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## ESSAY

# Extending Comparative Fault to Apparent and Implied Consent Cases

Aaron D. Twerski<sup>†</sup> & Nina Farber<sup>††</sup>

The move away from all-or-nothing responsibility in the law of torts has been remarkable. It began with the rejection of contributory fault as a complete bar to negligence and the substitution of comparative fault in its place,<sup>1</sup> but comparative fault now apportioning responsibility whether an action is brought in negligence,<sup>2</sup> strict products liability,<sup>3</sup> nuisance,<sup>4</sup> misrepresentation,<sup>5</sup> or express warranty.<sup>6</sup> In large part, it has swallowed not only issues of fault, but also those of proximate cause<sup>7</sup> and intervening cause.<sup>8</sup> Moreover, in many jurisdictions, proportional recovery now governs such cause-in-fact issues as lost chance in medical malpractice<sup>9</sup> and market share

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<sup>1</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 (AM. LAW INST. 2000) [hereinafter APPORTIONMENT RESTATEMENT]; DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 16.3 (2d ed. 2016). To date forty-six jurisdictions have rejected contributory fault as a complete bar. See AARON D. TWERSKI, JAMES A. HENDERSON, JR. & W. BRADLEY WENDEL, TORTS: CASES AND MATERIALS 488–89 (3d ed. 2012).

<sup>2</sup> APPORTIONMENT RESTATEMENT, *supra* note 1, § 1; DOBBS ET AL., *supra* note 1, § 16.3; TWERSKI, HENDERSON & WENDEL, *supra* note 1, at 488–89.

<sup>3</sup> COLO. REV. STAT. § 13-21-406 (2016); N.Y. C.P.L.R. § 1411 (McKinney 2016); *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978); see David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 78 (2000).

<sup>4</sup> See, e.g., *Tint v. Sanborn*, 259 Cal. Rptr. 902, 903–05 (Cal. Ct. App. 1989).

<sup>5</sup> Although, in general, comparative fault is not a defense to an intentional misrepresentation claim, it may be asserted in cases based on negligent misrepresentation. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997).

<sup>6</sup> See Owen, *supra* note 3, at 67–68.

<sup>7</sup> See e.g., *Archambault v. Sonoco/Northeastern, Inc.*, 946 A.2d 839, 855–56 (Conn. 2008).

<sup>8</sup> See, e.g., *Barry v. Quality Steel Prods., Inc.*, 820 A.2d 258, 269 (Conn. 2003); *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 107–08 (Ind. 2002).

<sup>9</sup> See TWERSKI, HENDERSON & WENDEL, *supra* note 1, at 247–54. The leading case advocating apportioning damages in lost-chance medical malpractice cases is *Herskovits v. Grp. Health Coop. of Puget Sound*, 664 P.2d 474 (Wash. 1983).

liability.<sup>10</sup> Even the once-universal rule that contributory fault is not a defense to an intentional tort has given way to comparative fault in some jurisdictions.<sup>11</sup>

The majority of jurisdictions adhere to the view that comparative fault should not apply to intentional torts despite<sup>12</sup> significant debate as to the legitimacy of the underlying rationales for continuing to do so.<sup>13</sup> This essay does not enter into the debate as to whether courts should retain the all-or-nothing paradigm for all intentional torts. Rather, the authors here suggest that there are certain cases where “lack of consent” is at issue in determining liability for an intentional tort that justify applying comparative responsibility principles in determining whether a plaintiff has either consented to the invasion of her person or not. Specifically, in cases where consent is predicated on apparent consent or implied consent, the all-or-nothing approach fails to take into account that both plaintiff and defendant may have been responsible for a miscommunication as to consent—or lack thereof. This essay focuses on well-known cases and situations where both parties likely contributed to a misunderstanding as to whether the plaintiff consented to the defendant’s conduct. When the court finds that both parties contributed to the misunderstanding it should apply comparative fault to reflect that reality.<sup>14</sup>

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<sup>10</sup> The leading case is *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

<sup>11</sup> See APPORTIONMENT RESTATEMENT, *supra* note 1, § 1 cmt. c, reporter’s notes.

<sup>12</sup> *Id.* at 14–16.

<sup>13</sup> See, e.g., Jake Dear & Steven E. Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984) (arguing that comparative fault should not apply to self-help intentional torts); William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641 (1984) (suggesting that in some intentional tort cases comparative fault should be adopted).

<sup>14</sup> The question of whether and when courts should opt for scalar or binary approaches to resolve issues of tort and/or criminal liability has been the subject of considerable scholarship. See, e.g., Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655 (2014); Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 ALA. L. REV. 855 (2016). Scholars have also examined whether scalar liability should be used to resolve issues of consent. See LEO KATZ, *WHY THE LAW IS SO PERVERSE* 163–72 (2011); Kenneth W. Simons, *Consent and Assumption of Risk in Tort and Criminal Law*, in *UNRAVELING TORT AND CRIME* 330 (Matthew Dyson ed., 2014); Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85, 94–97 (2008); Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RESERVE L. REV. 17 (2010). No writer, however, has yet confronted the use of comparative fault to resolve problems arising from inadequate or mistaken communication that is the fault of both the plaintiff and the defendant.

## I. CONSENT TO INTENTIONAL TORTS

It is hornbook law that consent negates liability for intentional torts.<sup>15</sup> Either actual or apparent consent operates as a bar to recovery for what would otherwise constitute an actionable intentional tort claim.<sup>16</sup> The doctrine of apparent consent bars recovery entirely where the plaintiff, by word or deed, leads the defendant to reasonably believe that the plaintiff consented to the conduct even though she was not actually willing to permit the invasion to her person or property.<sup>17</sup> The key issue in apparent consent cases is whether a reasonable person would have interpreted the plaintiff's conduct (verbal and non-verbal) as a signal to proceed with conduct that would otherwise be tortious. But, therein lies the problem. In determining whether a hypothetical reasonable person would have understood the signal as sufficient, courts faced with having to make an all-or-nothing decision generally focus only on one side of the equation in examining the plaintiff's verbal or physical cues. In such cases, a court's focus is either exclusively on whether the plaintiff sufficiently signaled her consent or, alternatively, on whether the defendant's apprehension of consent was reasonable. Either analysis misses an important dimension, namely the role of both parties in causing a possible miscommunication. The sufficiency of consent requires an understanding of the adequacy of the communication between both the plaintiff and the defendant, as there is a significant chance both parties may have been partially at fault in fostering the misunderstanding. In some cases, parties do not understand each other because of inadequate signaling by both parties.<sup>18</sup> In others, either party could easily have clarified the terms of the engagement.<sup>19</sup> In still others, the parties may have been involved in strategic behavior leaving the courts at sea as to how to interpret the facts.<sup>20</sup>

Miscommunication and misunderstanding are endemic to human conversation and human interaction, and parties to a communication often operate under a flawed perception as to the signals they project. Social psychologist Dr. Heidi Grant Halvorson offers the example of a participant in a team business meeting who intentionally puts on what he defines as his "active

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<sup>15</sup> See DOBBS ET AL., *supra* note 1, § 8.1.

<sup>16</sup> RESTATEMENT (SECOND) OF TORTS § 892A (AM. LAW INST. 1977).

<sup>17</sup> *Id.* §§ 892, 892A.

<sup>18</sup> See *infra* notes 25–29 and accompanying text.

<sup>19</sup> See *infra* notes 40–46 and accompanying text.

<sup>20</sup> See *infra* note 59 and accompanying text.

listening face” to communicate he values another participant’s input and then later learns the entire team thinks he is angry with them.<sup>21</sup> Indeed, differing cultural and societal norms play a significant role in communication. One example is the American employee who responds to his British boss’s invitation to an early lunch with “Yeah, that would be great,” which in turn leads the boss—who perceives “yeah” instead of “yes” as a sign of rudeness—to respond: “With that kind of attitude, you may as well forget about lunch.”<sup>22</sup> These cultural and societal norms may also play a role in an individual’s decision to consent. Take for example the Japanese businessman, intending to politely convey that he does not want to agree to a sale, states, “That will be very difficult” to a Norwegian client, who interprets the response as indicating “there are still unresolved problems, not that the deal is off.”<sup>23</sup> Likewise, it would be reasonable to expect that differences in socio-economic status, race, and gender may lead to misunderstandings between the parties.<sup>24</sup> When the issue of consent arises in litigation, the law may demand differing levels of clarity in the communication depending on how it values the underlying activity. Yet parties may be operating under differing perceptions as to the value of the activity and their perceptions may be relevant in assessing the degree of responsibility for the existence of apparent or implied consent.<sup>25</sup>

With the increased use of proportional recovery throughout the law of torts, it is time to examine whether the all-or-nothing paradigm should govern consent cases or whether many cases would be better decided by asking the trier of fact to decide what proportion of the fault for miscommunication should be relegated to each party. This essay will proceed by examining several classic textbook cases, familiar to most students who have

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<sup>21</sup> HEIDI GRANT HALVORSON, NO ONE UNDERSTANDS YOU AND WHAT TO DO ABOUT IT 69 (2015); see Emily Esfahani Smith, *Mixed Signals: Why People Misunderstand Each Other*, THE ATL. (Apr. 23, 2015), <http://www.theatlantic.com/health/archive/2015/04/mixed-signals-why-people-misunderstand-each-other/391053/> [<https://perma.cc/VBP5-RCXC>]; see also Boaz Keysar & Anne S. Henly, *Speakers’ Overestimation of Their Effectiveness*, 13 PSYCHOL. SCI. 207 (2002) (Speakers “underestimate the ambiguity of their own utterances . . . Such overestimation [of their effectiveness] could be a systematic source of miscommunication in natural conversation.”).

<sup>22</sup> NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 66–70 (2d ed. 1991) (examining communication across cultural barriers).

<sup>23</sup> *Id.* at 66.

<sup>24</sup> Ann C. Shalleck, *Feminist Legal Theory and the Reading of O’Brien v. Cunard*, 57 MO. L. REV. 371, 380–81 (1992).

<sup>25</sup> Robert H. Lande, *A Law & Economics Perspective on a “Traditional” Torts Case: Insights for Classroom and Courtroom*, 57 MO. L. REV. 399, 428–31, 452 (1992) (discussing the economic incentives for both plaintiff and defendant); see also Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010) (examining how social norms impact the perception of consent in cases of acquaintance rape).

taken torts, and inquire whether they would not have been better served by subjecting consent to a comparative fault analysis.

We do not suggest that comparative fault is appropriate in all consent cases. In some cases, in which the violation to human dignity is extremely high, the law should not allow the party to act unless the terms of engagement are extremely clear. Thus, for example, courts have required physicians to provide explicit information as to the risks of a proposed medical intervention.<sup>26</sup> Similarly, in cases involving violent crime, particularly sexual assault, only a clear and unambiguous communication that the plaintiff consented should absolve the defendant from liability. Indeed, where the issue is whether the plaintiff consented to sexual relations, precluding comparative fault is necessary to prevent juries from inferring such consent from casual relations or applying a heightened standard as to what a person must do to avoid rape that might be influenced by gender biases.<sup>27</sup> In these cases, the stakes are too high to permit one to act without clear consent. On the other hand, in many cases of apparent and implied consent, the invasion to human dignity is of lesser moment. This essay examines a host of cases in which the signaling between the parties is likely to be less formal and there is more likely to be a dispute after-the-fact as to what the parties agreed. To impose full responsibility on one party or another is to ignore the reality that the communication in these situations will be less than optimal and that both parties are responsible for the ambiguity.<sup>28</sup>

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<sup>26</sup> See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 780–82 (D.C. Cir. 1972), cert. denied, 409 U.S. 1064 (1972); *Scott v. Bradford*, 606 P.2d 554, 556–58 (Okla. 1979); see also *MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d 65, 71–72 (Mass. 1985), cert. denied, 474 U.S. 920 (1985) (warning that drug could cause potentially fatal blood clotting was inadequate because it did not warn that the drug could cause strokes).

<sup>27</sup> Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1416, 1460–61 (1999); see *infra* notes 107–112 and accompanying text. But see Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?*, 91 IND. L.J. 1363 (2016) (suggesting that in light of college binge drinking and the ambiguity of non-verbal cues in the “hook-up” culture and among college students, there are cases in which an individual claiming sexual assault may bear some responsibility for sending the alleged attacker the wrong message). In cases where both parties are intoxicated, comparative fault might well be appropriate in a civil case alleging rape.

<sup>28</sup> The trend in some jurisdictions to merge reasonable assumption of the risk into comparative responsibility supports the thesis of this essay. What was once an all-or-nothing defense in these jurisdictions is now viewed in comparative fault terms. See, e.g., N.Y. C.P.L.R. § 1411 (McKinney 2016); *Knight v. Jewett*, 834 P.2d 696, 701 (Cal. 1992). For a full list of jurisdictions that merge assumption of risk into comparative fault either by statute or by judicial decision, see VICTOR E. SCHWARTZ & KATHRYN KELLY, *COMPARATIVE NEGLIGENCE* § 9.04 (5th ed. 2015). Voluntary assumption of risk, like consent, was grounded in the theory that the plaintiff’s autonomous decision-making is an important variable in determining a tortfeasor’s liability. Yet, the extent of the plaintiff’s knowledge of the risk, the alternatives available to the plaintiff, and

## II. COMPARATIVE FAULT IN APPARENT CONSENT CASES: AMBIGUOUS SIGNALING AND FAILURE TO COMMUNICATE

In cases where consent to intentional tort is at issue, the ambiguity may arise from either the defendant's or the plaintiff's conduct. The following section examines both sides of that coin through two age-old tort cases.

### A. *Defendant's Responsibility to Clarify Ambiguous Signaling*

The following case, over one hundred years old, is a classic example of a circumstance where the defendant should have borne some responsibility for not clarifying whether the plaintiff consented to the invasion of her person. In *O'Brien v. Cunard Steam-Ship Co.*, Mary O'Brien, a young Irish immigrant woman, was traveling in steerage from Ireland to Boston on a ship owned by the Cunard Steam-Ship Company.<sup>29</sup> O'Brien was vaccinated for smallpox<sup>30</sup> and as a result, the vaccine left her body covered with sores and blisters. She sued Cunard claiming she did not consent to the vaccination, and it thus constituted a battery.<sup>31</sup> The story behind the vaccination is complicated. Boston health regulations required ship doctors to vaccinate all immigrants before they disembarked or quarantine them for fourteen days.<sup>32</sup> After being vaccinated, the women received a certificate allowing them to leave the ship.<sup>33</sup> Some two hundred women lined up to be vaccinated. O'Brien stood at the end of the line, showed the doctor her arm, and said that she had already been vaccinated.<sup>34</sup> The doctor looked at the arm and said "there was no mark, and that she should be vaccinated."<sup>35</sup> O'Brien told the doctor that the original vaccination left no mark.<sup>36</sup> The

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the defendant's duty to inform the plaintiff of the risk, are all legitimate factors to consider in assessing comparative responsibility. Accordingly, the existence of factors on both sides of the equation is also an important justification for abandoning the all-or-nothing approach in assumption of the risk and merging it with comparative fault.

<sup>29</sup> 28 N.E. 266 (Mass. 1891). *O'Brien* is featured in JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 595 (2d ed. 2008); VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 132 (2d ed. 1999); VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, *PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 97 (13th ed. 2015); TWERSKI, HENDERSON & WENDEL, *supra* note 1, at 76.

<sup>30</sup> *O'Brien*, 28 N.E. at 266.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

doctor replied that he should vaccinate her again.<sup>37</sup> She then "held up her arm" and was vaccinated.<sup>38</sup> The Massachusetts Supreme Judicial Court emphasized that "a large number of women" were vaccinated that day without "a word of objection," all of them indicating "by their conduct that they desired to avail themselves of the provisions made for their benefit."<sup>39</sup> Accordingly, the court found O'Brien did nothing "to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose."<sup>40</sup>

The court reasoned that the doctor's conduct must be considered in connection with the surrounding circumstances, and in doing so, examined solely O'Brien's conduct: "If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings."<sup>41</sup>

The *O'Brien* case has been analyzed and criticized by a host of scholars, but none have considered whether the case could have been best resolved through the use of comparative fault apportionment.<sup>42</sup> It is not necessarily true that the doctor could be "guided only by her overt acts."<sup>43</sup> The doctor could have asked O'Brien whether she did or did not want the vaccination; the court's conclusion that she "held up her arm to be vaccinated"<sup>44</sup> may not have been accurate. Having told the doctor about the previous vaccination and that it did not leave a scar, she may have raised her arm for the doctor to look more closely to see whether he could discern some evidence of a vaccination.<sup>45</sup> On the other hand, there were multiple signs on the ship that informed passengers that they either had to be vaccinated or be quarantined.<sup>46</sup> While O'Brien claimed not to have understood

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> For an extensive discussion of *O'Brien*, see Symposium, *Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on O'Brien v. Cunard S.S. Co.*, 57 MO. L. REV. 351 (1992).

<sup>43</sup> See *O'Brien*, 28 N.E. at 266.

<sup>44</sup> *Id.*

<sup>45</sup> One writer suggests that raising the arm might have been "an act of silent protest or signal of abject resignation in the face of overwhelming intimidation." Richard W. Bourne, *Introduction to Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on O'Brien v. Cunard S.S. Co.*, 57 MO. L. REV. 351, 357 (1992).

<sup>46</sup> *O'Brien*, 28 N.E. at 266.



what those words meant, the doctor saw his role as getting everyone vaccinated. He probably could not fathom that anyone would prefer fourteen days of quarantine or a trip back to Ireland as an alternative to a routine smallpox vaccination.

Given the complexity of the situation and the assembly-line quality of the delivery of the vaccine, it is not surprising that communication was less than optimal. The poverty and lack of sophistication of O'Brien, the importance of the vaccine to Boston health authorities, and the ambiguity of the signaling all played a part in the lack of clear communication between the parties. There was enough fault on all sides to eschew an all-or-nothing solution to the consent question, which left the plaintiff without recovery for injuries that arguably resulted from duplicative vaccinations. A court armed with comparative fault might well decide to allow a plaintiff partial recovery. Any attempt to disentangle all of the forces that led to the misunderstanding between O'Brien and the doctor is certain to fail. Comparative fault allows for a more just resolution of the issue of consent.

*B. Plaintiff's Responsibility to Clarify Ambiguous Signaling: De May v. Roberts*

This case, also of ancient vintage, often serves as a bridge between discussions of consent and informed consent in casebooks,<sup>47</sup> and is yet another example that calls for the application of comparative fault. In *De May v. Roberts*,<sup>48</sup> the plaintiff, Mrs. Roberts, was about to go into labor to deliver a child.<sup>49</sup> Her physician, defendant Dr. De May, came to her home on a stormy night.<sup>50</sup> De May's horse and carriage could not navigate the barely passable roads, and he prevailed on Scattergood, a young man with no ties to the medical profession, to accompany him to carry a lantern and other instruments necessary for the delivery of a baby.<sup>51</sup> Plaintiff's husband opened the door, and the physician said that "[he] had fetched a friend along to help carry [his] things."<sup>52</sup> The plaintiff went into labor about an hour after Dr. De May's arrival.<sup>53</sup> During the plaintiff's labor, Scattergood sat with his back to the plaintiff, who was lying on a nearby couch, and could only hear but not see her. At

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<sup>47</sup> See TWERSKI, HENDERSON & WENDEL, *supra* note 1, at 90-105; SCHWARTZ, KELLY & PARTLETT, *supra* note 29, at 106-08.

<sup>48</sup> 9 N.W. 146 (Mich. 1881).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 146-47.

<sup>51</sup> *Id.* at 147.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 148.

one point, a woman, who was holding the plaintiff still so that she would not fall off the couch, had to leave the room after plaintiff inadvertently kicked her while in intense pain.<sup>54</sup> The physician called Scattergood to the rescue, and he held the expectant mother steady until the woman returned.<sup>55</sup>

In ruling on the suit against the physician in battery for allowing a young unmarried man to be privy to the plaintiff's delivery and to hold her while she was in labor, the court's focus was solely on the physician's conduct. The court found that given the physician's conduct, the plaintiff was justified in thinking the young man was a physician or a student.<sup>56</sup> The court reasoned that the plaintiff and her husband "had a right to presume that a practicing physician would not [on such], an occasion . . . introduce into the house, a young man in no way, either by education or otherwise, connected with the medical profession" and that the physician's "remark . . . that he had brought a friend along to help carry his things" was insufficient to remove their presumption.<sup>57</sup>

Even if one agrees with the court that the physician could have made it clearer that Scattergood was not a physician or medical student, the plaintiff and her husband were not free from fault. The plaintiff was not in labor when the physician and young man came on the scene. A stranger whom they had never seen before was introduced as a "friend" who was brought along to "help carry things." They could have asked "who is this man?" It is at least doubtful that in rural Michigan in 1881 that a medical entourage arrived to aid in the plaintiff's delivery on this stormy night. Blame for this misunderstanding falls on the shoulders of both parties; consent need not have been an all-or-nothing question.

### III. AMBIGUOUS SILENCE IN FALSE IMPRISONMENT CASES

The most common of false imprisonment cases are those involving suspected shoplifters and employee discipline; both types of cases are rife with the potential for not only miscommunication but also deliberate silence. These cases reflect a continuing problem as to whether a suspected shoplifter or an employee charged with wrongdoing willingly consented to stay on for questioning or remained because the defendant did not

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 147.

<sup>57</sup> *Id.*

allow him to leave.<sup>58</sup> The repetitive nature of the issue in litigation deserves attention. Typically, a store manager confronts the suspected shoplifter or employee and tells the suspect she has reason to believe he has stolen an item or engaged in some sort of employee misconduct. And thus, an interesting standoff begins.

In the case of the shoplifter, the manager begins to question the suspect but does not tell him that he is free to leave. The suspect remains on for some period of time seeking to convince the manager that he did not take the merchandise. The suspect does not ask to leave for fear that the manager will call the police or otherwise subject him to some legal process in the future. This alone would not constitute false imprisonment. If a suspect stays for questioning because he believes it would be advantageous for him to do so, the fact that a shopkeeper may take future legal action does not constitute false imprisonment.<sup>59</sup> But if the suspect has good grounds to believe the shopkeeper will bar him from leaving, then he is imprisoned within the boundaries of the store.<sup>60</sup> The issue then becomes whether the suspect—who had a strong incentive to stay—voluntarily chose to do so, or did the shopkeeper coerce him to stay because of the shopkeeper's strong incentive to keep the suspect within the store in order to obtain a confession.

Likewise, where an employee accused of wrongdoing is summoned to a supervisor's office for questioning, the court is faced with a similar quandary. The employee may have remained simply because he believed it would be better for his professional future to try to exonerate himself; but, on the other hand, he may have had a legitimate basis for believing his employer would have prevented him from leaving.

The courts are then left to make an all-or-nothing decision. Did the suspect or employee voluntarily consent to stay or did he remain because he believed he could not leave? No one can know whether the manager or supervisor would have stopped the suspect or employee if he had asked to leave. The parties dance

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<sup>58</sup> The cases are legion. *See, e.g.*, *Carter v. Aramark Sports & Entm't Servs., Inc.*, 835 A.2d 262, 285 (Md. Ct. Spec. App. 2003) (employee discipline); *Grant v. Stop-N-Go Mkt. of Tex., Inc.*, 994 S.W.2d 867 (Tex. App. 1999) (shoplifting); *Teichmiller v. Rogers Mem'l Hosp.*, 597 N.W.2d 773 (Wis. 1999) (employee discipline).

<sup>59</sup> *See, e.g.*, *Blumenfeld v. Harris*, 3 A.D.2d 219, 219 (N.Y. App. Div.), *aff'd*, 145 N.E.2d 871 (N.Y. 1957) ("Threats to invoke peacefully the processes of the law, standing alone and unaccompanied by force or any other form of restraint, cannot result in such a detention as would constitute false imprisonment.").

<sup>60</sup> PROSSER & KEETON ON THE LAW OF TORTS § 11 (W. Page Keeton et al. eds., 5th ed. 1984) (noting that "[t]his gives rise, in borderline cases, to questions of fact, turning upon the details of the testimony, as to what was reasonably to be understood and implied from the defendant's conduct, tone of voice and the like, which seldom can be reflected fully in an appellate record, and normally are for the jury").

around the subject and take polar positions at trial. The plaintiff says he felt coerced to stay, and the defendant testifies the plaintiff was free to go and she did nothing to lead the plaintiff to believe otherwise.

Where the plaintiff did not ask to leave, and the defendant did not tell him that he was free to go if he so desired, courts are put in the unenviable position of trying to determine whether the plaintiff consented to stay. The situation is rife with ambiguity, and the resultant lack of clarity stems from the reality that neither party has an incentive to clarify the situation. The plaintiff wants to leave but, at that same time, believes he needs to stay to convince the defendant of his innocence. Meanwhile, the defendant may not want to be charged with wrongfully detaining the plaintiff, but he nevertheless wants to keep the plaintiff from leaving so as to establish his guilt. Both prefer the ambiguity until trial when they stake out their opposing positions. Rather than force the courts to make an all-or-nothing decision, it would be far better to recognize that both parties are at fault for the lack of clarity as to consent, apportion fault to both for the ambiguity, and assess damages accordingly.

*Foley v. Polaroid Corporation*<sup>61</sup> is an excellent example of this dynamic. Shea—the director of plaintiff Foley’s division and Polaroid’s top security officer—called Foley into a room to tell him that a female employee had accused him of sexual assault.<sup>62</sup> Foley countered that the employee had a history of performance problems; that she was worried about Foley’s possible promotion to be her supervisor; and that she had threatened she would prevent him from getting the job.<sup>63</sup> Shea told Foley that he should “come clean” and that Polaroid would prosecute him if he did not admit to the sexual assault.<sup>64</sup> When Foley stood up, Shea told him to “sit back down” and positioned himself between Foley and the door.<sup>65</sup> Foley said he felt he was “under arrest” and the “only way to get out of that room would be to have a fight with Jim Shea.”<sup>66</sup> When Foley told Shea that he was sick to his stomach and wanted to use the restroom, Shea pushed his chair against the door and said “If you go out of that door the job goes with you.”<sup>67</sup> The court held that the threat to fire an at-will

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<sup>61</sup> 508 N.E.2d 72 (Mass. 1987).

<sup>62</sup> *Id.* at 74.

<sup>63</sup> *Id.* at 75.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

employee did not amount to false imprisonment.<sup>68</sup> Before this last encounter, Foley did not ask whether he could leave because he was afraid of a confrontation with Shea.<sup>69</sup> On the other hand, Shea wanted Foley to stay so that he could force Foley to confess. There clearly was a period where both parties contributed to Foley's ambiguous status in the interview room. These situations where an employee believes he will be fired unless he satisfies the employer are so inherently coercive that anything short of a clear statement by the employer that the employee is free to go if he pleases creates ambiguity, which is best resolved by comparative fault.

The problem of ambiguous communication between the parties in false imprisonment cases is not limited to shoplifter and employee discipline cases. *Herbst v. Wuennenberg*<sup>70</sup> is a prime example of a case where consent was the central issue, and comparative fault would have better served the parties. And yet, the court dodged the issue by instead focusing on whether the plaintiffs should have tested the barriers of their confinement, precipitating a new line of case law as to when failure to test such barriers defeats a claim of false imprisonment.<sup>71</sup>

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<sup>68</sup> *Id.* at 77. This result is consistent with the shoplifter cases, in which fear of arrest is not sufficient to establish imprisonment. See *supra* note 58 and accompanying text. Indeed, the Restatement takes the position that threat of loss of employment is not sufficient to void consent, as do many jurisdictions. See *Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 152 (D.C. 1979); *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 277-78 (Ky. Ct. App. 1981); *Foley*, 508 N.E.2d at 77-78 (citing RESTATEMENT (SECOND) OF TORTS § 892B reporter's note (AM. LAW INST. 1982)); *Moen v. Las Vegas Int'l Hotel, Inc.*, 521 P.2d 370, 371 (Nev. 1974). A question arises, however, whether a court may be simply pinning its holding on this premise in order to duck the real problem of resolving a situation that necessarily involves some fault on both sides. See *supra* notes 59-60.

<sup>69</sup> *Foley*, 508 N.E.2d at 75.

<sup>70</sup> 266 N.W.2d 391 (Wis. 1978).

<sup>71</sup> Courts dodge the issue of consent in several ways. Most states grant a shopkeeper a privilege to detain a suspected shoplifter for a reasonable amount of time to investigate a theft if there are reasonable grounds to believe that the suspect was shoplifting. See Robert A. Brazener, *Construction and Effect, In False Imprisonment Action, of Statute Providing for Detention of Suspected Shoplifters*, 47 A.L.R. 3d 998 (1973) (updated weekly). Or a court, looking for some basis to find for the plaintiff, may hold that the plaintiff is not required to test the barriers (e.g. physical force) to determine whether she is, in fact, imprisoned because she had no reasonable means of escape. See RESTATEMENT (SECOND) OF TORTS § 36 cmt. a (AM. LAW INST. 1965). Indeed, before the almost universal adoption of the shopkeeper's privilege, it was not unusual for a court to find that a shoplifter's fear of loss of personal dignity could be sufficient to establish confinement. See, e.g., *Jacques v. Childs Dining Hall Co.*, 138 N.E. 843, 844-45 (Mass. 1923) (restaurant patron accused of not paying stated a case for false imprisonment where "her honesty and veracity had been openly and repeatedly challenged" in front of other customers, who might have interpreted her leaving before exoneration as an admission of guilt); see also *Lopez v. Wigwam Dep't Stores No. 10, Inc.*, 421 P.2d 289, 294 (Haw. 1966) (sustaining jury verdict of false imprisonment where shoplifter detained in store office could have "reasonably feared that any attempt to leave would result in a public demonstration and subsequent

In *Herbst*, a group of volunteers sought to purge ineligible voters from the voter list and were checking names on the list against the mailboxes in the vestibule in the defendant's apartment house.<sup>72</sup> The defendant stepped out of his apartment and challenged their right to check the voter list in the district.<sup>73</sup> While he called the police, his wife stationed herself in front of the outer door of the apartment house, stretching her arm across the doorway.<sup>74</sup> The plaintiffs subsequently sued for false imprisonment for their detention while the parties were waiting for the police to arrive. Plaintiffs agreed that no one threatened them and that they did not ask for permission to leave.<sup>75</sup> When asked why they did not leave, they answered that they would have had to push the defendant's wife out of the way to do so.<sup>76</sup> The defendant's wife said that she positioned herself in front of the outer doorway because she did not want "someone . . . to run away at that point."<sup>77</sup> Nonetheless, she testified that she would not have made any effort to stop the plaintiffs had they attempted to leave because she was "not physically capable of stopping anybody."<sup>78</sup> After a trial, the jury found for the plaintiffs and awarded them \$1500 in damages.<sup>79</sup>

On appeal, the Wisconsin Supreme Court found that defendant's wife did not create a sufficient barrier by standing in the doorway.<sup>80</sup> "At best, the evidence supports an inference that [they] remained in the vestibule because they *assumed* they would have to push [defendant's wife] out of the way in order to leave. This assumption is not sufficient to support a claim for false imprisonment."<sup>81</sup> The court went on to say that plaintiffs were merely speculating that they were not free to leave and that, "[a]t a minimum, . . . plaintiffs should have attempted to ascertain whether there was any basis to their assumption that

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humiliation"); *Mahan v. Adam*, 124 A. 901 (Md. 1924) (sufficient evidence of false imprisonment to avoid summary judgment where witness heard shopkeeper accuse the plaintiff). These cases are in fact inconsistent with the employee cases—how can loss of livelihood, and possibly a home, be more threatening than a few moments of shame in front of some onlookers? The only explanation is this is yet another effort (this time in the plaintiff's favor) to avoid addressing the more complex issue of consent.

<sup>72</sup> *Herbst*, 266 N.W.2d at 393.

<sup>73</sup> *Id.* at 394.

<sup>74</sup> *Id.* at 393.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 394.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 396.

<sup>81</sup> *Id.*

their freedom of movement had been curtailed.”<sup>82</sup> The court never considered the issue of consent, which was really the heart of the matter.

As in the shoplifter and employee discipline cases discussed above, the court had to deal with an ambiguous situation born of competing incentives: the plaintiffs had an incentive to stay and try to exonerate themselves, while the defendant also wanted to keep the plaintiffs from leaving in hopes the police would arrest them. If the only option is to make an all-or-nothing finding on the issue of consent, perhaps the Wisconsin court was correct. One of the defendants did block the door, and the defendants did not tell plaintiffs they were free to go. On the other hand, plaintiffs did not inquire whether they would be stopped if they tried to leave. Both parties bear responsibility for the misunderstanding. Had the court considered the option of applying comparative fault to this situation, a jury could have assessed responsibility in a manner that would have reflected that reality.

#### IV. BORDERLINE VIOLENCE IN SPORTS INJURY CASES: APPLYING COMPARATIVE FAULT TO THE ISSUE OF IMPLIED CONSENT

How to deal with borderline violence in sports cases has bedeviled the courts.<sup>83</sup> No one questions that if one player pulls out a gun and shoots an opposing team’s player in a fit of rage that the actor is liable for committing a battery. Nor is their disagreement that a player injured during the normal course of a game has no cause of action for battery. Participants in sports impliedly consent to the normal risks inherent in playing the game. They need not signal assent to other players; it is well known that in a contact sport injuries are expected. While league rules prohibit specific conduct that is prone to serious harm, violations of these rules generally do not give rise to a cause of action in tort.<sup>84</sup> For example, a football player who injures an opponent when he pulls on the opponent’s facemask may be

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<sup>82</sup> *Id.* at 396–97. A major premise for the result was that, given that the plaintiffs outnumbered the defendant three-to-one, their assumption was speculative if not completely unfounded. *Id.* at 397 (Plaintiffs “outnumbered Wuennenberg three-to-one; and they gave no testimony to the effect that they were frightened of Wuennenberg or that they feared she would harm them.”).

<sup>83</sup> See, e.g., *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393–94 (Cal. 2006) (“beanball” in retaliation for ball thrown at teammate is within the custom of the game and is within consent); *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (in bank) (discussing what is consented to in game of touch football).

<sup>84</sup> *Avila*, 131 P.3d at 393–94; *Knight*, 834 P.2d at 710.

subject to a penalty by the official, but no civil action in tort will succeed.<sup>85</sup> In the normal course of a football game such conduct is fully anticipated. It is part of the rough and tumble of the sport and participants are said to impliedly consent to such violation of the rules.<sup>86</sup>

There are, however, cases in which the violent conduct arguably exceeds the scope of consent. Consider the well-known case of *Hackbart v. Cincinnati Bengals, Inc.*,<sup>87</sup> in which a player, "Booby Clark," struck opposing player, Dale Hackbart, while Hackbart was kneeling on the ground watching a play unfold up field that resulted in a bad turn of events for Clark's team, the Cincinnati Bengals.<sup>88</sup> Although Hackbart was not involved in the play, Clark "acting out of . . . frustration" stepped forward and struck a blow with his right forearm to the back of Hackbart's head causing a serious neck fracture.<sup>89</sup> Hackbart sued the Bengals, but the trial court dismissed the case holding that as a matter of law, professional football is basically violent in nature and the available sanctions are imposition of penalties or expulsion from the game.<sup>90</sup> The Court of Appeals for the Tenth Circuit reversed, holding that "[t]he general customs of football do not approve of intentional punching or striking of other [players]."<sup>91</sup> The court remanded to the trial court to review the case on its facts.<sup>92</sup> In other words, the trial court should not have dismissed the case based on the blanket assumption that football was a violent sport but should have examined the conduct of the players in the specific circumstances of the case to determine whether players would have consented to this kind of conduct.<sup>93</sup>

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<sup>85</sup> See, e.g., *Knight*, 834 P.2d at 708 ("[D]efendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself.").

<sup>86</sup> See *id.*

<sup>87</sup> 601 F.2d 516 (10th Cir. 1979).

<sup>88</sup> *Id.* at 519.

<sup>89</sup> *Id.* For football cognoscenti, the following occurred: "Booby Clark," an offensive back for the Cincinnati Bengals struck Dale Hackbart, a defense player for the Denver Broncos, while he was kneeling on the ground. *Id.* Just before the injury, Clark had run a pass pattern to the Bronco's end zone, which a Denver free safety intercepted, changing the players' roles. *Id.* Clark was now playing defense, and Hackbart, who had been defending the pass, became an offensive player. *Id.* In this role, he threw a block at Clark by throwing his body against him and falling to the ground. *Id.* Hackbart remained on his knees and watched what was taking place up field after the interception. *Id.* Clark "acting out of . . . frustration" stepped forward and struck a blow with his right forearm to the back of Hackbart's head causing a serious neck fracture. *Id.*

<sup>90</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 356 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir. 1979).

<sup>91</sup> *Hackbart*, 601 F.2d at 521.

<sup>92</sup> *Id.* at 526-27.

<sup>93</sup> *Id.* at 526.



Had this case been tried on remand, the court would have needed to address the scope of the implied consent of players engaging in a professional football game. On that issue, the testimony of a witness in the earlier trial, who described how players were conditioned to maximize their violent instincts against opposing players, would have been relevant. The witness, a well-known football coach, stated that in programming players before a game, coaches seek to generate in the players "an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road."<sup>94</sup> The coach said that "[t]he precise pitch of motivation for the players . . . should be the feeling of that father when . . . he is about to open the door to take revenge upon the person of the other driver."<sup>95</sup>

If asked, Hackbart would have explicitly stated that he did not impliedly consent to being hit on his neck from behind when he was no longer in the play. But that is not the question. Rather, since both Hackbart and Clark had been the subject of pre-game programming, did they impliedly consent to play in a sport in which violent anger is the norm? Can we expect such violent emotions to be turned off in a matter of seconds? The contours of implied consent in any context are vague. The sports injury cases, however, make particularly clear that such consent is not easily determined by an all-or-nothing approach. It would be far better to apply comparative fault to apportion the damages arising out of this injury. The athletes in *Hackbart* both indulged in an activity knowing there was a wide margin of acceptable conduct. Accordingly, they knew the scope of their consent would be murky at best. Bench-clearing brawls, with combatants throwing punches at each other following a controversial play, are all too common. How much contact is consented to? The lack of clarity is the fault of all who partake in the game. Courts should not be asked to make all-or-nothing findings. Apportionment, using the principles of comparative responsibility, will produce a more fair and realistic result. Thus, whether Clark acted within two seconds of the tackle or ten seconds is relevant in determining the amount of responsibility we wish to place on Clark.

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<sup>94</sup> *Hackbart*, 435 F. Supp. at 355.

<sup>95</sup> *Id.* The testimony was that of the Denver Bronco's coach, John Ralston. *Id.* Paul Brown, another famous coach, testified that aggressiveness was the primary attribute sought in the selection of players. *Id.* at 355-56.

In short, some violence is clearly within the realities of the sport even when players violate the rules of the game. At the other extreme, some violent conduct is clearly beyond the pale and warrants a finding of battery. There is, however, an ill-defined area where comparative fault would provide a more accurate remedy rather than the classic binary consent or no consent models.

#### V. THE DUAL INTENT RULE AND CONSENT IN BATTERY CASES

The character of the intent necessary to make out an intentional battery has been the subject of considerable controversy. Is intent to cause a contact alone sufficient? Namely, is it enough that the defendant intends (or knows to a substantial certainty) that a contact will occur, or must the defendant also intend (or know to a substantial certainty) to cause the consequences of his act (“the dual-intent rule”)? The black letter of the Restatement (Second) of Torts adopts the second approach, providing that an actor is liable for an intentional tort only if she acts with either the desire to cause the consequences of her act, or with the belief that the consequences are substantially certain to result from it.<sup>96</sup> Accordingly, in states that adopt the Second Restatement, the prima facie case for battery requires not only an intentional contact which is offensive or causes bodily harm but also the desire or knowledge to a substantial certainty that the conduct be harmful or offensive.<sup>97</sup> The Third Restatement rejects the dual-intent requirement and finds it sufficient if the defendant intended the contact and the contact is either offensive to a reasonable person or causes bodily harm.<sup>98</sup>

Whether the Second Restatement or Third Restatement position is preferable is beyond the scope of this essay, but it is worth noting that application of comparative fault would resolve an incongruity in applying the defense of apparent consent in jurisdictions where dual intent is necessary to prove a battery. The reporters for the Third Restatement illustrate the problem:

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<sup>96</sup> RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

<sup>97</sup> *Id.* § 13. *But see* Nancy J. Moore, *Intent and Consent in Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585 (2012) (arguing that the Second Restatement is ambiguous as to whether dual intent is required or whether single intent to contact is sufficient).

<sup>98</sup> RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 (AM. LAW. INST., Tentative Draft No. 1, 2015).

*Actor honestly but unreasonably believes that plaintiff consents[.]*

In one category of offensive-battery cases, an actor honestly but unreasonably believes that plaintiff consents to the contact in question, and the plaintiff is offended by the contact. . . .

The tension arises as follows. The apparent-consent doctrine provides a defense for actors who honestly and *reasonably* (though mistakenly) believe that the other has consented to a contact. By contrast, actors who honestly and *unreasonably* believe that the other has consented are still liable. But if a jurisdiction endorses the dual-intent rule, this restriction of the apparent-consent doctrine to only those actors who hold a *reasonable* belief that the other consents makes little sense, and seems largely gratuitous. Under dual intent, the actor must have the purpose to offend or must know that he will offend the other. But how could an actor know that he will offend the other if he honestly (albeit unreasonably) believes that the other consents? In short, the apparent-consent doctrine states that if an actor X unreasonably and honestly believes that Y consents, X is liable; while the dual-intent rule says (in offensive-battery cases) that if X unreasonably and honestly believes that Y consents, X is *not* liable. It is thus difficult to endorse both the apparent-consent doctrine and the dual-intent view.<sup>99</sup>

According to the reporters, the difficulty with the dual-intent view arises when an actor honestly but unreasonably believes that another is willing for the contact to occur. Such an actor does not intend an offensive contact.

Although, in some cases, a defendant's unreasonable belief may result from self-delusion,<sup>100</sup> in most instances it arises from the plaintiff's ambiguous signaling. In these instances, both parties bear some responsibility for the mistaken consent. When such a situation arises, there is good reason to abandon the all-or-nothing rule in consent cases. Thus a defendant who acts with an unreasonable belief that plaintiff consented should be liable, at least in part, not because single intent to contact is sufficient but because he acted both intentionally and unreasonably.

## VI. SEXUAL DURESS CASES: COMPARATIVE FAULT GONE AWRY

Interestingly, the only case the authors found that applies comparative fault in a consent setting is one whose application is

<sup>99</sup> *Id.* § 102 cmt. b. 2, illus. 6.

<sup>100</sup> For example, a movie star, upon meeting a group of fans, kisses one on the cheek, thinking that all female fans would want to be kissed by him. This self-delusion, although perhaps understandable, is unreasonable. For other examples, see RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, *supra* note 98, § 102 cmt. b., illus. 10, 11.

clearly wrong. In *Grager v. Schudar*,<sup>101</sup> plaintiff Grager, a female inmate in a North Dakota county jail sued defendant, jailer Schudar, claiming that he had sexually assaulted her when she was a prisoner.<sup>102</sup> In a previous criminal action, Schudar had pled guilty to a criminal charge of sexual abuse of a ward under a North Dakota statute that proscribes a jailer's sexual act with a prisoner regardless of the prisoner's consent.<sup>103</sup> The question before the court was whether, in the civil case, the lower court had properly instructed the jury that consent was a complete defense to the battery, notwithstanding the criminal statute imposing criminal liability regardless of the prisoner's consent.<sup>104</sup>

In most jurisdictions, the general rule is that a defendant may assert the defense of consent even if that defendant's conduct violated a criminal statute.<sup>105</sup> Notwithstanding this rule, consent does not operate as a defense when a criminal statute is designed to protect a class of persons from abuse of power and duress.<sup>106</sup> The North Dakota appellate court recognized that its criminal statute prohibiting sexual relations between a guard and a prisoner fell within this exception to the general rule.<sup>107</sup> Thus, it overruled the lower court's ruling that the prisoner's consent was a *complete* bar to her claim of battery.<sup>108</sup> On the other hand, it determined that the exception had to be reconciled with North Dakota's comparative fault statute, which the court found had adopted a system of modified comparative fault applicable to a broad array of causes of action, including the prisoner's claim of battery.<sup>109</sup> Thus, although the prisoner's consent did not bar her claim, the jury had to consider it in apportioning fault. The court directed that on remand the jury, when deciding whether the prisoner had "effectively consented to the sexual act," should be instructed to "consider all of the factors limiting . . . [her] ability to control the situation or to give consent," including "age, sex, mental capacity, and relative

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<sup>101</sup> 770 N.W.2d 692 (N.D. 2009).

<sup>102</sup> *Id.* at 693–94.

<sup>103</sup> *Id.* at 694.

<sup>104</sup> *Id.* at 695.

<sup>105</sup> See DOBBS ET AL., *supra* note 1, § 8.13 (noting that some courts disagree as to whether violation of a criminal statute bars a defendant from asserting the defense of consent).

<sup>106</sup> RESTATEMENT (SECOND) OF TORTS § 892C (AM. LAW INST. 1977).

<sup>107</sup> *Grager*, 770 N.W.2d at 697. The North Dakota Statute, N.D. CENT. CODE § 12.1-20-06 (2016), criminalizes a jailer's sexual act with a prisoner regardless of whether the prisoner consents to the act and, accordingly, fits squarely within § 892C of the Second Restatement of Torts.

<sup>108</sup> *Grager*, 770 N.W.2d at 699.

<sup>109</sup> *Id.* at 697–98 (citing N.D. CENT. CODE § 32-03.2-01 (2016)).

positions of the parties.”<sup>110</sup> In effect, such instructions ask the jury to consider whether the prisoner’s consent was truly the product of duress or whether she could have exercised some control to prevent the assault. Under such instructions, a jury could find the guard eighty percent at fault and the plaintiff twenty percent at fault. The authors fail to understand how duress can be equated with fault and thus do not understand how it can be apportioned. Fault speaks to culpability and wrongdoing; duress addresses autonomous decision-making and willingness. One can readily compare relative degrees of culpability but how can one be twenty percent willing? Unlike the cases outlined in this essay where both parties bear some degree of fault for miscommunicating, *Granger* is not about communication. The plaintiff may well have communicated her willingness to engage in sexual relations with the guard, but if she consented because of abuse of power, she should be entitled to recover.

With rare exception, courts have held that fault should never be assigned to a rape victim in a civil case against the rapist.<sup>111</sup> Professor Ellen Bublick argues not only that courts should refuse to consider a rape victim’s fault in actions against a rapist but also in cases brought against third parties whom the plaintiff alleges had a duty to prevent the rape from occurring.<sup>112</sup> She makes a strong argument that allowing courts to consider a rape victim’s fault imposes on women an unreasonable duty to assume that every encounter involves a possible rape and to take every measure to shape their conduct around the fear of possible rape.<sup>113</sup> According to Professor Bublick, one danger of such a fault assessment is that juries will inappropriately incorporate gender biases into determining whether a reasonable woman would have taken action to prevent a rape.<sup>114</sup> For example, Bublick points to the incongruity of a case in which there “was no suggestion that a straight white man was negligent for his [own] rape because he was out alone in a nightclub parking lot,”<sup>115</sup> with another case where the jury found a female rape victim thirty percent negligent for not avoiding “certain streets

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<sup>110</sup> *Id.* at 698.

<sup>111</sup> One case allowing the imposition of fault against the victim of rape has been overruled by statute. See *Morris v. Yogi Bear’s Jellystone Park Camp Resort*, 539 So. 2d 70, 77–78 (La. Ct. App. 1989), *superseded by statute*, LA. CIV. CODE, ANN. art. 2323 (1996).

<sup>112</sup> Bublick, *supra* note 27, at 1416.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1460–61.

<sup>115</sup> *Id.* at 1460 (citing *Peterson v. Gibraltar Sav. & Loan*, 711 So. 2d 703, 714 (La. Ct. App. 1998), *rev’d on other grounds*, 733 So. 2d 1198 (La. 1999)).

[that] 'were dangerous places for a *young lady* . . . at 3:00 o'clock in the morning."<sup>116</sup> Courts ought to recognize a "no duty" rule that protects women from such fault assessment.<sup>117</sup>

## CONCLUSION

The reluctance of some courts to allow comparative fault as a defense to intentional torts<sup>118</sup> bears little relevance to the thesis that in cases of mistaken communication the fault of both parties should be considered. In the classic intentional tort case, the conduct of the defendant is clearly outside the realm of acceptable social conduct. In cases of mistaken communication, the heart of the issue is the possible violation of social norms. Indeed, even with regard to classic intentional torts, scholars have advocated for comparative fault for the violation of legal norms that involve "low-level moral culpability"<sup>119</sup> or conduct that is more akin to negligence.<sup>120</sup> It is not unusual for courts to re-couch an intentional tort in terms of negligence where doing so fosters important policy goals. For example, in informed consent medical malpractice cases, courts have almost unanimously couched the tort in terms of negligence, even though the issue in such cases is whether the physician has withheld information on risks attendant to the medical intervention that would vitiate the patient's consent, making the medical procedure a battery.<sup>121</sup> Re-casting the tort in negligence avoids

<sup>116</sup> *Id.* (quoting *Zerangue v. Delta Towers, Ltd.*, 820 F.2d 130, 132 (5th Cir. 1987)).

<sup>117</sup> *Id.* at 1441. Professor Bublick is critical of the Restatement's position with regard to the use of comparative fault to reduce damages against an intentional tortfeasor. *Id.* at 1430 n.98. The Restatement takes no position as to whether plaintiff's conduct should be compared with that of an intentional tortfeasor. APPORTIONMENT RESTATEMENT, *supra* note 1, at 17. Even if courts were to allow the reduction of damages in intentional tort cases based on comparative fault, they need not do so in rape cases. There is a vast difference between reducing damages for a plaintiff who is so enraged by the defendant's obnoxious conduct that he then batters him, and reducing damages because plaintiff's conduct supposedly encouraged the defendant to rape the plaintiff. Professor Bublick's argument that the law ought to adopt a rule that allows a woman to shape her life free from the fear of rape is persuasive. However, what constitutes consent in "acquaintance rape" cases has been a matter of huge controversy. *See, e.g.*, Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341 (2004). Some cases of acquaintance rape set forth in the article might well call for the application of comparative fault principles.

<sup>118</sup> *See* cases cited in APPORTIONMENT RESTATEMENT, *supra* note 1, § 1 cmt. b. For a review of the case law pro and con, see *Bonpua v. Fagan*, 602 A.2d 287 (N.J. Super. Ct. App. Div. 1992). *See also* Allan L. Schwartz, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R. 525 (5th ed. 1994).

<sup>119</sup> McNichols, *supra* note 13, at 685.

<sup>120</sup> Dear & Zipperstein, *supra* note 13, at 2 ("[N]egligence, recklessness, and intentional conduct are . . . not different in kind, but . . . reflect *degrees* of violation" of social norms.).

<sup>121</sup> *See* DOBBS ET AL., *supra* note 1, at 654; Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988

liability for doctors in cases where the plaintiff would have agreed to the procedure even if she were properly informed.<sup>122</sup>

The cases outlined in this essay are, in truth, instances of negligent failure to adequately communicate.<sup>123</sup> Even in the cases dealing with sports injuries where players have seriously violated the rules of the game, it is often hard to assign serious moral blame to the violator. In this past year, a runner viciously slid into second base to avoid a double play and seriously injured another baseball player,<sup>124</sup> and a football player intentionally butted helmets after the official terminated the play, conduct that was extremely dangerous.<sup>125</sup> The emotions generated in the

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U. ILL. L. REV. 607, 609–13 (1988); see cases cited *supra* note 26 and accompanying text. Courts are reluctant to label informed consent cases as batteries. To do so would hold physicians liable without having to prove damages. The violation of the dignitary right is sufficient to make out a battery; damages need not be proven. See DOBBS ET AL., *supra* note 1, § 4.20.

<sup>122</sup> Unlike intentional tort claims, which are dignitary torts and require no proof that the defendant's actions harmed the plaintiff, in a negligence action the plaintiff must prove that the defendant's conduct was a but-for cause of the harm. See RESTATEMENT (THIRD) OF TORTS § 26 (AM. LAW INST. 2010). By re-casting informed consent cases as a negligence claim, a plaintiff who would have undergone a procedure, even if fully informed, cannot recover. See DOBBS ET AL., *supra* note 1, § 311. If courts treated informed consent cases as a traditional battery, a claim could be made out whenever the plaintiff's body is invaded by an unconsented touching. *Id.*

<sup>123</sup> Professor Anita Bernstein has suggested to the authors that comparative responsibility principles might be used to allocate fault in express assumption of the risk cases. Many of these cases contain exculpatory clauses absolving the defendant from claims of negligence. These are classic contracts of adhesion. Plaintiffs rarely read or understand what they have waived, and defendants do little or nothing to make them aware that they are signing away valuable rights. Whether such clauses should be given any effect is a matter of serious debate. See, e.g., *Stelluti v. Casapenn Enters., LLC.*, 1 A.3d 678, 681–703 (N.J. 2010). In that case, the plaintiff was seriously injured when the handles of an exercise bicycle dislodged and caused her to fall to the ground. *Id.* at 681. Plaintiff alleged multiple counts of negligence against the gym but a sharply split Supreme Court dismissed the case because the plaintiff had signed a waiver when she became a member of the gym, thereby releasing the gym from all claims of negligence. *Id.* at 682–84, 695. Given the nature of the contract, it seems that both parties may have been at fault with regard to the agreement. Plaintiff should have read more carefully before signing away her rights and defendant should have explicitly alerted the plaintiff to the ramifications of the waiver. Whether claims of unconscionability should be subject to comparative fault raise issues beyond the scope of this essay.

<sup>124</sup> Chase Utley of the Los Angeles Dodgers “was suspended for Games 3 and 4” of the playoffs “for his takedown slide that broke the leg of [New York] Mets shortstop Ruben Tejada” in the 2015 National League Divisions Series. Ken Gurnick, *Utley to Appeal 2-Game Suspension for Slide*, MLB (Oct. 12, 2015), <http://m.mlb.com/news/article/154097810/dodgers-chase-utley-suspended-for-slide/> [<https://perma.cc/N29T-CSMB>]. The Los Angeles Dodgers stated that they stood “behind Chase Utley and his decision to appeal [his] suspension.” *Id.*

<sup>125</sup> Odell Beckham, Jr., a receiver for the New York Giants was suspended for one game because of his conduct in the December 20, 2015 game against the Carolina Panthers. See Ohm Youngmisuk & David Newton, *Josh Norman: Odell Beckham Jr. Should Have Been Tossed*, ESPN (Dec. 21, 2015), [http://espn.go.com/nfl/story/\\_/id/14408956/josh-norman-carolina-panthers-rips-odell-beckham-jr-says-new-york-giants-receiver-field](http://espn.go.com/nfl/story/_/id/14408956/josh-norman-carolina-panthers-rips-odell-beckham-jr-says-new-york-giants-receiver-field) [<https://perma.cc/5H8S-YQKV>]. On one occasion in that game, he rushed across the field to deliver a helmet-to-helmet blow to Josh Norman, a Panther's cornerback. See

sports arena are intense and not easily turned off in two or three seconds. In these cases, where the question is the scope of implied consent, all participants bear some responsibility for the vagueness of the line drawn between acceptable and non-acceptable violence.<sup>126</sup> Players' unions could advocate for clearer definitions and the imposition of serious sanctions when players cross a line. What happens is the very opposite. When the league imposes serious penalties, the team management or the unions contest them as unfair to the players and the teams they represent.<sup>127</sup> In short, in these vague consent cases, there is enough fault to go around.

It is unlikely that the imposition of comparative fault will deter valuable social behavior on the part of those who believe that they have a right to act based on conduct that reasonably appears to signal consent. There is little evidence that the shift

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*id.* That conduct of such severity was deserving of only a one-game suspension speaks volumes as to the kind of conduct that is viewed to be within the limits of consent.

<sup>126</sup> A large number of cases find no liability unless the conduct of the defendant is reckless or wanton under the theory that the participants assume the risks of ordinary negligence as conduct inherent in the sport. *See, e.g.,* Ross v. Clouser, 637 S.W.2d 11, 13–14 (Mo. 1982) (en banc) (holding that the cause of action for injury sustained during softball game must be predicated on recklessness not negligence); Dunagan v. Coleman, 427 S.W.3d 552, 558 (Tex. Ct. App. 2014) (holding that a catcher injured in softball game can sue the pitcher only for recklessness, not negligence); Mark v. Moser, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001) (holding that an athlete injured during triathlon can sue only for recklessness). However, administering the recklessness standard in a contact sport is no easy matter. *See* Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 213 (1990). It is not only close to impossible to draw a line for liability based on the defendant's recklessness, but doing so masks the issue of the plaintiff's role in consenting to the co-participant's conduct in a violent sport and presumes plaintiffs would never acquiesce to reckless conduct. Yet, experience teaches that, at least in professional sports, players and their unions regularly seek to protect players from sanctions for conduct that is reckless or intentional. The culture of violence in professional football received notoriety on what came to be known as "Bountygate." An investigation revealed that members of the New Orleans Saints received bounties if they injured opposing teams' star quarterbacks. The history of this sordid scandal is recounted in Lynn Zinser, *Bountygate: A Circular, Confusing History*, N.Y. TIMES (Oct. 10, 2012), [http://fifthdown.blogs.nytimes.com/2012/10/10/bountygate-a-circular-confusing-history/?\\_r=0](http://fifthdown.blogs.nytimes.com/2012/10/10/bountygate-a-circular-confusing-history/?_r=0) [<https://perma.cc/GDQ3-T5NS>] (and accompanying links). It is noteworthy that despite the Saints defensive coach's admission to the bounty program, the head of the National Football League Players Association went on national television and denied that the Saints bounty program ever existed. Chris Strauss, *NFLPA Head: Saints Bounty Program 'Never Existed'*, USA TODAY (Dec. 12, 2012), <http://www.usatoday.com/story/gameon/2012/12/12/nfl-saints-bounty-smith/1764161/> [<https://perma.cc/4CDD-NEP7>].

<sup>127</sup> For example, in a recent National Hockey League game between the Boston Bruins and the Pittsburgh Penguins, a Bruins player struck one of the Penguins while he was lying defenseless on the ground causing him to be later hospitalized with a concussion. Gary B. Bettman, *Thornton Decision on Appeal*, NHL (Dec. 24, 2014), [http://www.nhl.com/nhl/en/v3/ext/pdfs/Thornton\\_DecisionOnAppeal122413.pdf](http://www.nhl.com/nhl/en/v3/ext/pdfs/Thornton_DecisionOnAppeal122413.pdf) [<https://perma.cc/H9DB-VNR2>]. The NHL suspended the Bruins player for fifteen games, but the Players' Association appealed, alleging the fifteen-game suspension was too harsh. *Id.*



from contributory fault as a complete bar to comparative fault has had an impact on the primary behavior of actors.<sup>128</sup> The case for comparative fault for some apparent and implied consent cases is addressed to courts in helping them resolve murky consent cases where competing parties stake out polar positions. In the majority of cases, the binary all-or-nothing paradigm is fully justified. But when courts sense that both parties bear responsibility for the lack of clarity in the communication they should feel free to allow the factfinder (either judge or jury) to apportion fault.

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<sup>128</sup> A significant body of law and economics literature focuses on the efficiency of comparative negligence. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 156–67 (3d ed. 1986); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 123–24 (2d ed. 1977); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 347 (1973); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986); David Haddock & Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49, 50 (1985). But there is little empirical work as to whether the change from contributory fault as a complete bar to comparative negligence has had any impact on primary behavior. One study is inconclusive. See Michelle J. White, *Empirical Comparisons of the Contributory Versus Comparative Negligence Rule*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (P. Newman ed., 1998); see also Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 536–37 (2010).