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One Drunk Driver, Shame on You, Two Drunk Drivers, Shame on Who: Reconciling the Unlawful Acts Doctrine with Comparative Negligence

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ONE DRUNK DRIVER, SHAME ON YOU, TWO DRUNK DRIVERS, SHAME ON WHO: RECONCILING THE UNLAWFUL ACTS DOCTRINE WITH COMPARATIVE FAULT

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INTRODUCTION

Two drivers are drinking and driving. They both approach an intersection and one runs a red light, striking the other driver as he goes through the green light. Should the driver going through the green light be able to recover damages for the other driver's negligence? Or, should the driver be barred from recovery because he was also drinking and driving, and thus participating in an illegal act?[1] Does allowing recovery in a tort claim of this nature reward illegal activity?

A recovering drug addict is solicited by the federal government to sell drugs as part of an undercover drug operation by the federal government's undercover agent in a drug operation. The addict relapsed upon his participation in the drug selling scheme. Should the relapsed addict be barred from claims of negligence and intentional infliction of emotional distress against the government because he subsequently participated illegal drug use?[2] Does the barring of recovery in a tort claim like this discourage illegal activity?

In New Mexico, courts have answered these two questions differently: allowing the recovery of one plaintiff but not the other.[3] The prohibition of these claims in which the plaintiff is involved in an illegal act may be argued as a defense under the unlawful acts doctrine.[4] The unlawful acts doctrine is an affirmative defense to tort claims that aims to embody the concept that "people should not profit from their own wrongs."[5] Therefore, it seeks to forbid recovery for those "whose cause of action is based on their own illegal conduct, or upon their own dishonest or

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1. This fact pattern is based on *Rodriguez v. Williams*, 2015-NMCA-074, ¶¶ 2–3, 355 P.3d 25.

2. This fact pattern is based on *Romero v. United States*, 658 F. App'x 376, 378 (10th Cir. 2016).

3. *See Rodriguez*, 2015-NMCA-074, ¶ 13 (holding that plaintiff's blood alcohol content did "not preclude Plaintiff from recovering damages attributed to Defendant's comparative negligence"); *Romero*, 658 F. App'x. at 380 (holding that the "district court did not err by relying on the wrongful-conduct rule to dismiss Mr. Romero's claim").

4. The unlawful acts doctrine has many names from both courts and scholars. It might be referred to as immoral plaintiff, serious misconduct rule, illegal plaintiff, wrongful conduct doctrine, unlawful conduct, or *ex turpi causa non oritur actio* ("from a dishonorable cause an action does not arise"). The New Mexico Court of Appeals in *Rodriguez* referred to it as "unlawful acts doctrine" and the Tenth Circuit Court of Appeals in *Romero* referred to it as the "wrongful conduct rule." For purposes of clarity and continuity, this Comment will refer to it as the unlawful acts doctrine.

5. DAN B. DOBBS ET AL., THE LAW OF TORTS § 228, at 818 (2d ed. 2011).

tortious acts, or upon their own moral turpitude."[6] While used in the torts context as a defense of negligence, this doctrine has roots in contracts law.[7]

The New Mexico Supreme Court adopted the unlawful acts doctrine in 1950 when New Mexico was still a contributory negligence state.[8] When the Court later adopted comparative fault and rejected contributory negligence in 1981, it also stated that "common sense will assist in its fair application" of how various rules would be affected by this new doctrine.[9] The unlawful acts doctrine was not raised again in any New Mexico appellate tort case until *Rodriguez v. Williams* in 2015. In that case, with the established modern-day pure comparative fault system, the New Mexico Court of Appeals was faced with a question of whether to apply the unlawful acts doctrine, and thereby bar the plaintiff's claim to recovery. The court allowed the plaintiff to recover but also held that recovery was consistent with the unlawful acts doctrine.[10] Subsequently, the Tenth Circuit Court of Appeals in *Romero v. United States* held that "as the *Rodriguez* decision makes clear, the [unlawful conduct rule] is not inherently incompatible with a comparative fault framework." Relying on New Mexico's unlawful acts doctrine, the Tenth Circuit dismissed the plaintiff's claim.[11]

These two opinions expose tension at issue with the capacity of the unlawful acts doctrine in New Mexico. This Comment addresses this tension. Implicit in this issue is the question of whether the unlawful acts doctrine can coexist with comparative fault. This Comment suggests that logic and "common sense" illustrate that the unlawful acts doctrine and comparative negligence cannot coexist because the New Mexico Supreme Court implicitly overruled the unlawful acts doctrine in adopting comparative negligence. Moreover, the unlawful acts doctrine's categorical bar is inherently at odds with New Mexico's repudiation of contributory negligence.

Part I of this Comment will discuss the New Mexico cases that recently revitalized the unlawful acts doctrine in New Mexico tort claims. This section will examine how the New Mexico Court of Appeals and the Tenth Circuit Court of Appeals have approached the unlawful acts doctrine in congruence with New Mexico's comparative fault doctrine. This will include a description and analysis of *Rodriguez v. Williams* and how the Tenth Circuit Court of Appeals and the United States District Court, District of New Mexico have applied and interpreted *Rodriguez*.

Part II of this Comment will discuss the unlawful acts doctrine generally, as well as its use and history in New Mexico. This section will examine how the unlawful acts doctrine has been affected by judicial actions, and explore the policy

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6. 1 AM. JUR. 2D *Actions* § 39 (2017).

7. 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, 57 (1995).

8. *See* Desmet v. Sublett, 1950-NMSC-057, 225 P.2d 141.

9. Scott v. Rizzo, 1981-NMSC-021, ¶ 19, 634 P.2d 1234. The New Mexico Legislature later codified comparative fault and the principles of *Scott* in 1987. *See* N.M. STAT. ANN. 1978, §§ 41-3A-1 to -2 (1987); *Reichert v. Atler*, 1992-NMCA-134, ¶ 34, 875 P.2d 384 ("Following our Supreme Court's decision in *Scott* and this Court's decision in *Bartlett*, our [L]egislature enacted legislation continuing the doctrine of joint and several liability in certain situations.").

10. Rodriguez v. Williams, 2015-NMCA-074, ¶ 7, 355 P.3d 25 (stating that "the judgment in this case is consistent with the principles that our Supreme Court applied in *Desmet*.").

11. Romero v. United States, 658 F. App'x 376, 279–381 (10th Cir. 2016).

concerns that are important to establish the rationale for the doctrine's implementation. This also includes a brief of how other jurisdictions approach the unlawful acts doctrine.

Part III will discuss comparative fault generally and in New Mexico. This includes a look at the policy goals of comparative fault, as well as New Mexico's judicial adoption of comparative fault. Part IV will explore an example of the New Mexico Supreme Court rejecting another defense due to comparative fault's controlling law. This Part will also discuss the application of this case to the unlawful acts doctrine and how it showcases the strong policy of comparative fault over preexisting doctrines.

Finally, Part V will show the implications and possible path forward for New Mexico. This Part will highlight the problem with uncertainty in this area of law and what it means for New Mexico practitioners. I will suggest that in questions of negligence, the answer is an application of comparative fault. However, claims for other torts may muddle up the answer, and the unlawful acts doctrine may still be applicable for those cases. This Part will showcase how these outlier cases may influence New Mexico tort law.

The question of whether the unlawful acts doctrine is still viable is deeply important for tort litigation in New Mexico. Without understanding whether the court might apply comparative fault or the unlawful acts doctrine, litigants confront an uncertain and unpredictable result. It would benefit New Mexico to establish a consistent approach to tort claims by prohibiting the application of the unlawful acts doctrine in negligence claims.[12] While there are outliers, prohibiting the application of the unlawful acts doctrine to tort claims would better serve the New Mexico courts' adoption of comparative fault and would better serve the interest of fairness to tort litigants. Ultimately, this Comment will suggest that the unlawful acts doctrine was logically and effectually overruled with New Mexico's adoption of comparative fault.

I. RECENT NEW MEXICO APPLICATION OF THE UNLAWFUL ACTS DOCTRINE

A. *Rodriguez v. Williams*: Reintroducing *Desmet v. Sublett*

On February 24, 2012, defendant, Stephan Williams ("Williams"), was driving while intoxicated when he ran a red light and struck the plaintiff, Alfredo Rodriguez ("Rodriguez").[13] Rodriguez was also intoxicated and was not wearing a seatbelt.[14] Following the crash, Rodriguez was rushed to the hospital and underwent a craniotomy for evacuation of a subdural hematoma.[15] As a result, Rodriguez spent

12. *Scott*, 1981-NMSC-021, ¶ 23 (stating that contributory negligence is increasingly being abolished due to the "undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how trifling plaintiff's negligence might be").

13. *Rodriguez*, 2015-NMCA-074, ¶ 2.

14. *Id.* The court disposed of the seatbelt issue separately. The New Mexico legislature by statute has prohibited the use of seatbelts from being used in apportioning damages in negligence cases, as a matter of policy. *Id.* ¶ 16.

15. *Id.* ¶ 2 (internal quotations omitted).

a total of eight days in the hospital. Rodriguez was uninsured, unable to pay these medical bills, and unable to work for three months.[16]

Rodriguez sued Williams for negligence in state court.[17] After a bench trial, the trial court found in favor of Rodriguez, concluding that Williams was primarily at fault and Rodriguez was 5% at fault due to his alcohol impairment.[18] Subtracting 5% of the total damages, the court entered a judgement against Williams in the amount of $182,271.40.[19]

On appeal, Williams raised the unlawful acts doctrine[20] and argued that Rodriguez was barred recovery because such recovery would violate "our basic sense of right and wrong." [21] He stated that the unlawful acts doctrine has been long embraced in New Mexico.[22] Williams argued that the unlawful acts doctrine "supersedes principles of comparative fault," and is not a "mere vestige of a contributory negligence era."[23] He also ultimately suggested that New Mexico should look to and adopt the New York approach that accounts for both comparative fault and unlawful acts doctrine concurrently.[24]

Rodriguez argued that the unlawful acts doctrine should not apply because New Mexico repudiated the unlawful acts doctrine with its rejection of contributory negligence and adoption of comparative fault.[25] Rodriguez highlighted the policy arguments in favor of abolishing contributory negligence, such as the "undeniable inequity" of contributory negligence which would permit a contributing wrongdoer to avoid all liability.[26]

The New Mexico Court of Appeals[27] permitted Rodriguez's recovery and held that Rodriguez's unlawful act of drinking and driving did not bar his recovery of damages attributed to Williams's actions.[28] The court reasoned that Williams breached his duty, regardless of Rodriguez's own level of intoxication.[29] The Court first determined that Rodriguez's claim was "founded solely on [Williams's]

16. *Id.* ¶ 3.

17. *See id.* ¶ 2. Rodriguez reached a settlement agreement about the medical bills with the hospital separately. *Id.* ¶ 3.

18. *Id.* ¶ 4.

19. *Id.*

20. *Id.* ¶ 5. Williams also argued three other issues on appeal. In addition to the unlawful acts defense, he argued "the district court should have considered the fact that Plaintiff was not wearing a seat belt in determining Plaintiff's comparative negligence; [. . .] Plaintiff's seat belt non-use barred operation of the collateral source rule; and [. . .] Plaintiff's medical damages should have been reduced to the amount that the hospital eventually agreed to accept from Plaintiff, not what it initially billed." *Id.* The court was not persuaded and these arguments failed. *Id.* ¶¶ 14, 17, 22.

21. Brief of Defendant-Appellant at 5, Rodriguez v. Williams, 2015-NMCA-074, 355 P.3d 25 (Nos. 33,138, 33,668) (citing Gaines v. General Motors Corp., 789 F. Supp. 38, 43 (D. Mass. 1991)).

22. *Id.* at 5.

23. *Id.*

24. *Id.* at 13–15.

25. Brief of Plaintiff-Appellee at 1–2, Rodriguez v. Williams, 2015-NMCA-074, 355 P.3d 25 (Nos. 33,138, 33,668).

26. *Id.* at 2.

27. The New Mexico Supreme Court denied certiorari and thus the New Mexico Court of Appeals is the final ruling. Rodriguez v. Williams, 2015-NMCERT-006, 367 P.3d 850.

28. *Rodriguez*, 2015-NMCA-074, ¶ 13.

29. *Id.* ¶ 12.

negligence" and "not on [Rodriguez's own] unlawful act of driving impaired."[30] The Court appeared to add a causation requirement to the unlawful acts analysis, because Rodriguez was permitted to recover due to his illegal conduct being sufficiently separate from the cause of injuries.[31] The Court determined that a plaintiff's wrongful conduct did not forbid a claim entirely, although such wrongful conduct is relevant to the analysis.[32] Therefore, the court affirmed the district court's finding in favor of Rodriguez.[33]

However, although the court permitted recovery, it also highlighted that its rationale was consistent with the principles laid out in 1950 in *Desmet v. Sublett* by the New Mexico Supreme Court establishing the unlawful acts doctrine.[34] The court cited to the *Desmet* court's statement that there is a:

> well settled rule of law that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or where he must base his cause of action, in whole or in a part, on a violation by himself of the criminal or penal laws.[35]

The court concluded that its rationale was consistent with this concept.[36] In holding this, the court stated that the fact that a plaintiff is guilty of unlawful acts shows negligence, but it does not answer how much, "so a comparison of the plaintiff's per se fault and the defendant's negligence is still appropriate."[37]

Furthermore, the court rejected the system of New York's hybrid test that preserves both comparative fault and the unlawful acts doctrine. Further, the court stated that its decision would have been the same even if it had adopted the New York approach.[38] Hence, while explicitly rejecting New York's test, the court simultaneously seemed to apply it. And, while explicitly claiming to remain consistent with *Desmet*'s unlawful acts doctrine, the Court did not seem to apply it.

B. *Romero v. United States*: Applying and Interpreting *Rodriguez*

In *Romero*, plaintiff Aaron Romero ("Romero"), a recovering drug addict, was propositioned by a Drug Enforcement Agency (DEA) confidential informant to begin a relationship of dealing crack cocaine.[39] Part of this relationship included providing Romero with crack cocaine for his own consumption.[40] Romero had a long history of drug addiction but had been clean for about five months before he was

30. *Id.* ¶ 8.
31. *See id.*
32. *Id.* ¶ 13 (citing DOBBS, ET. AL., *supra* note 5, § 228).
33. *Id.* ¶ 23.
34. *Id.* ¶ 7.
35. *Id.* (citing *Desmet*, 1950-NMSC-057, ¶ 9).
36. *Id.*
37. *Id.* ¶ 13 (citing DOBBS, ET. AL., *supra* note 5, § 228).
38. *Id.* ¶ 12.
39. Romero v. United States, 658 F. App'x 376, 379 (10th Cir. 2016).
40. *Id.* at 378.

approached by the DEA informant.[41] Romero initially rejected the informant's offer, but upon repeated attempts, Romero eventually agreed.[42] In November of 2011, with the DEA's approval, the informant provided Romero with a large amount of crack cocaine for his personal use.[43] This pattern of Romero dealing and consuming drugs provided by the government continued for about six months.[44]

Romero relapsed.[45] He destroyed his newly-regained relationship with his family, and he was unable to keep a job.[46] He brought suit against the federal government for negligence and intentional infliction of emotional distress under the Federal Tort Claims Act.[47] Romero sought damages from his loss of employment and familial relationships as a result of the government's actions.[48]

The district court held that Romero's illegal conduct barred his recovery against the government's alleged tortious conduct because, in order to state a claim, Romero had to rely on his illegal acts.[49] The court granted the government's motion to dismiss.[50]

Romero appealed and argued that the unlawful acts doctrine is an "anachronism" of New Mexico law, particularly considering New Mexico's subsequent adoption of comparative fault.[51] The government, however, highlighted the policy purposes served by New Mexico maintaining the unlawful acts doctrine. It argued that the unlawful acts doctrine serves public policy by "protecting the integrity of the justice system by preventing violators of the law from bringing claims based on their illegal acts."[52] The government argued that *Rodriguez's* holding "ensures that the unlawful acts doctrine will only apply when the plaintiff's illegal acts are an inseparable element of his cause of action."[53] The government distinguished the permitted recovery in *Rodriguez* from the present case by demonstrating the difference in causation: Rodriguez was able to state a claim separate from his own illegal conduct, and Romero could not.

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41. *Id.* at 378–379.

42. *Id.* at 378.

43. *Id.*

44. Brief of Defendant-Appellees at 13, United States v. Romero, 658 F. App'x 376 (10th Cir. 2016) (No. 15-2185).

45. *Romero*, 658 F. App'x at 378.

46. Romero v. United States, 159 F. Supp. 3d 1275, 1278 (D.N.M. 2015).

47. *Romero*, 658 F. App'x at 378–379. The court also acknowledged other arguments. This included a *Bivens* claims for violation of substantive due process rights to be free from bodily harm and to be free from deprivation of liberty without due process of law, violation of his First Amendment right a continuing relationship with his family and civil conspiracy to commit constitutional violations against him. The court still dismissed all claims against the government. *Id.*

48. *Romero*, 159 F. Supp. 3d at 1278.

49. *Id.*

50. *Id.* at 1276.

51. *Romero*, 658 F. App'x at 380. In a separate argument, Romero argued that "DEA agents committed outrageous government conduct by providing him with crack cocaine, violating his clearly established due process rights, and therefore they were not entitled to qualified immunity." *Id.* at 380–382.

52. Brief of Defendant-Appellees at 10, United States v. Romero, 658 F. App'x 376 (10th Cir. 2016) (No. 15-2185).

53. *Id.* at 13.

On August 10, 2016, the Tenth Circuit Court of Appeals upheld the district court's application of the unlawful acts doctrine, holding that the lower court did not err in barring Romero's claims against the government.[54] Although not binding on New Mexico courts, the court interpreted *Rodriguez* and stated that "the *Rodriguez* decision makes clear [that] the wrongful-conduct rule is not inherently incompatible with a comparative fault framework."[55] The court reasoned that Romero had failed to prove why the unlawful acts doctrine would not be applied, particularly since "[a]ll of his purported damages stem from these illegal acts."[56] Furthermore, as an established and recovering addict, Romero could not allege that the government caused his addiction, though he did attempt to allege that it "reignited" his addiction.[57] Hence, the court determined that the causation between illegal act and injury could not be extrapolated.[58]

While the court properly applied the unlawful acts doctrine as stated in *Desmet* and *Rodriguez*, it also stated that the unlawful acts doctrine and comparative fault can coexist, and are "not inherently incompatible."[59]

C. *Inge v. McClelland*: Applying and Interpreting *Rodriguez* and *Romero*

On June 26, 2017, in *Inge v. McClelland*, Judge Parker of the District Court, District of New Mexico applied the unlawful acts doctrine and dismissed plaintiffs' multiple claims, which included a claim of negligence.[60] Plaintiffs, Elizabeth and Johnny Inge, sued Defendant Bob McClelland, of Bob's Budget Pharmacy.[61] McClelland knowingly filled fraudulent prescriptions for the Inges for roughly a year and a half.[62] As a result of receiving and using these drugs, the Inges became addicted to the drugs, lost custody of their child, and lost their jobs.[63] They went through withdrawal symptoms, Mr. Inge was arrested for driving while intoxicated, and Mrs. Inge suffered an overdose.[64]

The Inges asserted five claims against McClelland and his pharmacy: civil damages under the Racketeering Influenced and Corrupt Organizations Act, actual and punitive damages for Defendant's negligent provision of pharmacy services, unfair trade practices, and Defendant's breach of a fiduciary duty by filling prescriptions for dangerous drugs in excessive numbers and dosage amounts.[65] McClelland brought a motion to dismiss, asserting that the wrongful conduct rule barred the Inges's claims.[66] The court granted the motion to dismiss and held that the Plaintiffs were barred from asserting their claims because the claims were based on

54. *Romero*, 658 F. App'x at 378–379.
55. *Id.* at 380.
56. *Id.*
57. *Id.* (internal citations omitted).
58. *Id.*
59. *Id.*
60. Inge v. McClelland, 257 F.Supp.3d 1158, 1161–1162 (D.N.M. 2016).
61. *Id.* at 1160.
62. *Id.* at 1162.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1163.

Plaintiffs' own illegal conduct, acquiring narcotics through fraudulent prescriptions.[67]

Since getting narcotics through fraudulent prescriptions is a violation of federal and state law, the Inges were barred from recovery under New Mexico's state tort law through the wrongful conduct rule.[68] Citing *Romero*,[69] the Court stated that "the wrongful conduct rule forecloses recovery by the plaintiff even where the defendant has participated equally in the illegal activity and in which this prohibited conduct has a sufficient causal nexus to plaintiff's asserted damage."[70] The Inges attempted to distinguish their case from *Romero* by arguing that unlike brokering crack cocaine sales, their presentation of prescriptions to a pharmacist was not illegal and therefore should not be barred the way the *Romero* plaintiff was.[71] However, the court was not persuaded since the Inges admitted to presenting fraudulent prescriptions to a pharmacy, conduct which is illegal under both federal and state law.[72]

The court relied on both *Romero* and *Rodriguez* in preventing the Inges from receiving recovery.[73] Ultimately, similar to *Rodriguez*, the court determined that although McClelland broke the law and partially enabled the Inges to abuse drugs, the "[d]efendant's unlawful actions cannot be said to have been a greater cause of Plaintiffs' injuries than Plaintiffs' own unlawful behavior" and thus the Inges were "at least equally at fault in this case."[74]

II. BACKGROUND OF THE UNLAWFUL ACTS DOCTRINE GENERALLY AND IN NEW MEXICO

a. Unlawful Acts Doctrine Generally

The unlawful acts doctrine stands for the affirmative defense that an individual partaking in an illegal or immoral act cannot recover from injuries resulting from the illegal or immoral act.[75] Its Latin namesake is *ex turpi causa non oritur actio*, meaning "from a dishonorable cause an action does not arise."[76] At the heart of the doctrine is the clean-hands notion that "[n]o polluted hand shall touch the pure fountains of justice."[77]

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67. *Id.*

68. *See id.*

69. Romero v. United States, 658 F. App'x. 376 (10th Cir. 2016) (unpublished) (citing Orzel, 449 Mich. 550, 537 N.W.2d 208, 212–13 (1995)).

70. *Inge*, 257 F.Supp.3d at 1164 (internal quotation marks omitted).

71. *Id.* at 1167.

72. *Id.* at 1168.

73. *Id.* at 1163, 1168.

74. *Id.* at1168.

75. DOBBS, ET. AL., *supra* note 5, § 228.

76. Prentice, *supra* note 7, at 54.

77. Prentice, *supra* note 7, at 53 (quoting Chief Justice Wilmot) (internal quotation marks omitted).

Ex turpi causa non artiur actio can be traced to English common law beginning in eighteenth century[78] contract law.[79] Contract law has a fundamental concept that illegal bargains will not be enforced by the courts;[80] the courts will not dirty their own hands. Contracts may also be invalidated for public policy reasons, such as equitable arguments.[81] Consequently, the rationale of the unlawful acts doctrine in contract law is that "in some instances the freedom to contract is outweighed by broader societal interests."[82]

Eventually, the doctrine expanded beyond contracts and became an affirmative defense to tort claims involving unlawful acts by a plaintiff. Some legal scholars have suggested that this shift to torts was a response to the increase in what some saw as "frivolous" plaintiff claims.[83] Other scholars have defended the utility of the doctrine as a torts defense because it carries this public policy argument into tort recovery.[84] This argument highlights the utility of a strong public policy against rewarding illegal acts. Moreover, as one legal scholar emphasizes, while the unlawful acts defense is "normally contingent on the causal connection between the plaintiff's conduct and her harm," it is less concerned with the plaintiff's contribution to the harm "than in the fact that the plaintiff's conduct was offensive to the public at large."[85]

However, some scholars and courts believe the unlawful acts doctrine should be entirely abolished.[86] Often, this notion is based on the belief that the unlawful acts doctrine bears a strong resemblance to contributory negligence – a system that unforgivingly bars plaintiffs' recovery.[87] Some have voiced a distrust of this expansion from contracts to torts because it becomes too confusing to apply the defense in that context and the "[s]lavish emulation of the contract principles in an altogether different situation" might lead to "confusion of the real issue before a court faced with the tort problem."[88]

Notable cases illustrate both the benefit and downside of the unlawful acts doctrine in tort cases. A particularly infamous case is the New York City "millionaire

78. Prentice, *supra* note 7, at 57 n.21 (stating that the ex turpi causa doctrine "had its origin no later than the eighteenth century and was directed primarily to contracts" (citing *Godbolt v. Fittock*, 1963 N.S.W. St. R. 617, 627 (Austl.)). For a thorough discussion of the history of the unlawful acts doctrine, see Prentice, *supra* note 7 and Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011 (2001–2002).

79. *See* Bruce MacDougall, *Ex Turpi Causa: Should a Defence Arise from a Base Cause*, 55 SASK. L. REV. 1, 2 (1991)

80. Prentice, *supra* note 7, at 57 (citing 5 SAMUEL WILLISTON, CONTRACTS § 1630 (2d ed. 1937)).

81. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 22-1 (2d ed. 1977).

82. Prentice, *supra* note 7, at 59.

83. *See id.* at 55; *see also* King, Jr., *supra* note 79, at 1017 (stating that there are new "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").

84. *See, e.g.*, Oden v. Pepsi Cola Bottling Co., 621 So. 2d 953, 955 (Ala. 1993).

85. Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177 (2006). It is a rule that lends itself to policy arguments, and some courts have even called it the "public policy defense." *See* Goldfuss v. Davidson, 679 N.E.2d 1099 (Ohio 1997).

86. *See, e.g.*, Prentice, *supra* note 7, at 54; *see also* King, Jr., *supra* note 78, at 1018.

87. *See* Prentice, *supra* note 7.

88. G.H.L. Fridman, *The Wrongdoing Plaintiff*, 18 MCGILL L.J. 275, 295 (1972).

mugger," who made headlines when he recovered millions by suing the police officers who injured him while he was attempting to commit a robbery.[89] The public was outraged by such recovery.[90] However, the doctrine has also barred a Virginia woman from recovering in a sexual tort because the intercourse was premarital, and thus illegal.[91] It has also been successfully used to prevent a twelve-year-old rape victim from recovering civil damages from her attacker because she had an illegal abortion.[92] The abortion procedure had complications which resulted in neurological damage, but since the pregnancy was past the legal period, the abortion was illegal and the girl's claim against her physician was barred.[93]

Across the country, jurisdictions have dealt differently with whether to adopt the unlawful acts doctrine, and whether it can exist with comparative fault.[94] For example, some jurisdictions have the unlawful acts doctrine,[95] but also do not have comparative fault and therefore circumvent any tension between the two, as contributory negligence is more akin to the unlawful acts doctrine.[96] Other jurisdictions[97] have explicitly rejected the unlawful acts doctrine and have instead

89. *See* McCummings v. New York City Transit Auth., 613 N.E.2d 559 (N.Y. 1993); *see also Mugger Is Allowed To Keep Jury Award*, NEW YORK TIMES, November 30, 1993.

90. *Court Awards Mugger Shot By Cop $4.3 Million*, CHICAGO TRIBUNE, April 8, 1993.

91. Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) ("The very illegal act [of premarital sexual intercourse] to which the plaintiff consented and in which she participated produced the injuries and damages of which she complains.")

92. Symone T. v. Lieber, 613 N.Y.S.2d 404 (N.Y. App. Div. 1994).

93. *Id.*

94. *Cf.* King, Jr., *supra* note 78.

95. *See, e.g.*, King, Jr., *supra* note 78; *see also* Oden v. Pepsi Cola Bottling Co., 621 So. 2d 953 (Ala. 1993); Ardinger v. Hummell, 982 P.2d 727 (Alaska 1999); Anderson v. Miller, 559 N.W.2d 29 (Iowa 1997); Feltner v. Casey Family Program, 902 P.2d 206, 207–08 (Wyo. 1995) (applying the wrongful conduct rule and holding "on the grounds that public policy forecloses the recognition of such claims, that Wyoming will not recognize a claim for relief which is dependent upon a plaintiff's own illegal conduct" and declaring the unlawful acts doctrine the "prevailing rule in American jurisdictions.").

96. Alabama is an example of a state with both contributory negligence and the unlawful acts doctrine. *Oden*, 621 So.2d 953, 955 (barring recovery for a 14-year-old's death when a soda machine fell on him while he was attempting to steal from it. The court stated that it "bar[s] 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."); *Ex parte* W.D.J., 785 So.2d 390, 393 (Ala. 2000) (barring plaintiff's recovery from drinking and driving and assault and explaining that the doctrine aims to ensure that "those who transgress the moral or criminal code shall not receive aid from the judicial branch of government").

97. *See, e.g.*, Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (stating that "it is well established that a person can recover in tort for injury suffered as a result of his own criminal activity."); Adams v. Smith, 201 S.E.2d 639 (Ga. Ct. App. 1973) (stating that a person does lose all rights while committing an illegal act); Ashmore v. Cleanweld Products, Inc., 672 P.2d 1230, 1231 (Or. Ct. App. 1983); Kelly v. Moguls, 632 A.2d 360 (Vt. 1993) (rejecting the argument that allowing a claim for injury to victim would allow an individual to profit from his own wrongdoing); Tug Valley Pharm., LLC v. All Plaintiffs Below in Mingo County, 773 S.E.2d 627, 633 (W. Va. 2015).

opted for a comparative fault analysis.[98] Finally, New York[99] has created a hybrid system that applies both the unlawful acts doctrine and comparative fault, seemingly allowing both systems to coexist in harmony.[100]

b. Policy of Unlawful Acts Doctrine

As a doctrine that has sometimes been called the public policy defense,[101] the unlawful acts doctrine has a multitude of policy rationales for its existence. One legal scholar compiled 19 different policy arguments that courts have cited in applying and justifying the doctrine.[102] Essentially, these policy points can be described in three groupings.

First, the most often cited purpose for the unlawful acts doctrine is to avoid rewarding illegal actions with monetary relief.[103] Under this rationale, the "policy derives from the rule that one may not profit from one's own wrongdoing."[104] It is a rationale that appeals to society's sense of right and wrong.[105] This circles back to society's general sense of justice in reserving recovery and the justice system to those who did not create the harm, particularly an illegal harm.[106] However, a criticism of this justification is that since tort law generally aims to make a plaintiff whole through compensatory damages, then these damages are not a reward, but rather mere compensation.[107]

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98. *Tug Valley Pharm., LLC*, 773 S.E.2d at 631–32 (rejecting the unlawful acts doctrine in support of comparative fault and stating that the unlawful acts doctrine essentially permits the court to substitute its judgment for that of the traditional fact-finder—the jury—and therefore 'may also invite judges to vent their moral sensibilities or react to anticipated public indignation based on the moral flavor of the month) (internal quotation marks and citation omitted); *see also* Bowman v. Barnes, 282 S.E.2d 613 (W.Va. 1981) (demonstrating West Virginia's comparative fault system); Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982) (same).

99. Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984) (precluding recovery of a 15-year-old plaintiff who was injured while constructing a pipe bomb because the injury was a direct result of intentional participation in a criminal act); Manning v. Brown, 689 N.E.2d 1382 (N.Y. 1997) (creating a two-prong test of when to apply the unlawful acts doctrine: the tests asks (1) how egregious and hazardous the illegal or immoral act was and (2) how directly related the illegal or immoral act was to the injury seeking recover); *see also* Alami v. Volkswagen of Am., Inc., 97 N.Y.2d 281, 288 (N.Y. 2002).

100. *See* Orzel *ex rel.* Orzel v. Scott Drug Co., 537 N.W.2d 208, 210 (Mich. 1995) (barring a plaintiff's recovery in a claim against a drug company for negligently supplying pharmaceuticals and leading to addiction.) The court rationalized that "courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." However, the court also found that a "plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries," seemingly applying a form of comparative fault. *Id.* at 217.

101. *See* Goldfuss v. Davidson, 679 N.E.2d 1099, 1104 (Ohio 1997).

102. King, Jr., *supra* note 78, at 1043–61. This article ultimately finds all 19 of these arguments unpersuasive and argues that the unlawful acts doctrine should be definitively repudiated. The author calls these rationales "stale smorgasbord of rationales."

103. *Id.* at 1043–44.

104. *Manning*, 689 N.E.2d at 1384.

105. *See* Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981) (stating that to allow recovery of an individual suing her psychiatrist for negligence in failing to prevent her from murdering her ex-husband "would be, plainly and simply, wrong as a matter of public policy").

106. King, Jr., *supra* note 78, at 1045.

107. *Id.* ("If a plaintiff in a tort case is simply entitled to be made whole by the award of compensatory damages, where is the 'profit'?")

Second, the unlawful acts doctrine purports to deter and discourage hazardous acts and illegal conduct.[108] This rationale follows that to create a policy in which one cannot recover sends a clear message that the law must always be obeyed.[109] To allow otherwise would "condone and encourage illegal conduct."[110]

Third, some justify the unlawful acts doctrine as concern over public reactions and maintaining credibility of the court. The courts do not want the public to "view the legal system as a mockery of justice."[111] To allow those committing illegal acts to benefit from them would discredit the judicial system. In this rationale, then, those involved in illegal conduct are deemed "outlaws" whose interests expand outside "the remedial ambit of legal beneficence."[112]

However, some believe that the application of the unlawful acts doctrine is "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."[113]

c. Unlawful Acts Doctrine in New Mexico

New Mexico established the unlawful acts doctrine in 1950 in *Desmet v. Sublett*.[114] The New Mexico Supreme Court held that "plaintiff's violations of the motor vehicle license laws preclude a recovery for the loss of use of the truck" and recovery was denied entirely.[115] However, at the time *Desmet* was decided and the unlawful acts doctrine was adopted, New Mexico was still a contributory negligence state.[116] While the doctrine was raised in contract cases in New Mexico,[117] it was not raised again as a defense to negligence in torts claims until *Rodriguez*.

d. Unlawful Acts Doctrine's Roots in Contributory Negligence

Contributory negligence completely bars a plaintiff's recovery if found at fault, regardless of the apportionment of fault to both plaintiff and defendant.[118] Although it bears clear similarities, the unlawful acts doctrine differs from contributory negligence. The unlawful acts doctrine's application may be more severe and restrictive than contributory negligence since it bars any recovery contingent on illegal act, whereas, contributory negligence will also factor in

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108. *Id.*

109. *Id.*

110. Orzel *ex rel.* Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995).

111. *Id.*

112. King, Jr., *supra* note 78, at 1053.

113. *Id.* at 1052.

114. 1950-NMSC-057. In this case, the plaintiff was suing under the tort of conversion regarding a dispute in which the plaintiff had improper license plate registration.

115. *Id.* ¶ 16.

116. *See* Joseph Goldberg, *Judicial Adoption of Comparative Fault in New Mexico: The Time is at Hand,* 10 N.M. L. REV. 1, 3 (1980) ("The traditional defense of contributory negligence has long been and remains the law in New Mexico.").

117. *See, e.g.*, Bank of New Mexico v. Freedom Homes, Inc., 1980-NMCA-064, ¶ 16, 612 P.2d 1343; Fleming v. Phelps-Dodge Corp., 1972-NMCA-060, ¶ 19, 486 P.2d 1111; P.C. Carter Co. v. Miller, 2011-NMCA-052, ¶ 26, 253 P.3d 950.

118. DOBBS, ET. AL., *supra* note 5, § 228.

causation. There is some confusion here, and "[t]he line between the contributory negligence defense and the [unlawful acts] doctrine is not always drawn correctly."[119] Still, the distinction stems from the fact that the "former focuses on the fact that the plaintiff's conduct endangered herself, whereas the latter focuses on the unlawfulness of the plaintiff's conduct in relation to others."[120] While contributory negligence requires an additional analysis of whether the plaintiff was negligent,[121] under the unlawful acts doctrine, the plaintiff is categorically barred from recovery if partaking in any illegal or immoral activity. As such, a key difference between these two approaches is the point at which each is applied. While contributory negligence is a categorical bar when a plaintiff's negligence is found, the unlawful acts doctrine is a categorical bar at the threshold of the case.

III. BACKGROUND OF COMPARATIVE FAULT GENERALLY AND IN NEW MEXICO

a. Comparative Fault Generally

Comparative fault[122] is a system that apportions fault in negligence claims between the defendant and plaintiff when both are negligent.[123] Thus, comparative fault means that the plaintiff's recovery is reduced in proportion to the plaintiff's own negligence.[124] This means that a plaintiff might be at fault 65%, but can still recover for the defendant's 35% of fault.[125] Contributory negligence, on the other hand, completely bars the plaintiff's recovery when the plaintiff is also found to have been at fault, regardless of the defendant's apportionment of fault.[126] Today, contributory negligence is only practiced by five jurisdictions.[127] Modified comparative fault, in which the plaintiff typically cannot recover if his fault is greater

119. Perry, *supra* note 69, at 207.

120. *Id.*

121. DOBBS, ET. AL., *supra* note 5, § 228.

122. For further discussion on comparative fault and its effect on other tort doctrines and defenses, see Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U.L. REV. 859 (1996).

123. *See* Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343 (1979–1980); *see also* Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1, 1–2 (1984) ("No court, however, has explicitly applied comparative fault principles to intentional torts. This 'rule' is supported by social policy considerations against sanctioning, or even appearing to facilitate, self-help—i.e., the taking of the law into one's own hands—by defendant tortfeasors. . . . [And,] negligence and intentional conduct cannot be compared because they are different in kind." (internal quotations omitted)).

124. DOBBS, ET. AL., *supra* note 5, § 220.

125. *See, e.g.*, Safeway, Inc. v. Rooter 2000 Plumbing and Drain, 2016-NMSC-009, 368 P.3d 389 (applying an apportionment of damages).

126. RESTATEMENT (FIRST) OF TORTS § 463 (1934) (defining contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff's harm").

127. RESTATEMENT (THIRD) OF TORTS: *Apportionment Liab*. § 17 (2000).

than 51%, is practiced in thirty-three jurisdictions.[128] Pure comparative fault means that the plaintiff may recover for any apportionment of fault the negligent defendant is given. This means a plaintiff can recover even when he is more than 51% at fault. This regime is practiced in twelve states.[129]

b. Policy of Comparative Fault

The essential purpose of comparative fault is to "ameliorate the all-or-nothing harshness of the contributory negligence doctrine."[130] While contributory negligence allows one of the contributing wrongdoers to circumvent all liability, comparative fault divides the liability between parties.[131] The New Mexico Supreme Court has said that comparative fault's adoption and contributory negligence's rejection rests upon the "undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered."[132]

Courts have called the comparative fault system the more "humane" and "fundamentally just" system of apportioning fault.[133] The benefits of comparative fault include: "(1) denying recovery for one's own fault; (2) permitting recovery to the extent of another's fault; and (3) holding both parties responsible to the degree that they have caused harm."[134] Essentially, comparative fault serves to reduce the harshness of contributory negligence, while still holding each individual party responsible for their own actions.[135]

c. Comparative Fault in New Mexico

New Mexico's system of pure comparative fault was established in *Scott v. Rizzo* and is rooted in fairness to both plaintiffs and defendants.[136] New Mexico tort law is "premised on the notion that each concurrent tortfeasor should bear responsibility for an accident in accordance with his or her fault."[137] The New Mexico Supreme Court adopted pure comparative fault and abolished contributory negligence in 1981.[138]

In *Scott*, the New Mexico Supreme Court held that "the doctrine of comparative [fault] more equitably apportions damages and [. . .] the interest of

128. MATTHIESEN, WICKERT & LEHRER, S.C., CONTRIBUTORY NEGLIGENCE/COMPARATIVE FAULT LAWS IN ALL 50 STATES (2017), https://www.mwl-law.com/wp-content/uploads/2013/03/contributory-negligence-comparative-fault-laws-in-all-50-states.pdf.

129. *Id.*

130. Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 344 (1979–1980).

131. *See* Scott v. Rizzo, 1981-NMSC-021, ¶ 23, 634 P.2d 1234.

132. *Id.*

133. *Id.*; *see also* Tug Valley Pharm., LLC v. All Plaintiffs Below in Mingo County, 773 S.E.2d 627, 631 (W. Va. 2015).

134. Safeway, Inc. v. Rooter 2000 Plumbing and Drain, 2016-NMSC-009, ¶ 19, 368 P.3d 389 (discussing *Scott*, 1981-NMSC-021, ¶ 29).

135. *Scott*, 1981-NMSC-021, ¶ 24.

136. *See* Terrazas v. Garland & Loman, Inc., 2006-NMCA-111, 142 P.3d 374.

137. Otero v. Jordan Restaurant Enterprises, 1996-NMSC-047, ¶ 11, 922 P.2d 569.

138. *Scott*, 1981-NMSC-021, ¶ 5.

fundamental justice."[139] Further, the court reasoned that the "contributory negligence rule has long since reached that point of obsolescence."[140] The court further reasoned that the doctrine's goals were (1) to better apportion fault among negligent parties contributing to the proximate cause of the injury and (2) to apportion the total damages proportionality.[141] Therefore, under a comparative fault regime, "rules designed to ameliorate the harshness of the contributory negligence rule are no longer needed."[142]

However, the court declined to analyze how this new rule would affect other existing legal principles in New Mexico,[143] such as the pre-established unlawful acts doctrine. Rather, the court suggested that "common sense will assist in its fair application" in distinguishing between contrasting principles.[144] The court concluded by stating that comparative fault "shall supersede prior law in New Mexico."[145]

d. Comparative Fault and the Unlawful Acts Doctrine

Thus, after the New Mexico Supreme Court's adoption of comparative fault, the status and viability of the unlawful acts doctrine has been ambiguous. The tension between the two doctrines mostly stems from the unlawful acts doctrine's strong similarities and historical ties to contributory negligence. The unlawful acts doctrine categorically bars recovery of a plaintiff before a negligence analysis may even take place. Thus, the unlawful acts doctrine seems more akin to contributory negligence than to comparative fault. The contemporaneous existence of comparative fault and the unlawful acts doctrine initially appears problematic because comparative fault clearly and unequivocally repudiated contributory negligence,[146] but a potential remnant of it still exists in the form of the unlawful acts doctrine.

On the other hand, the policy arguments of the unlawful acts doctrine may counter this apparent rejection. The *Scott* court also stated that doctrines will be analyzed to maintain consistency with the court's public policy.[147] Thus, the unlawful acts doctrine may be able to supplement comparative fault and fill in gaps in which it is too forgiving. Conversely, comparative fault may have already supplanted the unlawful acts doctrine.

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139. *Id.* ¶ 5.

140. *Id.* ¶ 15.

141. *Id.* ¶ 20.

142. *Id.* ¶ 17 (quoting Kaatz v. State, 540 P.2d 1037 (Alaska 1975)); *see also, e.g.*, Baxter v. Noce, 1988-NMSC-024, 752 P.2d 240 (holding that the theory of complicity was implicitly overruled with the adoption of comparative fault).

143. *Id.* ¶ 19.

144. *Id.*

145. *Id.* ¶ 30.

146. *See id.*

147. *See id.* ¶¶ 19, 30.

IV. HOW NEW MEXICO COURTS APPLY DEFENSES FOLLOWING COMPARATIVE FAULT: AN EXAMPLE IN *BAXTER V. NOCE*

a. *Baxter v. Noce*

In exploring how other doctrines are influenced by *Scott*'s adoption of comparative fault, it is useful to examine how New Mexico's adoption of comparative fault influenced other doctrines. Hence, particularly useful here is the New Mexico Supreme Court's analysis of the legal status of the theory of complicity as a defense to a dramshop claim.[148] Although no party in *Rodriguez, Romero*, or *Inge* raised this case, its similarities help illuminate the future for the unlawful acts doctrine.

The complicity doctrine bars a claim under the dramshop act if the plaintiff had an "active role in producing the intoxication that harmed him."[149] Sometimes called the "noninnocent party doctrine,"[150] this defense aims to protect the innocent.[151] It is based on the plaintiff's involvement in the claimed wrong and "operates as a complete bar to recovery despite the existence of comparative negligence statutes in the jurisdiction."[152] The distinction between the complicity defense and contributory negligence is that contributory negligence relates to the plaintiff's role in causing his own injury, while complicity deals with the plaintiff's role in causing the inebriate's intoxication.[153] Further, complicity is more than mere negligence because complicity is the act of encouraging or voluntarily participating in the intoxication,[154] while negligence merely constitutes breaching a duty. Some jurisdictions that have dramshop statutes have also adopted the complicity defense. In *Baxter v. Noce,* the defendants suggested its adoption in New Mexico.[155]

In *Baxter v. Noce*, Wayne K. Baxter ("Baxter") and Robert Reynolds, Jr., ("Reynolds") were drinking at Shady Grove Truck Stop & Café and La Fiesta Night Club & Bar when it was "reasonably apparent" they were intoxicated. Later in the evening, Reynolds drove with Baxter as a passenger, got in a car accident, and they both died as a result.[156] The issue for the New Mexico Supreme Court was whether an intoxicated passenger of a vehicle could have a cause of action under New Mexico's dramshop statute against the taverns that served alcohol to both the passenger and the driver of the vehicle.[157]

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148. Baxter v. Noce, 1988-NMSC-024, 752 P.2d 240. Dram-shop liability is civil liability of a commercial seller of alcoholic beverages for personal injury cause by an intoxicated customer. *Dram-shop liability,* BLACK'S LAW DICTIONARY (10th Ed.).

149. Heidi A.O. Fisher, *Torts—Complicity as a Comparative Fault in Minnesota: The Essence of a Doctrine is Lost*, 27 WM. MITCHELL L. REV. 1375, 1376 (2000).

150. 45 AM. JUR. 2D, *Intoxicating Liquors* § 493.

151. Fisher, *supra* note 149, at 1388.

152. *Baxter*, 1988-NMSC-024, ¶ 21, 752 P.2d 240 (Stowers, J., dissenting).

153. *See id.* ¶ 22.

154. 45 AM. JUR. 2D, *Intoxicating Liquors* § 493.

155. *See Baxter*, 1988-NMSC-024, ¶ 4.

156. *Id.* ¶ 1.

157. *Id.* ¶ 4.

Baxter's personal representative brought a wrongful death action against the owners of the bars.[158] The Court of Appeals found that Baxter died as a result of his voluntary intoxication, and therefore, was the proximate cause of his claim and could not recover. As a policy point, the Court of Appeals determined that "[p]ublic policy should not protect adults from their own conscious folly."[159]

The New Mexico Supreme Court reversed and held that Baxter's claim was not barred because the lower court had "overlooked" the significance of the adoption of comparative fault.[160] It rejected the defense of complicity because a plaintiff's negligent conduct cannot entirely bar recovery in a comparative fault jurisdiction.[161] While rejecting it, the court stated that although "superficially dissimilar," the complicity defense is still "only a hybrid form of contributory negligence" and moreover, is "identical . . . in application."[162] Thus, the Court held that the action "sounds in negligence" and comparative fault theories "must govern."[163] The Court emphasized that comparative fault "*shall* apply to suits sounding negligence."[164]

The court determined that other jurisdictions that apply comparative negligence only to common-law negligence actions "fail to recognize that the comparative negligence doctrine readily embraces within it the defense concept that plaintiff[s] should not profit from his own wrong."[165] Therefore, comparative fault already accounts for the policy considerations that attract courts to these other "noninnocent" defenses. The court even went as far as to say that the Court of Appeals had "inappropriately overrul[ed] [the Supreme Court's] pronouncement in *Scott v. Rizzo*" by barring Baxter with the complicity defense.[166]

Additionally, dismissing the plaintiff's claim at the threshold, far before trial, misapplied both the spirit of comparative fault and the proper procedure because it "erroneously usurp[ed] the jury's function as the trier of facts."[167] The court was concerned that this threshold application of the complicity defense was an improper use of court's own fact-finding determination of negligence without considering duty or breach.[168]

The court highlighted the proper negligence analysis and reasoned that barring a plaintiff's claim before a proper breach, duty, and proximate cause findings had occurred was putting "the cart before the horse" and not the accurate analysis.[169] Rather, the court stated that in comparative fault jurisdictions, such as New Mexico,

158. *Id.* ¶ 1.

159. *Id.* ¶ 3 (quoting *Baxter v. Noce,* 1987-NMCA-119, ¶ 12, 752 P.2d 245, *rev'd*, 1988-NMSC-024, 752 P.2d 240) (internal citations omitted).

160. *Id.* ¶ 10.

161. *Id.* ¶ 10.

162. *Id.* ¶ 14.

163. *Id.* ¶ 15.

164. *Id.* (emphasis in original).

165. *Id.* ¶ 13.

166. *Id.*

167. *Id.* ¶ 15.

168. *Id.* ¶ 10.

169. *Id.* ¶¶ 10–11.

a plaintiff's negligent acts cannot entirely bar recovery, but instead serve to reduce the amount of damages awarded.[170]

More recently, the New Mexico Court of Appeals in *Mendoza v. Tamaya Enterprises, Inc.*, confirmed that this complicity defense is dead in New Mexico dramshop cases.[171] The Court affirmed that under comparative fault, the question of amount of fault or complicity of the plaintiff is given to the "province of the jury."[172]

b. Application in New Mexico: Implications of *Baxter*

Turning to *Baxter*'s rejection of the defense of complicity, we can glean that the unlawful acts doctrine likewise does not fit in New Mexico negligence law. There are three points in *Baxter* that illustrate that the unlawful acts doctrine is not functional in New Mexico.

First, the complicity defense bears strong resemblance to the unlawful acts doctrine. In *Baxter*, the complicity theory was dismissed by the court for being a relic of contributory negligence era and "a hybrid form of contributory negligence." Accordingly, the unlawful acts doctrine is likewise a relic of contributory negligence. Second, the court in *Baxter* emphasized that other doctrines and defenses following the adoption of contributory negligence were subject to a comparative fault analysis. This clearly "supplanted the all-or-nothing bar of contributory negligence" to instead provide a more just result of balancing the parties' fault.[173] Therefore, comparative fault superseded defenses that were at odds with it, such as the unlawful acts doctrine. Third, these categorical and threshold bars would inhibit comparative fault's ability to use juries as the fact finder, as intended.

The similarity between the complicity defense and the unlawful acts doctrine demonstrates that the unlawful acts doctrine may no longer be viable in New Mexico. The complicity defense prevents recovery from an act in which the plaintiff had an active role in the voluntary intoxication. Likewise, the unlawful acts doctrine prevents recovery from an act in which the plaintiff voluntarily engaged in illegal conduct. The complicity defense's policy aims to provide accountability and prevent "noninnocent" parties from recovering.[174] Similarly, the unlawful acts doctrine's policy aims to provide culpability to particularly egregious or illegal acts and to prevent individuals from benefiting from their wrongdoing. While the complicity defense applies in dramshop cases only, its application bears a strong resemblance to the unlawful acts doctrine's application in negligence cases. Thus, just like the court rejected the complicity defense for being inconsistent with comparative fault, the unlawful acts doctrine likewise conflicts with comparative fault.

Second, *Baxter* highlights that comparative fault reigns above the other defenses and doctrines. The court explained that *Scott* did not abolish these other doctrines completely, but instead they are all now governed by the comparative fault analysis.[175] This means that if another doctrine is inconsistent with comparative fault,

170. *Id.*

171. *See* Mendoza v. Tamaya Enterprises, Inc., 2010-NMCA-074, 238 P.3d 903.

172. *Id.* ¶ 22.

173. *Baxter*, 1988-NMSC-024, ¶ 12.

174. *Id.* ¶ 21 (Stowers, J., dissenting).

175. *Id.* ¶ 12.

comparative fault would be the dominant doctrine and would effectively overrule the other, inconsistent doctrine. In *Baxter*, comparative fault did not leave space for the complicity defense. The defense was a relic of contributory negligence because it barred recovery in its entirety, regardless of the defendant's negligence. Likewise, the unlawful acts doctrine not only is effectively analogous to contributory negligence, but also has roots in the era of contributory negligence.[176]

Finally, the role of the jury as the fact finder is critical to the application of comparative fault. Threshold prohibitions of these defenses inhibit the jury from providing its fact-finding function because the judge makes a determination of the plaintiff's fault instead. The court in *Baxter* voiced concern over this situation, in which the jury's role is effectively "usurp[ed]" by the judge and thus the judge can find negligence before analyzing duty or breach.[177] The court found this to be problematic and thus held that the complicity defense is not valid. The unlawful acts doctrine similarly negates the jury's function as trier of fact and accordingly faces the same problems in not adhering to the proper procedure.

V. IMPLICATIONS AND SOLUTIONS: MOVING FORWARD

While New Mexico has established a pure comparative fault system,[178] *Rodriguez* has subsequently sparked the question of how comparative fault can interact and coexist with the preexisting unlawful acts doctrine. The history and policy of the unlawful acts doctrine and comparative fault regime emphasize the tension between the two. In untangling this confusion and moving forward, New Mexico courts should leave questions of negligence to comparative fault analysis.[179] Ultimately, the unlawful acts doctrine provides minimal value to New Mexico, if any, since comparative fault analysis accounts for many of the policy purposes of the unlawful acts doctrine. In questions of non-negligence tort claims,[180] the answer is less clear; however, the unlawful acts doctrine may not need to be utilized in order to dismiss the claim.[181]

First, *Rodriguez* shows that the doctrine does not practically work in the comparative fault regime. The court determined that Rodriguez could extrapolate a claim that was separate from his own illegal action, and thus, permitted recovery. This analysis was similar to a causation analysis in comparative fault. The *Rodriguez* court also agreed that the extension of the unlawful acts doctrine "would abrogate judicially [. . .] mandated comparative fault analysis in a wide range of tort

176. *See* King, Jr., *supra* note 78, at 1020.

177. *Baxter*, 1988-NMSC-024, ¶ 15.

178. *See* Scott v. Rizzo, 1981-NMSC-021, 634 P.2d 1234; Reichert v. Atler, 1992-NMCA-134, ¶ 34, 875 P.2d 384 (construing N.M. STAT. ANN. § 41-3A-1 (1987)); *see also* Bartlett v. New Mexico Welding Supply, Inc. 1982-NMCA-048, 646 P.2d 579.

179. *See, e.g.*, Rodriguez v. Williams, 2015-NMCA-074, ¶ 7, 355 P.3d 25.

180. *See, e.g.*, Romero v. United States, 658 F. App'x 376, 279–381 (10th Cir. 2016).

181. For example, in *Romero*, a 12(b)(6) motion to dismiss for failure to state a claim would potentially also be successful since the plaintiff likely could not carry his burden of proving negligence because it would likely fail at causation. *Id.*

claims."[182] Consequently, the unlawful acts doctrine does not fit within a negligence claim in which comparative fault may accurately be applied.

Second, the unlawful acts doctrine is strikingly like contributory negligence. When the New Mexico Supreme Court expelled contributory negligence, it rejected the policy of placing restrictive bars on the plaintiff's right of recovery merely because the plaintiff was partially at fault in bringing about her own injury. Moreover, in *Baxter*, the complicity defense was expelled from New Mexico because it conflicted with comparative fault and was too similar to contributory negligence. The unlawful acts doctrine is grounded in this same rejected policy, and coincides with contributory negligence. Here, common sense and logic suggest that the New Mexico Supreme Court aimed to disband the unlawful acts doctrine in New Mexico and replace it with comparative fault.

However, in the outlier cases that do not match the clear negligence analysis, such as intentional torts or a breach of a fiduciary duty, the outcome and solution are less clear. *Romero* and *Inge* serve as key examples of this scenario. Notably, *Romero*'s unique fact pattern and muddled claims of negligence and intentional infliction of emotional distress are likely already outside the scope of comparative fault analysis since they do not "sound in negligence." While the remedy for uniformity in these outlier cases is uncertain, practitioners should consider this historical evolution of the unlawful acts doctrine in using it as a defense. In the other common situations of negligence claims, comparative fault reigns over the unlawful acts doctrine.

CONCLUSION

Since New Mexico has adopted comparative fault and expunged contributory negligence,[183] the question remains whether the unlawful acts doctrine can still be viable in New Mexico. The question was raised in *Rodriguez* whether a plaintiff who engaged in illegal conduct could recover from the injury. This exposed an important question in New Mexico tort law: can defendants still contend that the unlawful acts doctrine, as a threshold matter, bars recovery of a wrong-doing plaintiff even after *Scott* and New Mexico's adoption of comparative fault? While the court permitted recovery in *Rodriguez*, it did not adequately answer the question, but instead, sidestepped it. Further, *Scott* left the issue open and said that "common sense" will guide the effect of comparative fault on these rules.[184]

In answering this question, this Comment has demonstrated that the unlawful acts doctrine is (1) incongruent with New Mexico's comparative fault regime and (2) already effectively and logically renounced in New Mexico's adoption of comparative fault. Hence, "common sense" here dictates that the unlawful acts doctrine cannot be utilized in claims that "sound in negligence."

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182. *Rodriguez*, 2015-NMCA-074, ¶ 12 (citing *Alami v. Volkswagen of Am., Inc*., 97 N.Y.2d 281 (N.Y. 2002)) (internal quotation marks omitted).

183. *See Scott*, 1981-NMSC-021, ¶¶ 23, 30 (holding that "a pure comparative negligence standard shall supersede prior law in New Mexico, and that a plaintiff suing in negligence shall no longer be totally barred from recovery because of his contributory negligence").

184. *Id.* ¶ 19.

Hopefully this Comment has exposed the problematic tension between two doctrines which grapple with how to apportion fault between multiple wrongdoing parties, and has suggested a benefit from consistency and predictability in comparative fault. While the policy of the unlawful acts doctrine may appear attractive, it is incongruent with New Mexico's comparative fault system and should therefore be abated.