3d 844, 851 (Wash. Ct. App. 2004) (recognizing that Washington's comparative fault statute applies to negligent misrepresentation and reasoning that "the harsh result of denying recovery was eliminated because the plaintiff's culpability was considered in determining total damages" (quoting ESCA Corp. v. KPMG Peat Marwick, 959 P.2d 651, 655 (Wash. 1998))).

45. 737 So. 2d 1275 (La. 1999).

46. *Id.* at 1283 (emphasis added).

47. Scott v. Am. Tobacco Co., 830 So. 2d 294, 303 (La. 2002) (Victory, J., concurring in part and dissenting in part).

48. Charles D. Harrison, Roger D. Rowe & William A. Waddell, Jr., *Proposed Arkansas Model Fraud Jury Instructions [Unofficial Working Draft]*, 20 U. ARK. LITTLE ROCK L.J. 51 (1997).

49. *Id.* at 61.

courts have indicated that the Arkansas comparative fault statute applies to fraud claims."[50] They then suggest that this makes sense: "The typical fraudulent misrepresentation case is essentially an 'all or nothing' proposition for a plaintiff. Use of comparative fault may permit a jury to reach some middle ground between the positions of the parties."[51]

Other state courts, to be sure, dismiss the possibility of applying comparative fault in fraud actions.[52] But most—if not all—do so out of hand, with little more than a nod to the traditional rule.[53] Given the increasing use of comparative fault in intentional and economic tort cases, not to mention the handful of direct applications in misrepresentation actions, it seems well worth considering exactly *why* (or why not) fraud presents a laboratory for the use of comparative fault.

III. POLICY CONSIDERATIONS

A. Supporting the Limitation of Comparative Fault

In the face of a trend toward applying comparative fault more broadly, some scholars assert that courts should limit the expansion. On the question of whether comparative fault should apply to intentional torts, Professor Bublick has been especially active in advocating for limitations.[54]

In one recent article, Professor Bublick discussed the principles that lead courts to limit comparative fault defenses in tort actions. This section of the Article addresses those principles in connection with fraud,[55] recognizing their application in some situations, but concluding that they do not inherently preclude the use of comparative fault in fraud actions. The Article then goes on to argue that some of the fundamental polices that drive tort law generally actually support the application of comparative fault in such cases.

Professor Bublick asserts that courts limit comparative-fault defenses based on the basis of six policy factors:

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50. *Id.*

51. *Id.* The proposed instructions, however, have never been adopted. In addition, at least one appellate court decision in Arkansas casts doubt on the extent to which comparative fault applies to intentional torts in the state. *See* Kellerman v. Zeno, 983 S.W.2d 136, 141 (Ark. Ct. App. 1998) (comparative fault does not apply in case of malicious prosecution because it is an intentional tort).

52. 37 AM. JUR. 2D *Fraud and Deceit* § 319 (2005) ("Generally, however, where intentional fraud is the basis of the relief sought, the negligence of the defrauded party is not an answer or defense.").

53. *See, e.g.*, Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 80–81 (Iowa 1990); Lynn v. Taylor, 642 P.2d 131, 135 (Kan. Ct. App. 1982); Florenzano v. Olson, 387 N.W.2d 168, 175 (Minn. 1986); McCrary v. Taylor, 579 S.W.2d 347, 349 (Tex. App. 1979).

54. Bublick, *End Game of Tort Reform, supra* note 21; Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977 (2003) (hereinafter Bublick, *Comparative Fault to the Limits*).

55. For example, these principles could apply in a straightforward "failure to read" case such as *Arp v. United Cmty. Bank*, 612 S.E.2d 534 (Ga. Ct. App. 2005). *See supra* notes 29–31 and accompanying text.

> 1) [R]ecognized absence of capacity—the plaintiff lacks total or partial capacity for self-care and the plaintiff's incapacity is recognizable and socially accepted; 2) structural safety—due to systemic differentials in knowledge, experience or control, the defendant can be expected to take better care of the plaintiff's safety than can the plaintiff herself; 3) role definition—it is the defendant's obligation to care for a negligent plaintiff because of social or contractual understandings about the defendant's responsibilities as a professional rescuer; 4) process values—the very process of litigating the comparative-fault defenses would harm the litigants, create expensive or unmanageable litigation issues, or produce a statement of relative fault in an area in which relative statements are viewed as problematic; 5) fundamental values—a determination of plaintiff comparative fault would encroach on fundamental, sometimes constitutional, values; and 6) autonomy and self-risk judgment—plaintiff's conduct can be considered reasonable or unreasonable but risked only harm to self and as such receives more latitude for risk.[56]

Professor Bublick's first three policies speak to situations that undoubtedly counsel for the non-application of comparative fault in fraud actions—or perhaps, more accurately, they describe situations where one would expect a jury to find that reliance *was* justifiable. Indeed, this Article agrees that comparative fault should not apply in cases that fit into these categories. Recall, the Article's thesis asserts that *plaintiffs* should not be barred from seeking a comparison of fault when they are unable to prove justifiable reliance.[57] The thesis does not advocate allowing *defendants* to chip away at a plaintiff's recovery where a plaintiff can prove each element of the prima facie case.[58]

By way of further explanation, Professor Bublick's first policy factor concerns instances of plaintiff incapacity.[59] In a fraud action, a plaintiff who truly cannot care for herself—or even a plaintiff at a serious bargaining disadvantage—would normally be insulated from a serious argument that her reliance was not reasonable or justifiable.[60] The same would be true of cases that interpose

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56. Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 982.

57. *See supra* note 8.

58. In such cases, the arguments against the application of comparative fault in other intentional tort cases make more sense.

59. Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 999–1004. Professor Bublick explains that "[a]t times courts limit comparative-fault defenses when the plaintiff lacks the capacity to exercise reasonable care for her own safety and when the plaintiff's capacity is recognizable and socially accepted." *Id.* at 1000. Among her prime examples are cases where a plaintiff has a complete inability to care for herself, such as where she is an infant. *Id.*

60. This is true regardless of whether courts use a reasonable or justifiable reliance standard. *See, e.g.*, *In re* Vann, 67 F.3d 277, 283 (11th Cir. 1995) (justifiable reliance takes account of "the plaintiff's own capacity and the knowledge which he has"); Kanellis v. Pac. Indem. Co., 917 So. 2d 149, 153–54 (Ala. Civ. App. 2005) (preferring a reasonable reliance standard to a justifiable reliance standard because the latter allows for more flexible consideration of factors like "mental capacity, educational background, relative sophistication, and bargaining power of the parties"); Moe v. Moe, No. A04-953,

Professor Bublick's second and third policy factors, "structural safety" and "role definition."[61] While Professor Bublick analyzes these factors in the context of cases where defendants are in a position to provide care for a plaintiff's physical safety,[62] the policy might extend to a situation where a defendant defrauds an individual with whom he has a fiduciary relationship.[63]

While the first three policy factors identified by Professor Bublick point to specific fact patterns where reliance seems justifiable, however, it is hard to see why these factors point toward a flat prohibition against the application of comparative fault in every fraud case where a plaintiff is not careful in her reliance. For a concrete example, think back to the *Arp v. United Community Bank* case, discussed above.[64] Recall, in *Arp*, that the plaintiff sued a bank, asserting that the bank had fraudulently informed him that it had obtained an insurance policy on his wife's life. The trial court granted summary judgment to the bank, in part because the plaintiff did not review documents that would have demonstrated the lack of life insurance for his wife. The Court of Appeals affirmed.[65] This Article's

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2005 WL 354028, at *3 (Minn. Ct. App. Feb. 15, 2005) (stating that reasonable reliance depends on the "capacity and experience" of the plaintiff and noting that the "nature of the relationship between the parties is relevant to assessing whether reliance is reasonable"); *see also* RESTATEMENT (SECOND) OF TORTS § 541 cmt. a (1977) ("[T]he rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses."); 27 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 69:35, at 39 (4th ed. 2003) ("[T]he law should not give any assistance to a knave, a scoundrel, or a con artist who preys upon the less alert or more naive members of society."); SPEISER ET AL., *supra* note 14, at 315 (stating that the law does not "protect positive, intentional fraud successfully practiced upon the simple-minded or unwary").

61. Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 1004, 1017. Professor Bublick explains the difference between the two categories by noting that

> although the defendant in [the role definition] category may be the better care provider at a particular time, in a broader frame the defendant is not necessarily better able to safeguard the plaintiff's interests than is the plaintiff herself. [So in the role definition] category, limits are placed on defendants' (often professional helpers') use of comparative-fault defenses to set baseline levels of care owed to even negligent plaintiffs.

Id. at 1017.

62. *See, e.g.*, *id.* at 1004–06 (discussing *Doe v. Brainerd Int'l Raceway, Inc.*, 533 N.W.2d 617 (Minn. Ct. App. 1995), *rev'd*, 533 N.W.2d 617 (Minn. 1995), in which the Minnesota Court of Appeals refused to allow defendants, a raceway and a security company, to raise contributory negligence in an intentional tort action brought by a young woman who was sexually assaulted after the degeneration of a "wet T-shirt contest" on raceway grounds).

63. *See* Flanary v. Mills, 150 S.W.3d 785, 795 (Tex. App. 2004) ("Breach of a fiduciary relationship can constitute fraud because the fiduciary relationship imputes higher duties, such as duties of good faith, candor, and 'full disclosure respecting matters affecting the principal's interests and a general prohibition against the fiduciary's using the relationship to benefit his personal interest, except with the full knowledge and consent of the principal.'") (citations omitted).

64. 612 S.E.2d 534 (Ga. Ct. App. 2005); *see also supra* notes 29–31 and accompanying text.

65. *Id.* at 539.

position is that the court should have permitted the plaintiff to ask the jury to compare his failure to review the policies with the bank's alleged misrepresentations[66] and adjust any award according to comparative fault principles. Allowing comparative fault to operate in this fashion does not violate any of the first three principles that Professor Bublick identifies. There is no indication in the case of incapacity on the part of either party. Nor do we face any "structural safety" or "role definition" issues. Indeed, to the extent the case presented such issues, one might consider the bank a more sophisticated entity in the best position to make sure that the plaintiff understood his agreement.

The latter three policies identified by Professor Bublick do no more to counsel for a prohibition against the application of comparative fault in fraud. In fact, these policies can be used to argue that such a prohibition is actually wrong. Most prominently, Professor Bublick's fourth policy factor is process values, including concerns that "comparative-fault defenses might traumatize participants, . . . create expensive or unmanageable litigation issues, or . . . provide a statement of relative fault when such . . . relative statements are morally problematic."[67] These concerns are simply not in play in a fraud action. In a fraud case, a jury already must consider the fault of *both* parties to resolve the dispute—the defendant's scienter and the plaintiff's justifiable reliance are each elements of the prima facie case.[68]

The last two factors identified by Professor Bublick factors have little application to most fraud cases.[69] To the extent that "autonomy and self-risk judgment" might be a consideration, reliance on its underlying values would not protect fraud victims in the way that avoiding comparative fault would protect victims of other intentional torts. As Professor Bublick notes, courts sometimes "restrict comparative-fault defenses as a matter of law when a jury could consider

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66. The misrepresentations were statements from bank employees that they would provide insurance for plaintiff's wife, and that the policy plaintiff signed would cover both spouses. *Id.* at 537.

67. Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 1021.

68. *See supra* note 17 and accompanying text (general elements of fraud). The question of whether providing a statement of relative fault is morally problematic is not easily resolved. However, it is not apparent that the issue would counsel more strongly for the avoidance of using comparative responsibility in economic loss cases than in other cases.

69. The fifth factor, fundamental values, recognizes that when "the plaintiff has a constitutional or otherwise fundamental entitlement to engage in a particular activity, courts often hesitate to let juries decide on a case-by-case basis whether the exercise of that entitlement is reasonable." Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 1023. As examples, Professor Bublick points to situations where plaintiffs make choices to bear children in wrongful contraception cases, exercise their free speech rights, or even decisions to comply with law. *Id.* at 1023–29. These situations, however, focus on protecting plaintiffs from having recovery for personal or property reduced due to the exercise of protected conduct. To the extent that a plaintiff's reliance on another's misrepresentation might fit into this a category, perhaps the best rule would be deem the reliance automatically justifiable. Short of that, however, a plaintiff would benefit from having a jury compare the conduct to that of the defendant, instead of having his claim denied for failure to prove the prima facie case.

the plaintiff's choice to be unreasonable, but the choice is one that risks harm to the plaintiff alone [and] involves an aspect of plaintiff liberty or autonomy."[70] But fraud is unlike other actions because it includes a lack of plaintiff culpability as part of the prima facie case.[71] Therefore, it is possible that full deference to plaintiff autonomy might make courts less likely to find any recovery for those victimized by fraudulent conduct. In other words, courts could conclude that, short of incapacity, reliance is "justifiable" as a matter of an individual's own assessment of risk in relying on a representation. In turn, this could reward or encourage those inclined to engage in fraudulent behavior by making them aware that courts might completely protect them from liability when their victims make poor decisions. As an example, consider the facts in *Schlaifer Nance & Co. v. Estate of Warhol*, discussed above.[72] Would it be right to resolve the case simply by pointing to the "autonomous" decision of the licensing company to rely on the estate's representations without further diligence, regardless of what the executors said? If so, the rule would seem to encourage fraudulent behavior in the first place. Under such a regime, there would be little downside to making a misrepresentation. Either the plaintiff investigates and does not rely, or the plaintiff fails to investigate and provides a profit for the defendant with a low risk of liability. As in other areas, it seems that the law should be more sophisticated in the way in which it creates incentives.

B. Supporting the Use of Comparative Fault

The preceding point raises the issue of how incorporating comparative fault into some fraud cases might impact behavior in a way that would reduce incentives to engage in fraudulent activity. It is almost axiomatic to note that deterrence is a goal of tort law.[73] And while the efficiency case for including comparative fault in fraud largely tracks the argument for its use in comparative fault generally, it is worth noting in context here.

Although some scholars questioned whether comparative fault served the goal of efficiency in the doctrine's early days,[74] there is now support for its use

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70. Bublick, *Comparative Fault to the Limits*, *supra* note 54, at 1029.

71. *See supra* note 6 and accompanying text.

72. 927 F. Supp. 650 (S.D.N.Y. 1996); *see also supra* notes 24–28 and accompanying text.

73. *See also* KEETON ET AL., *supra* note 14, at 25 ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.").

74. Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 n.8 (1986) (comparative negligence is inefficient because efficiency would require only one party to take precaution) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.3 at 124 (2d ed. 1977); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 158 (1970)).

among those who study law and economics.[75] As Professors Daniel H. Cole and Peter Z. Grossman write in their new law and economics text:

> [The] application of the comparative negligence doctrine provides both parties with incentives to minimize the sum of accident costs and avoidance costs. . . . [C]omparative negligence is arguably superior, from the perspective of economic efficiency, to other fault-based tort regimes that treat cost allocation as an all or nothing proposition, imposing financial responsibility on only one party—the defendant *or* the plaintiff.[76]

The all-or-nothing approach, of course, is exactly what fraud plaintiffs face today—potential full recovery if they can prove justifiable reliance along with the other elements of the claim, but no recovery at all if they cannot. Certainly this rule provides plaintiffs with strong incentives to avoid the consequences of a misrepresentation. But it also at least opens the possibility to a conclusion that defendants are not fully deterred from the fraudulent behavior in the first place.[77] Leaving open the possibility that a defendant who has acted with scienter will be compelled to at least partially compensate a careless plaintiff should shift the incentive in a direction that reduces the overall amount of fraudulent behavior.[78]

Of course, even economists recognize goals beyond efficiency that support tort law rules.[79] Providing equitable compensation to those harmed by the conduct of others is also very much at the heart of tort law.[80] Indeed, it is one of

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75. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 5 AM. L. & ECON. REV. 433, 434 (2003) ("The first-generation economically oriented studies of comparative negligence erroneously declared the rule inefficient.").

76. DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 222 (Prentice Hall 2005). For one of the earlier articles supporting comparative fault in many cases on the basis of efficiency, see Cooter & Ulen, *supra* note 74. For an article that challenges some of Cooter's and Ulen's conclusions, see Bar-Gill and Ben-Shahar, *supra* note 74.

77. For example, current doctrine may encourage "phishers" on the internet—scam artists who use deceptive emails and websites to obtain people's banking information. If a victim's reliance on a scam is deemed unreasonable, he would be barred from recovery in a fraud action. Under this proposal, the victim might be able to proceed and have his fault compared with that of the "phisher."

78. *See* Cooter & Ulen, *supra* note 74, at 1100 (stating comparative negligence "induces efficient behavior by *potential victims and tortfeasors*") (emphasis added).

79. Cooter and Ulen explain,

> Efficiency . . . is not the only goal of tort law. Nor is efficiency prominent among the reasons given by judges and legislators for the change to comparative negligence. Instead, proponents of comparative negligence often claim that dividing costs among the parties at fault is more fair and results in a less severe allocation of accident costs than contributory negligence.

Id. at 1094–95.

80. *See* KEETON ET AL., *supra* note 14, at 20 ("It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development . . . . A recognized need for compensation is . . . a powerful factor influencing tort law."); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983).

the policies that drove the comparative fault revolution in the first place.[81] There is no reason to ignore such compensatory goals in a fraud action. A fraud plaintiff needs to prove that a defendant's misrepresentation caused her actual economic harm.[82] Without belaboring the obvious, the all-or-nothing rule of justifiable reliance might insulate a defendant from accountability for damage that he caused. As in personal injury or property damage cases, the use of comparative fault avoids this outcome, while still allowing an allocation to account for the plaintiff's own contribution to her harm.[83]

CONCLUSION

While much of tort law has changed to serve a policy of aligning liability with fault, fraud has stood still. By its terms, fraud remains an action that completely precludes a plaintiff from recovering damages if her reliance on an intentional misrepresentation was not justifiable. This is not to ignore that justifiable reliance is often subsumed within other elements of fraud.[84] But one suspects that, regardless, fact finders in fraud actions account for a plaintiff's conduct somewhere in their decision-making process.[85]

If this is true, then the all-or-nothing nature of fraud appears to be a vestige of an earlier day. The principles that underlie comparative fault apply as well—if not better—to fraud as they do other torts.[86] In addition, the policies that counsel for non-extension of comparative fault in other areas do not compel such hesitation when a plaintiff behaves carelessly in relying on a misrepresentation.[87]

In sum, this Article argues that courts in comparative fault jurisdictions should not bar recovery in a fraud action when a plaintiff fails to establish

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81. *See* Grandstaff v. Hawks, 36 S.W.3d 482, 490 (Tenn. App. 2000) (discussing the decision of Tennessee—the most recent state to move to comparative fault—as based, in part, on a principle of enabling "plaintiffs to recover fully for their injuries" and describing the "conceptual underpinnings" of comparative fault as "fairness, consistency, and efficiency"); Cooter & Ulen, *supra* note 74, at 1094–95; Brown & Morgan, *supra* note 20, at 510 ("Jurisdictions also concluded it was unjust to allow a defendant to escape liability when he contributed to the loss and was in better position to bear the loss.").

82. *See supra* note 17 and accompanying text.

83. Courts would implement a comparison through jury instructions as in any other comparative fault case. The proposed Arkansas model instructions referenced earlier in this Article provide a good starting point. *See supra* notes 48–51 and accompanying text. To elaborate, a court's instructions would eliminate justifiable or reasonable reliance as an element of plaintiff's case and replace it with a simple question of whether the plaintiff's reliance on the defendant's misrepresentation was reasonable or justifiable. The instruction would define the term as necessary. If a jury answered in the negative, the instructions would require a comparison of the defendant's scienter with the plaintiff's lack of care. The court would adjust damages according to the jurisdiction's normal comparative fault principles.

84. *See supra* notes 22–23 and accompanying text.

85. It is also true that courts still regularly list justifiable or reasonable reliance as an element of a fraud claim, and some do appear to take it seriously. *See supra* notes 24–30 and accompanying text.

86. *See supra* Part III.A.

87. *See supra* Part III.B.

justifiable reliance. Instead, courts should apply comparative fault principles and allow a jury to evaluate all parties' conduct in assessing damages. Doing so will address an anomaly that has escaped attention for many years and serve the very policies that support our tort law system.