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Can Apples Be Compared to Oranges? A Policy-Based Approach for Deciding Whether Intentional Torts Should Be Included in Comparative Fault Analysis

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CAN APPLES BE COMPARED TO ORANGES? A POLICY-BASED APPROACH FOR DECIDING WHETHER INTENTIONAL TORTS SHOULD BE INCLUDED IN COMPARATIVE FAULT ANALYSIS

I. INTRODUCTION

Suppose a man is sued civilly for raping a woman.[1] Suppose further that the State with jurisdiction over this matter allows intentional torts to be compared with negligent acts when allocating liability under comparative fault.[2] During the proceedings, the defendant alleges that the victim behaved negligently by dressing suggestively and not taking reasonable precautions for her own safety.[3] Should the defendant be allowed to shift liability to the plaintiff for her negligence?

Providing one answer to the foregoing question, Justice Daniel Stewart of the Utah Supreme Court concluded the following:

> Comparing a defendant's negligence and a rapist's intentional tort results in an absurdity; it is a comparison of unlikes, of apples and oranges. . . . The legal obligation not to assault or rape is absolute. The law does not impose on a victim a duty to avoid a criminal act by another.[4]

The State in the hypothetical allows comparisons between the intentional and negligent acts of the parties. Consequently, if the fact finder decides that the plaintiff was negligent for failing to protect herself, the defendant would be able to reduce his liability by the plaintiff's percentage of fault. Although this may seem harsh in its result, some states have adopted similar approaches.[5]

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1 *See* Field v. Boyer Co., 952 P.2d 1078, 1083 (Utah 1998) (Stewart, J., concurring in part and dissenting in part) (discussing this hypothetical to illustrate problems of comparing intentional and negligent torts when allocating fault among parties in a lawsuit).

2 *See infra* note 77 and accompanying text (listing the states that do allow intentional torts in their comparative fault schemes).

3 *See Field*, 952 P.2d at 1083.

4 *Id.* at 1088.

5 *See* Comeau v. Lucas, 455 N.Y.S.2d 871 (N.Y. App. Div. 1982) (permitting a defendant that was sued for assault to reduce his liability by the plaintiff's negligence of drinking and engaging in disruptive behavior); *see also* Blazovich v. Andrich, 590 A.2d 222 (N.J. 1991) (reducing the liability of a group of defendants who physically assaulted and battered the plaintiff by the plaintiff's provocation and disruptive behavior).

Now consider the same facts and jurisdiction as before, except that the negligent party is a co-defendant.[6] Defendant A is the rapist who committed the intentional act, and Defendant B is the owner of the publicly accessible property where the rape took place.[7] If the fact finder finds that the owner is negligent for not providing enough security and lighting on the property, should the rapist be able to reduce his liability in an amount equivalent to the property owner's negligence?

Justice Rosalie E. Wahl of the Minnesota Supreme Court stated that in such a situation, the intentional tortfeasor should not be able to shift any of his liability.[8] She stated that, "[w]here society wants certain conduct absolutely prohibited and discouraged," such as intentional assaults, "apportionment of fault is not appropriate."[9] Notwithstanding this position, once again, the rapist in the hypothetical presented above would be able to reduce his liability by the owner's negligence because the jurisdiction allows comparisons between negligent and intentional torts. Is this a fair and just result? Furthermore, what if the rapist is an unknown party or is insolvent, leaving only the owner of the property available to pay the plaintiff's damages? If the fact finder decides that both defendants are at fault, should the owner be responsible for the entire amount of damages or only his percentage of attributable fault?

The purpose of this Note is to answer these hypothetical questions by creating an analytical framework from which to view various policy goals of tort law. Accordingly, Part II provides background information for understanding this issue by discussing its common law roots,[10] the expansion and progression of pertinent legal principles,[11] and various attempts throughout history to uniformly approach this issue.[12] Part III explores several modern policy goals of tort law helpful for analyzing whether to include intentional torts when applying the doctrine of comparative fault.[13] Part IV proposes a model statute that prohibits

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6 *See Field*, 952 P.2d at 1079 (Utah 1998) (detailing the facts of the case as the rape of the plaintiff on the property of the defendants being sued for negligence).

7 *See id.* (describing a parallel fact pattern as the issue in the case with respect to the defendants).

8 *See* Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986) (holding that the fraud of the defendant could not be reduced by the plaintiff's negligence).

9 *Id.* at 175–76.

10 *See infra* Part II.A (chronicling the common law heritage of comparative negligence and how it has expanded beyond solely negligence claims in some states).

11 *See infra* Part II.B (describing the varying approaches adopted by different states throughout the country).

12 *See infra* Part II.C (detailing where the Uniform Comparative Fault Act and the Restatement stand on this issue).

13 *See infra* Part III (analyzing the issue of including intentional torts using Johnson and Gunn's list of tort policy goals as a framework).

comparisons between intentional and negligent torts.[14] Finally, Part V offers a brief conclusion as to why intentional torts should not be included in states' comparative fault schemes.[15]

II. BACKGROUND

One of the primary functions of tort law is to compensate victims for damages resulting from another's wrongdoing.[16] Indeed some scholars argue that this is the highest priority in a tort law system.[17] Criminal law seeks to remedy offenses against the public at large, and tort law provides individual relief to plaintiffs for personal losses suffered for which criminal law provides no remedy.[18] This creates tension,

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[14] *See infra* Part VI (constructing a model statute that draws distinct lines between intentional misconduct and negligent acts, and precludes any comparisons between the two).

[15] *See infra* Part V (summarizing the conclusions of this Note regarding why intentional torts should not be included in comparative fault).

[16] *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979). The Restatement states the following as the primary purposes of tort law:

> The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:
> (a) to give compensation, indemnity or restitution for harms;
> (b) to determine rights;
> (c) to punish wrongdoers and deter wrongful conduct; and
> (d) to vindicate parties and deter retaliation or violent and unlawful self-help.

Id.

[17] *See* Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585 (March 2003) (arguing that the main drive of tort law is victim compensation, and this notion is supported by important legal authority, such as the Restatement of Torts). In this article, Geistfeld describes what he calls the "compensatory norm" of understanding tort law. *Id.* at 587. He states that this is defined as "one's security interests over another's liberty interests . . . ." *Id.* He explains that, "[i]n light of that priority, the tort system must adequately protect physical security while allowing risky behavior." *Id.* As a result, this priority implies that for any risky interaction between two people, "the potential 'victim' is the party facing a threat to her physical security, whereas the potential 'injurer' is the one whose exercise of liberty creates that threat." *Id.* at 587-88. Before performing the risky act in the ideal situation, the potential injurer would get the potential victim's consent and the potential victim would agree to assume the risk only if she was fully compensated. *Id.* However, because consensual risky interactions are not ordinarily feasible, tort law exists to provide compensation for the nonconsensual risks that result in injury. *Id.*

[18] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 7 (5th ed. 1984) (stating that torts are commenced and maintained by injured persons to be compensated for the damages they have suffered at the expense of a wrongdoer). However, these authors later suggest that, "[i]t is perhaps more accurate to describe the primary function as one of determining when compensation is to be required." *Id.* at 20. Because "[c]ourts leave a loss where it is[,] unless they find good reason to shift it[,]" tort

however, because a court will compensate a victim only when it finds a good reason to do so, such as when fault can be attributed to a defendant.[19] Nevertheless, the need for victim compensation remains an ever-present drive of the American tort system.[20]

This goal, to remedy a victim's injuries, underlies the three bases of tort liability: intentional misconduct, negligence, and strict liability.[21] Traditionally courts have treated these bases separately and distinctly.[22] But many courts struggle to maintain firm barriers because each of these three bases overlaps and runs into the others.[23] One such situation has arisen in the context of comparative fault and whether it applies to intentional torts.[24] Where comparative analysis was once reserved for only negligent acts, some states are now expanding the reach of their systems to include other forms of misconduct.[25] The effects of these reforms on plaintiff recovery can be significant in scope.[26]

To more fully illustrate the issues created by including intentional torts in comparative fault analysis, a review of how comparative fault developed and expanded is warranted. Therefore, Part II.A of this Note chronicles the common law roots of comparative fault and its expansion beyond negligence.[27] Second, Part II.B describes how comparative fault

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law will not compensate a victim unless there is first a showing of fault or some other form of liability. *Id.*

19 *Id.* at 20 (stating that "[c]ourts leave a loss where it is[,] unless they find good reason to shift it.").

20 *Id.* at 6 (explaining that the purpose of tort law is to adjust the losses arising out of human activities to provide compensation to injured persons harmed by the conduct of another).

21 VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 2-2 (1994). More specifically, the three bases of liability can be characterized as:

> 1. Intent of the defendant to interfere with the plaintiff's interests.
> 2. Negligence.
> 3. Strict liability, or liability "without fault," where the defendant is held liable in absence of any intent which the law finds wrongful,or any negligence.

Id. See also Geistfeld, *supra* note 17, at 585 (arguing that tort law exists to compensate victims of accidents and injury).

22 *See infra* note 77 and accompanying text (discussing the states that refuse to compare torts from these different spheres).

23 *See infra* Part II.B (discussing the struggle that states are faced with in fashioning laws to either include intentional torts into, or exclude them from, their comparative fault schemes).

24 *See id.*

25 *See infra* Part II.B (listing and discussing the different approaches to comparative fault by the states).

26 *See infra* Part III.B (analyzing how including intentional torts results in plaintiffs being denied adequate and equitable compensation for their injuries).

27 *See infra* Part II.A (discussing contributory negligence and its development into modern-day comparative fault).

exists in individual states and how it has been addressed in view of intentional misconduct.[28] Third, Part II.C briefly reviews prior attempts to bring uniformity to this issue.[29] Finally, Part II.D provides a list of important public policy goals inherent in tort law that help in deciding whether intentional torts should be included in states' comparative fault schemes.[30]

A. From Contributory Negligence to Comparative Fault

The common law dealt harshly with plaintiffs who played any part in causing their own injuries.[31] Under the common law, if a plaintiff's own negligence contributed to his injury, no matter how slightly, he would be completely barred from recovering any damages from a negligent defendant.[32] Parts II.A.1–2 discuss how courts have attempted to ameliorate the stringent rule of contributory negligence and replace it with a more equitable rule of comparative negligence that is more favorable to plaintiffs' recovery.[33] Part II.A.3 describes how some states have expanded their comparative negligence schemes to include types of fault other than negligence.[34]

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[28] *See infra* Part II.B (listing and discussing the different approaches to comparative fault by the states).

[29] *See infra* Part II.C (discussing the Restatement and the Uniform Comparative Fault Act).

[30] *See infra* Part II.D (detailing Johnson and Gunn's list of important policy goals for tort law that will be used as a framework for analysis).

[31] *See* Butterfield v. Forrester, 103 Eng. Rep. 926 (1809) (establishing the common law doctrine of contributory negligence). *See also* DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 233 (West 1985). Discussing this decision, Dobbs wrote:

> [f]rom *Butterfield v. Forrester* the courts developed the rule of contributory negligence as a complete defense. Even relatively minor failure of the plaintiff to exercise ordinary care for his own safety would be a bar to any recovery. This picture did not change even if the defendant's negligence was extreme, so long as it fell short of a reckless or wanton act.

Id.

[32] SCHWARTZ, *supra* note 21, at 5 (stating that under contributory negligence, if a plaintiff's negligence contributed to the happening of an accident, he could not recover any damages from a negligent defendant who injured him).

[33] *See infra* Parts II.A.1–2 (detailing the creation of contributory negligence and its development into comparative negligence).

[34] *See infra* Part II.A.3 (describing how some states have expanded their allocation systems to include types of fault other than negligence, such as strict liability and intentional acts).

1. Common Law Contributory Negligence

The doctrine of contributory negligence has its roots in the early nineteenth-century English case of *Butterfield v. Forrester*.[35] In that case, the plaintiff was speeding on his horse when he hit an obstruction in the road that had been left by the defendant.[36] The plaintiff fell off his horse and suffered injuries.[37] When the plaintiff brought an action for damages against the defendant, the court held that he could not recover due to his own negligence in riding too fast.[38] The decision in *Butterfield* established a precedent for the doctrine of contributory negligence that denied plaintiffs any compensation if they were at fault for any portion of their own injuries.[39] Shortly thereafter, United States jurisdictions began to adopt and apply this doctrine.[40]

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[35] 103 Eng. Rep. 926 (1809). Although many commentators claim that this case established the doctrine of contributory negligence that later gave rise to comparative negligence, Victor E. Schwartz suggests that comparative negligence may actually have been developed earlier than contributory negligence. *See* SCHWARTZ, *supra* note 21, at 4–5. He suggested that, "[t]he *Butterfield* court was not bound to select this rule. There was precedent in the law of admiralty for comparative negligence as a method of handling the case in which a plaintiff was at fault." *Id.* at 5.

[36] *Butterfield*, 103 Eng. Rep. at 927.

[37] *Id.*

[38] *Id.* In the court's reasoning, Lord Ellenborough stated that, "[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do [sic] not himself use common and ordinary caution to be in the right." *Id.* He continued by explaining that if a person rode on the wrong side of the road, that would not authorize someone else to intentionally ride up against that person. *Id.* In other words, "[o]ne person being in fault will not dispense with another's using ordinary care for himself." *Id.* Consequently, in order for the plaintiff to be able to recover damages, Lord Ellenborough concludes that there must be both an obstruction in the road by the fault of the defendant, and there must be "no want of ordinary care to avoid it on the part of the plaintiff." *Id.*

[39] *Id.* Describing how this doctrine functioned as a defense to a defendant's negligence, Prosser and Keeton explained that contributory negligence occurs when the plaintiff contributes to the harm that he has suffered, which conduct "falls below the standard to which he is required to conform for his own protection." KEETON ET AL., *supra* note 18, at 451. However, unlike assumption of risk, contributory negligence is not based upon the idea that the defendant is relieved of his duties toward the plaintiff. *Id.* Rather, even though the defendant has breached his duty, the plaintiff is denied recovery because his own fault precludes him from maintaining the lawsuit. *Id.* at 452. Consequently, the law views both parties at fault and allows the defense to be "one of the plaintiff's disability, rather than the defendant's innocence." *Id.* at 452.

[40] *See* Smith v. Smith, 19 Mass. (2 Pick.) 621 (Mass. 1824) (holding that a negligent plaintiff who overloaded his horse's carriage and drove recklessly could not recover damages for injuries caused to his horse by the defendant's woodpile). *See also* W. Union Tel. Co. v. Hoffman, 15 S.W. 1048 (Tex. 1891). In *Hoffman*, the plaintiff brought a negligence claim against Western Union for failure to deliver a telegram to a family doctor. *Id.* The plaintiff alleged that such failure caused his minor son to lose his arm after it had been broken, the treatment of which had been the reason the plaintiff sent the telegram. *Id.* The

2. The Emergence of Comparative Negligence

Although contributory negligence was the rule in the United States for some time, courts began to determine that its results were too harsh on plaintiffs.[41] Under contributory negligence, a plaintiff who was one percent at fault for causing his injuries recovered absolutely nothing.[42] Describing how this stringent rule may have come about, Lou Dobbs wrote, "[s]ometimes a seemingly incomplete or irrational rule is simply the result of conceptual failure—an inability to put together a coherent idea of what the rule ought to be."[43] As states began to recognize the inherent unfairness of contributory negligence, notions of comparative negligence developed and were adopted.[44]

Comparative negligence differs from contributory negligence in that it permits a culpable plaintiff to recover damages from a defendant for a portion that does not include the plaintiff's own percentage of fault.[45] In

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Supreme Court of Texas held that because the plaintiff could have sent another message or procured other medical assistance, he could not recover against Western Union. *Id.*

41 *See, e.g.*, Blazovic v. Andrich, 590 A.2d 222, 226 (N.J. 1991) (stating that the legislative decision to adopt comparative negligence was to ameliorate the harsh results of contributory negligence).

42 *Id.* (stating that under contributory negligence, a negligent plaintiff was precluded from recovering damages "even when . . . [his] negligence was substantially less than the defendant's.").

43 *See* DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 234 (1985). Although Dobbs offers one explanation of the creation of contributory negligence, Prosser and Keeton described other theories that have been proffered for this doctrine. KEETON ET AL., *supra* note 18, at 452. One theory is that contributory negligence has a "penal basis" and exists to deny a plaintiff recovery to punish him for his misconduct. *Id.* Another theory is that the law requires a plaintiff to come into court with "clean hands." *Id.* Some have also said that contributory negligence is founded upon voluntary assumption of the risk. *Id.* However, Prosser and Keeton suggest that this theory is unsound because negligence can exist without knowing the risk of the behavior. *Id.* Last, contributory negligence has also been explained in terms of proximate causation because "the plaintiff's negligence is an intervening, or insulating, cause between the defendant's negligence and the result." *Id.*

44 *See infra* notes 45–58 and accompanying text (discussing the move in this country from contributory negligence to comparative negligence).

45 *See, e.g.*, FLA. STAT. ANN. § 768.81(1) (stating that the effect of contributory fault is that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."). Furthermore, the Iowa comparative fault statute states the following:

> Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to

the United States, at least three basic systems have developed.[46] First, a number of jurisdictions have adopted what is called the "pure" form of contributory negligence.[47] This system of contributory negligence permits a plaintiff to recover against a defendant even if his negligence rises to a greater proportion than that of the defendant's; however, the plaintiff's damage award is reduced by his percentage of fault.[48]

Second, some states use a modified system of comparative negligence that can take one of two forms.[49] There is the "forty-nine percent" system that allows a plaintiff to recover only if his fault is less than that of the defendant's, i.e., less than fifty percent.[50] If his fault is

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> section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

IOWA CODE ANN. § 668.3(1)(a).

[46] *See* SCHWARTZ, *supra* note 21, at 32–33; *see also* KEETON ET AL., *supra* note 18, at 471–74. The three forms of comparative fault are the pure form, the modified form, and the slight-gross system.

[47] *See, e.g.*, ALASKA STAT. §§ 09.17.060, 09.17.900; FLA. STAT. ANN. § 768.81; LA. CIV. CODE ANN. art. 2323; Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1983); Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984).

[48] Lee A. Wright, Comment, *Utah's Comparative Fault Apportionment: What Happened to the Comparison?*, 1998 UTAH L. REV. 543, 552 (1998). Wright explains how this system functions by stating, "[u]nder this approach, a plaintiff's recovery is diminished by the plaintiff's percentage of negligence, regardless of which party bears the greater portion of fault." *Id.* Describing this system further, Prosser and Keeton stated that "a plaintiff's contributory negligence does not operate to bar his recovery altogether, but does serve to reduce his damages in proportion to his fault." KEETON ET AL., *supra* note 18, at 472. This aim of the system is to compensate injured plaintiffs for all of the harm attributable to the defendant's wrongdoing. *Id.* In the case of multiple defendants, "all are liable to the plaintiff for their respective shares of the loss, even though some may have been less negligent than he." *Id.*

[49] KEETON ET AL., *supra* note 18, at 473–74 (explaining the modified forms of comparative negligence).

[50] SCHWARTZ, *supra* note 21, at 33. Wisconsin instituted this system when it adopted WIS. STAT. ANN. § 895.045(1) which states:

> Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

equal to or greater than that of the defendant's, common law contributory negligence is triggered, and the plaintiff recovers nothing.[51] The other form of modified comparative negligence, i.e., the fifty-percent system, varies only slightly from the former in that it precludes a plaintiff's recovery if his fault is equal to or greater than fifty-one percent.[52]

Third, some states use a slight-gross system when applying comparative negligence.[53] In order for the plaintiff to recover under this approach, his negligence must be only slight or minimal, whereas the defendant's negligence must be gross by comparison.[54] The plaintiff's damage award is diminished by his percentage of negligent fault.[55]

Id. This statute appears to be the first of its kind; as a result, the 50% system is sometimes referred to as the Wisconsin system of comparative negligence. *See* SCHWARTZ, *supra* note 21, at 33.

51 KEETON ET AL., *supra* note 18, at 474 (describing this system as the "equal fault bar" that precludes plaintiff recovery if his fault is equal to or greater than the defendant's fault).

52 SCHWARTZ, *supra* note 21, at 34. As a result, this system allows a plaintiff to recover if his fault is equal to or less than that of the defendants' fault. *Id.*

53 Two states that have adopted this approach are Nebraska and South Dakota. *See* NEB. REV. STAT. ANN. § 25-21, 185 (2007); S.D. CODIFIED LAWS § 20-9-1 et. seq. (2007); *see also* Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001); Frey v. Kouf, 484 N.W.2d 864 (S.D. 1992). The Nebraska Statute states in part that, "the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison[] . . . ." NEB. REV. STAT. ANN. § 25-21, 185.

54 SCHWARTZ, *supra* note 21, at 33.

55 *Id.* Along with understanding the three types of comparative negligence systems in the United States, it is also important to note the effects of joint and several liability on these systems. For instance, under any comparative negligence system, is the plaintiff's negligence compared with each individual defendant, or against the aggregate of all of the defendants' fault combined? *See* SCHWARTZ, *supra* note 21, at 317. A number of states mandate that the plaintiff's negligence be compared against the combined negligence of the joint defendants. *See* CONN. GEN. STAT. ANN. § 52-572h(a); DEL. CODE ANN. tit. 10, § 8132; HAW. REV. STAT. § 663-31; IND. CODE ANN. § 34-4-33-4(b); IOWA CODE ANN. § 668.3; NEV. REV. STAT. § 141.1(1); N.J. STAT. ANN. § 2A:15-5.1; OHIO REV. CODE ANN. § 31-610; OKLA. STAT. ANN. tit. 23, § 13; OR. REV. STAT. § 18.470. However, states such as Idaho compare the plaintiff's negligence to that of each individual defendant. *See* Odenwalt v. Zaring, 624 P.2d 383, 387 (Idaho 1981); *see also* IDAHO CODE ANN. § 6-801 (2007). In *Odenwalt*, the plaintiff's truck collided with one of the defendant's cows that was allowed to wander onto an interstate highway at night, causing injury to the plaintiff. 624 P.2d at 384. The plaintiff sued the defendant and his association in charge of the cattle for negligence for allowing the cow to roam. *Id.* The trial court found the two defendants to be ten percent and sixty-five percent at fault, respectively, and the plaintiff to be twenty-five percent at fault. *Id.* The issue on appeal was whether the plaintiff could recover when he was more at fault than one defendant, but was less at fault than the aggregate of both the defendants' negligence combined. *Id.* at 386. The court looked to the State of Wisconsin that had construed its similar statute to require "individual or one-on-one comparison." *Id.* at 387

The foregoing innovations for allocating fault have been successful in reducing the harsh impact that contributory negligence has had on plaintiffs.[56] However, comparative negligence is not without its own shortcomings, and courts continue to grapple with ever-evolving fact scenarios.[57] It follows, then, that courts are beginning to move beyond the more progressive forms of contributory negligence founded by comparative negligence.[58]

3. The Rise of Fault Beyond Negligence in Apportioning Liability

Common law contributory negligence was a defense only to acts that were negligent.[59] As states transitioned from contributory to

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(applying the holding in Reiter v. Dyken, 290 N.W.2d 510 (Wis. 1980)). The Idaho court adopted this approach and held that the plaintiff could not recover against the defendant who was 10% at fault. *Odenwalt*, 624 P.2d at 387–88.

Moreover, how joint and several liability is construed will affect the amount of damages a plaintiff may recover. SCHWARTZ, *supra* note 21, at 317. For instance, if a plaintiff's negligence is compared against each defendant individually, under a fifty-percent system, a thirty-percent-at-fault plaintiff could not recover against three defendants who were each twenty to twenty-five percent at fault. *Id.* Conversely, if the plaintiff's negligence is compared to the aggregate fault of all of the defendants, the plaintiff may recover seventy percent of the loss. *Id.*

[56] *See, e.g.*, Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984). In *Hilen*, the plaintiff was severely injured when the driver of the car in which the plaintiff was a passenger crashed and overturned the vehicle. *Id.* at 714. The issue at trial was whether the plaintiff was contributorily negligent by riding in a car with a driver that she knew was intoxicated. *Id.* The trial court instructed the jury on the defense of contributory negligence, and the jury awarded the plaintiff no damages as a result. *Id.* The plaintiff appealed, arguing that comparative fault should be adopted by Kentucky. *Id.* The Kentucky Supreme Court determined that the issue before them was "whether there are principles of fundamental fairness, underlying the application of contributory negligence as a defense, so compelling that contributory negligence as a complete defense should be discarded as part of the common law of this state in favor of comparative negligence." *Id.* at 717. After reviewing many arguments for and against comparative negligence, the court held that

> where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce the total amount of the award in the proportion that the claimant's contributory negligence bears to the total negligence that caused the damages.

Id. at 720. As a result, the plaintiff could recover for at least the driver's percentage of the fault, rather than receiving no compensation at all. *Id.*

[57] *See also infra* Part II.B (discussing how courts struggle with the inclusion of intentional torts in comparative fault systems).

[58] *See infra* Part II.A.3 (chronicling the expansion of comparative negligence to include other forms of fault).

[59] KEETON ET AL., *supra* note 18, at 462. On this, Prosser and Keeton stated as follows:

> The ordinary contributory negligence of the plaintiff is to be set over against the ordinary negligence of the defendant, to bar the action. But

comparative negligence, many states maintained that contributory negligence should be applied exclusively to negligence claims.[60] But some states now expand their comparative schemes by substituting the word "fault" for "negligence" in their statutes, or by broadly construing key terms within their laws to allow for other forms of fault outside of negligence.[61]

In *Bohan v. Ritzo*, for example, the New Hampshire Supreme Court enlarged the reach of its comparative negligence system by adopting a "comparative causation" approach when evaluating damages under claims of strict liability.[62] The court held that the state's comparative fault statute applied to "all tort actions, not merely actions founded in negligence[]" and, accordingly, that a dog-bite cause of action could be analyzed under it.[63] Even though the court noted that by definition strict

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> where the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense never has been extended to such intentional torts.

Id. The authors also state that contributory negligence was also not available to cases involving strict liability. *Id.* As a result, the two areas of tort law other than negligence—intentional acts and strict liability—were excluded from the defense of contributory fault. *See supra* note 21 and accompanying text (stating that the three bases of tort law are intentional acts, negligence, and strict liability).

60 *See, e.g.*, MASS. GEN. LAWS ch. 231, § 85 (2007) (stating that, "[i]n determining by what amount of the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought"). Moreover, the Supreme Judicial Court of Maine described Maine's exclusive application of comparative fault to negligent conduct by stating that "[c]ontributory negligence never has been considered a good defense to an intentional tort such as a battery, and it would likewise appear contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm." McLain v. Training and Development Corp., 572 A.2d 494, 497 (Me. 1990). The court went on to declare, "[w]e have never recognized contributory or comparative negligence as a defense to the intentional tort of assault and battery and we decline to do so now." *Id.*

61 For example, UTAH CODE ANN. § 78-27-37(2) includes in the meaning of fault "negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of product." *See also* Field v. Boyer Co., 952 P.2d 1078, 1086 (Utah 1998) (Stewart, J., concurring in part, dissenting in part). In this case, Justice Stewart stated that the term, "fault," was broadened "to apply to comparative principles in products liability and breach of warranty cases so that defenses such as misuse, abuse of product modification, etc., were no longer absolute bars to recovery[.]" *Id.*

62 679 A.2d 597, 601 (N.H. 1996). In this case, as the plaintiff rode his bicycle past the defendant's house, the defendant's dog chased after the plaintiff. *Id.* at 599. Fearing that the dog might bite him, the plaintiff stuck out his leg, looked down at the dog, and then lost control of his bicycle and fell down. *Id.* The dog never bit the plaintiff. *Id.*

63 *Id.* at 601. The text of New Hampshire's comparative fault statute reads as follows:

liability and comparative negligence were not compatible because the former requires no showing of fault, the court decided that the disparity could be reconciled by looking at the "comparative causation" of the parties rather than their actual fault.[64]

In the same vein, New York created its own unique brand of comparative fault by incorporating language such as "culpable conduct" into its apportionment scheme.[65] The lower appellate court in New York applied this language in the case of *Comeau v. Lucas*.[66] In *Comeau*, the plaintiff sustained a head injury when an intoxicated member of a rock band, who had been entertaining at a party, intentionally assaulted him.[67] The plaintiff brought a battery claim against the rocker, along

> Contributory fault shall not bar recovery in an action by any plaintiff or plaintiff's legal representative, to recover damages in tort for death, personal injury or property damage, if such fault was not greater than the fault of the defendant, or the defendants in the aggregate if recovery is allowed against more than one defendant, but the damages awarded shall be diminished in proportion to the amount of fault attributed to the plaintiff by general verdict. The burden of proof as to the existence or amount of fault attributable to a party shall rest upon the party making such allegation.

N.H. REV. STAT. ANN. § 507:7-d.

64 *Bohan*, 679 A.2d at 601. Interestingly, other states also allow negligence and strict liability to be compared in their comparative fault schemes, even though strict liability requires no showing of fault. *See, e.g.*, UTAH CODE ANN. § 78-27-37(2). Defining the common understanding of strict liability, Prosser and Keeton state that

> '[s]trict liability,'. . . as that term is commonly used by modern courts, means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence. This is often referred to as liability without fault.

KEETON ET AL., *supra* note 18, at 534.

65 *See* N.Y.C.P.L.R. 1411 (McKinney 2007). The statute states:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence, or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Id.

66 455 N.Y.S.2d 871 (N.Y. App. Div. 1982).

67 *Id.* In *Comeau*, a teenage girl hosted a party, where she provided alcohol beverages. *Id.* She did this, with her parents' consent, while her parents were out of the country. *Id.* During the party, the plaintiff's head was seriously injured after a member of the rock band hired to play at the party intentionally assaulted him. *Id.* Prior to that event, the plaintiff had also engaged in disruptive and drunken behavior. *Id.* Most of the guests at the party were minors under the age of eighteen. *Id.*

with negligence actions against the hostess of the party and her parents, for failure to properly supervise the event.[68]

On appeal, the court affirmed the lower court's jury award for the battery claim and awarded $250,000 in compensatory damages and $30,000 in punitive damages to the plaintiff.[69] However, the court reduced the amount by ten percent due to the plaintiff's own "culpable conduct" by drinking and engaging in disruptive behavior.[70] The appellate court then reinstated the negligence claims against the hostess and her parents that had been dismissed by the trial court, and remanded those issues for determination.[71] In the end, the court applied New York's "culpable conduct" statute to compare every party's fault, regardless of the type of tort committed.[72]

States like New Hampshire and New York set the stage for others to rethink their own approaches to comparative fault.[73] Some states began to apply comparative principles to actions formerly excluded from fault

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[68] *Id.* Specifically, the plaintiff's allegations were that because the hostess's parents gave their consent to the event and knew that minors would be present and drinking alcohol and that a rock band had been hired, they failed to properly supervise the party given by their 16 year-old daughter, even though they were out of the country at the time of the party. *Id.* Furthermore, the plaintiff claimed the hostess was individually liable as the agent of her parents for failing to properly supervise the party in the absence of her parents. *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* The court reasoned that the plaintiff had made a prima facie case against the parents of the hostess for failure to supervise because of their consent to the party. *Id.* at 675. Furthermore, the court said that the hostess was the agent of the parents because the parents expressly placed their daughter in control of the premises, authorized the party, and gave their daughter instructions to be followed. *Id.*

[72] *Id. But see* New York v. Corwen, 565 N.Y.S.2d 457 (N.Y. App. Div. 1990) (holding that intentional torts could not be included in a civil action to recover bribes paid to city officials who had been convicted of racketeering). In *Corwen*, the city of New York brought an action to recover bribes paid to city officials. *Id.* Discussing the issue of allocating fault and including intentional torts, the court reasoned:

> The defendants-appellants also contend that the IAS Court erroneously barred the city's claimed negligence as a defense to the intentional tort causes of action. While the Corwen defendants did not explicitly assert comparative negligence as a defense, they did assert negligence as a recoupment and setoff and the IAS court correctly regarded that as identical to asserting a comparative negligence defense. In the past, contributory negligence clearly has not been regarded as a defense to intentional torts and that appears to remain the rule with respect to comparative negligence.

Id. at 459-60 (citations omitted). As a result, in this opinion, the court did not allow comparisons between intentional and negligent fault. *Id.*

[73] *See infra* Part II.B (discussing the approaches of different states regarding the inclusion of intentional torts).

allocation, such as breach of warranty or products liability.[74] But the most controversial expansion of comparative fault has been when it is applied to torts that are intentional in nature.[75]

B. The Fifty States and the Inclusion of Intentional Torts into Comparative Fault

In the wake of many states broadening the reach of comparative fault, some states now struggle with the question of whether to allow comparisons between negligent acts and intentional acts.[76] Presently, the majority of states does not permit such comparisons.[77] But an emerging

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[74] *See, e.g.*, UTAH CODE ANN. § 78-27-37(2) (stating that "fault" includes negligence, assumption of risk, strict liability, breach of express or implied warranty, products liability, and misuse, modification, and abuse of a product). Discussing this statute, Justice Stewart of the Utah Supreme Court determined that the Utah legislature "broadened the statute to apply comparative principles in products liability and breach of warranty cases so that defenses such as misuse, abuse of product modification, etc., were no longer absolute bars to recovery but operated only to reduce a plaintiff's recovery, as in negligence cases." Field v. Boyer Co., 952 P.2d 1078, 1086 (Utah 1998) (Stewart, J., concurring in part and dissenting in part).

[75] *See infra* Part II.B.2 (describing the states that include intentional torts when comparing fault).

[76] *See, e.g.*, Field v. Boyer, 952 P.2d 1078 (Utah 1998); *see also* Jedrziewski v. Smith, 128 P.3d 1146 (Utah 2005). Also, the term "comparison" in this context refers to the concept of a court grouping the fault of all contributors to an injury together, then comparing each to decide what percentage was caused by whom, and then dividing up the damages between the culpable parties according to those percentages. And, as this Note will discuss, issues arise when the acts of defendants who committed intentional torts are allowed to be compared to the acts of negligent defendants under traditional comparative fault allocation systems. *See infra* Part III (analyzing the issue as it now stands before the states).

[77] *See* ARK. CODE ANN. § 16-64-122 (2007); *see also* Kellerman v. Zeno, 983 S.W.2d 136 (Ark. 1998). *See* CAL. CIV. CODE § 1431.2 (West 2007); *see also* Heiner v. Kmart Corp., 84 Cal.App. 4th 335 (Cal. Ct. App. 2000). *See* CONN. GEN. STAT. ANN. § 52-572h (West 2007); *see also* Bhinder v. Sun Co., 819 A.2d 822 (Conn. 2003). *See* DEL. CODE ANN. tit. 10 § 8132 (2007); *see also* Rochester v. Katalan, 320 A.2d 704 (Del. 1974). *See* FLA. STAT. ANN. § 768.81 (West 2007); *see also* Vantran Indus., Inc., 890 So. 2d 421 (Fla. Dist. Ct. App. 2004). *See* Gates v. Navy, 617 S.E.2d 163 (Ga. Ct. App. 2005). *See* Poole v. Rolling Meadows, 656 N.E.2d 768 (Ill. 1995). *See* IOWA CODE ANN. § 668.1 et seq. (West 2007); *see also* Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818 (Iowa 2001). *See* KAN. STAT. ANN. § 60-258a (2007); *see also* Sieben v. Sieben, 646 P.2d 1036 (Kan. 1982). *See* ME. REV. STAT. ANN. tit. 14, § 156 (2007); *see also* McLain v. Training and Dev. Corp., 572 A.2d 494 (Me. 1990). *See* MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2007); *see also* Flood v. Southland Corp., 616 N.E.2d 1068 (Mass. 1993). *See* MINN. STAT. ANN. § 604.01(West 2007); *see also* Florenzano v. Olson, 387 N.W.2d 168 (Minn. 1986). *See* MISS. CODE. ANN. § 85-5-7 (2007); Dawson v. Townsend & Sons, Inc., 735 So. 2d 1131 (Miss. Ct. App. 1999). *See* MO. ANN. STAT. § 537.765 (West 2007); *see also* Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983). *See* MONT. CODE ANN. § 27-1-702 (2007); *see also* Martel v. Power Co., 752 P.2d 140, 143 (Mont. 1988) (holding that all forms of conduct can be compared that fall short of intentional acts to cause injury or damage). *See* NEB. REV. STAT. ANN. § 25-21, 185 (West 2007); *see also* Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001). *See* NEV. REV. STAT. § 41.141; *see also* Davies v.

minority of states includes intentional torts either by statute,[78] judicial interpretation, or decree.[79] Still, other states have yet to resolve this issue within their jurisdictions.[80] Part II.B discusses how each state approaches this issue.[81]

Butler, 602 P.2d 605 (Nev. 1979). *See* Coleman v. Hines, 515 S.E.2d 57 (N.C. Ct. App. 1999). *See* OHIO REV. CODE ANN. § 2315.33 (West 2007); *see also* Labadie v. Semler, 585 N.E.2d 862 (Ohio Ct. App. 1990). *See* OKLA. STAT. ANN. tit. 25, § 6 (West 2007); *see also* Parret v. Unicco Serv. Co., 127 P.3d 572 (Okla. 2005). *See* OR. REV. STAT. ANN. § 31.600, et seq. (West 2007); *see also* Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762 (Or. Ct. App. 2005). *See* Johnson v. Phila., 808 A.2d 978 (Pa. Commw. Ct. 2002). *See* R.I. GEN. LAWS § 9-20-4 (2007); *see also* Calise v. Hidden Valley Condo. Assoc., Inc., 773 A.2d 834 (2001). *See* S.D. CODIFIED LAWS § 20-9-1 et. seq. (2007); *see also* Frey v. Kouf, 484 N.W.2d 864 (S.D. 1992). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (2007); *see also* Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1 (Tex. 1991), *modified*, Tony Gullo Motors I v. Chapa, 212 S.W.3d 299 (Tex. 2006). *See* VT. STAT. ANN. tit. 12, § 1036 (2007). *See* WASH. REV. CODE ANN. § 4.22.070 (West 2007); *see also* Tegman v. Accident & Med. Investigations, Inc., 75 P.3d 497 (Wash. 2003). *See* Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). *See* WIS. STAT. ANN. § 895.045 (West 2007); *see also* Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 384 N.W.2d 692 (Wis. 1986).

[78] *See* ALASKA STAT. ANN. § 09.17.900 (2007) (including intentional torts in the definition of fault); IDAHO CODE ANN. § 6-803 (2007) (allowing negligence and comparative responsibility to be compared); IND. CODE. ANN. § 34-6-2-45 (West 2007) (including willful, wanton, reckless, and intentional acts under the definition of fault); MICH. COMP. LAWS. ANN. § 600.6304 (West 2007) (including intentional misconduct within the definition of fault); N.Y.C.P.L.R. 1411 (designating comparisons between "culpable conduct"); N.D. CENT. CODE § 32-03. 2-02 (2007) (including in the definition of fault, "willful conduct"); *see also* Hansen v. Scott, 645 N.W.2d 223, 229 (N.D. 2002) (interpreting the language of the statute to include intentional acts).

[79] *See* ARIZ. REV. STAT. ANN. § 12-2506 (2007); *see also* Hutcherson v. Phoenix, 961 P.2d 449 (Ariz. 1998). *See* COLO. REV. STAT. ANN. § 13-21-111.5 (West 2007); *see also* Toothman v. Freeborn & Peters, 80 P.3d 804, 815-16 (Colo. Ct. App. 2002) (allowing intentional and negligent torts to be compared between joint defendants, but not between the plaintiff and defendants). *See* HAW. REV. STAT. § 663-31 (2007); *see also* Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998), *rev'd in part on other grounds*, 954 P.2d 644 (Haw. 1998). *See* KY. REV. STAT. ANN. § 411.182 (West 2007); *see also* Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998). *See* LA. CIV. CODE ANN. art. 2323 (2007); *see also* Landry v. Bellanger, 851 So. 2d 943, 954 (La. 2003) (holding that intentional and negligent torts will be compared between the plaintiff and defendants only when the plaintiff is negligent, but not when the plaintiff's conduct was intentional). *See* N.H. REV. STAT. ANN. § 507:7-d (2007); *see also Bohan*, 679 A.2d at 601 (stating that courts should look to "comparative causation" when allocating damages). *See* N.J. STAT. ANN. § 2A:15-5.1-5.2 (West 2007); *see also* Blazovic v. Andrich, 590 A.2d 222, 231-32 (N.J. 1991) (stating that the fault of a negligent plaintiff and an intentional tortfeasing defendant can be compared). *See* N.M. STAT. ANN. § 41-3A-1 (West 2007); *see also* Garcia v. Gordon, 98 P.3d 1044 (N.M. Ct. App. 2004). *See* TENN. CODE ANN. § 29-11-102 (2007); *see also Limbaugh*, 59 S.W.2d at 87. *See* WYO. STAT. ANN. § 1-1-109 (2007); *see also* Bd. Of County Comm'rs v. Bassett, 8 P.3d 1079 (Wyo. 2000).

[80] *See* Jedrziewski v. Smith, 128 P.3d 1146, 1151 (Utah 2005) (concluding that Utah has not resolved this issue, and the legislature may do so if it chooses). Alabama, Maryland, South Carolina, Virginia, and the District of Columbia continue to employ common law contributory negligence. *See* Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1980); Harrison

1. States That Do Not Include Intentional Torts in Their Comparative Fault Systems

The primary reason that a majority of states does not allow intentional torts within the reach of their comparative fault systems is that common law contributory negligence did not bar a plaintiff's recovery if the harm caused was the result of intentional misconduct.[82] Other states are less concerned about the common law heritage of the principle than they are about the literal definitional differences between intentional acts and torts more akin to negligence.[83] The Oregon Court of Appeals has gone so far as to characterize intentional-negligent evaluations as "conceptually incoherent[.]"[84] Many courts insist that

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v. Montgomery County Bd. of Educ., 456 A.2d 894, 905 (Md. 1983); Langley v. Boyter, 332 S.E.2d 100, 101 (S.C. 1985); Virginia Elec. & Power Co. v. Winesett, 303 S.E.2d 868, 872 (Va. 1983); Sanai v. Polinger Co., 498 A.2d 520, 524 (D.C. 1985).

[81] *See infra* Parts II.B.1–4 (discussing the different approaches throughout United States jurisdictions).

[82] *See* KEETON ET AL., *supra* note 18, at 462; *see also* McLain v. Training and Dev. Corp., 572 A.2d 494, 497 (Me. 1990) (stating that, in Maine "[c]ontributory negligence never has been considered a good defense to an intentional tort such as a battery, and it would likewise appear contrary to sound policy to reduce a plaintiff's damages under comparative fault for his 'negligence' in encountering the defendant's deliberately inflicted harm."). Also, the Court of Appeals of Oregon stated, "[b]efore the adoption of comparative fault, contributory negligence was not a defense to willful or intentional misconduct." Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762, 776 (Or. Ct. App. 2005).

[83] *See* Labadie v. Semler, 585 N.E.2d 862, 864 (Ohio 1990) (stating that, "[n]egligence is synonymous with heedlessness, carelessness, thoughtlessness, disregard, inattention, inadvertence, remissness, and oversight. Willfulness implies design, set purpose, intention, [and] deliberation[]"). The court concluded that a willful actor is "conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences[,] he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result." *Id.* Furthermore, the Supreme Court of Oklahoma stated that, "[i]ntent. . .is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does." Parret v. Unicco Serv. Co., 127 P.3d 572, 577 (Okla. 2005). Additionally, the Supreme Court of Rhode Island took the literal meaning of the statute and stated that, "[o]ur comparative negligence statute . . . is not a comparative fault statute. It comes into play only after negligence is first established on the part of both the plaintiff and the defendant." Calise v. Hidden Valley Condo. Assoc., Inc., 773 A.2d 834, 837 (2001).

[84] *Shin*, 111 P.3d at 776. The Oregon court qualified this characterization by stating that negligence exists on a continuum of fault that begins with simple negligence and ends with gross negligence and recklessness. *Id.* Willful and intentional misconduct, however, is not on that continuum. *Id.* Describing the nature of intentional acts, the court determined, "[they do] not involve a mere neglect of responsibility, however serious; to the contrary, [they] involve[] a conscious decision to act in a way that risks harm to another." *Id.* As a result, the court held that intentional misconduct and negligence were "qualitatively different" and are "not comparable." *Id.*

intentional acts and negligent conduct are not just different by degree, but they are absolutely different in the type of fault each embodies.[85]

Some states choose to not include intentional torts when comparing fault because of public policy.[86] For example, the Minnesota Supreme Court would not allow an insurance agent's liability for intentional misrepresentations to be compared to any negligence on the part of the plaintiff because "where society wants certain conduct absolutely prohibited and discouraged, apportionment of fault is not appropriate."[87] The Nevada Supreme Court declared that intentional tortfeasors should not be able to reap the benefits of comparative fault by shifting any portion of their culpability to other parties.[88] It has also been

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[85] *See, e.g., Parret*, 127 P.3d at 576. The Oklahoma Supreme Court concluded that ordinary and gross negligence differ in degree, yet negligence and willful and wanton conduct differ in kind. *Id.* As a result, Oklahoma refused to expand its comparative fault to include willful and wanton or intentional misconduct. *Id. See also* KEETON ET AL, *supra* note 18, at 462 (stating that, "where the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense [of contributory negligence] never has been extended to such intentional torts."). Interestingly, however, the Illinois Supreme Court differently characterized the disparity between intentional and negligent misconduct when it stated, "because of the '*qualitative difference*' between simple negligence and willful and wanton misconduct a plaintiff's negligence . . . [can]not be compared with a defendant's willful and wanton misconduct." *Poole*, 656 N.E.2d at 770 (emphasis added). *But see* Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Tort Suits in Which Both the Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 138–41 (1993) (arguing that the distinction between intentional and negligent torts is often vague and varies only in degree, not in kind).

[86] *See infra* notes 87–89 and accompanying text (describing the holdings and reasoning of courts that adhere to this approach).

[87] Florenzano v. Olson, 387 N.W.2d 168, 175–176 (Minn. 1986). The court continued by stating that it is "bad [public] policy to permit an intentional tortfeasor the defense of comparative negligence merely because he or she chooses a gullible or foolish victim." *Id.* at 176. *See* Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 827 (Iowa 2001). In *Hansen*, the Supreme Court of Iowa stated that, "shifting the full responsibility for the loss to the intentional tortfeasor serves the policy of deterring conduct which society considers to be substantially more egregious than negligence." *Id. But see* William Westerbeke, *The Application of Comparative Responsibility to Intentional Tortfeasors and Immune Parties*, 10-FALL KAN. J. L. & PUB. POL'Y 189, 190 (2000) (discussing how not all intentional torts rise to the "high culpability" level that society is so bent on prohibiting).

[88] Davies v. Butler, 602 P.2d 605, 611 (Nev. 1979). In *Davies*, the parents of a young man brought a wrongful death action against a social drinking club when their son died of alcoholic poisoning during his initiation to the club. *Id.* at 606–07. The respondent drinking club on appeal argued that the decedent was contributorily negligent in that he consented to the initiation process. *Id.* at 610. However, the Nevada court disagreed and said that intentional wrongdoers "should not have the benefit of contributory negligence[.]" *Id.* at 611. *See* Lee A. Wright, *Utah's Comparative Apportionment: What Happened to the Comparison?*, 1998 UTAH L. REV. 543, 561 (1998) (describing how including intentional torts leads to under-accountability); *see also* Christopher M. Brown & Kirk A. Morgan, *Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect*

argued that apportionment of fault between intentional and negligent actors diminishes the deterrent elements designed to prevent intentional misconduct.[89] But whatever the rationale, the majority of states continues to keep intentional torts separate from negligence when allocating fault.[90]

Against Intentional Misconduct, 2 WYO. L. REV. 483, 511–12 (2002) (discussing that the duty to prevent harm will be diminished by including intentional torts).

89 *See* Blazovic v. Andrich, 590 A.2d 222, 231 (N.J. 1991) (rejecting this argument because a plaintiff's comparative fault will reduce only the recovery of compensatory damages, not the recovery of punitive damages).

90 *See supra* note 77 (listing the authority for states that do not include intentional torts when comparing fault). The effect of not including intentional torts in comparative fault is illustrated in the decision of *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001). In *Brandon*, the decedent had been sexually abused as a child and, as a result, developed a gender-identity disorder. *Id.* In 1993, she came to Richardson County and held herself out to the public as a man. *Id.* The decedent met a young woman, who believed the decedent was a man, and they dated for approximately one month. *Id.* However, the decedent's true gender fell under suspicion when she went to jail on charges of forgery and the county placed her in the female area. *Id.* Subsequently, in an attempt to verify their suspicions, two male friends of the decedent and her girlfriend forcibly removed the decedent's pants and then drove her to a remote location where they brutally beat and raped her. *Id.* After the decedent had been raped and beaten, she managed to escape through a bathroom window to report the event to the sheriff's department. *Id.* at 611. However, the sheriff who took her interview demeaned and belittled the decedent, by referring to her as an "it" and crudely and insensitively questioning her about her gender-identity crisis and the rape. *Id.* at 611–13. Furthermore, no arrests were made, even after questioning the two men and knowing that each had significant criminal records and had made threats on the decedent's life if she revealed the incident. *Id.* at 614. Within the week, however, the two men murdered the decedent, along with two other people, in a rural farmhouse. *Id.* at 610. The trial court awarded the plaintiff, who was the mother of the decedent, $6,223.20 in economic damages and $80,000 in noneconomic damages. *Id.* at 618. However, because the court found the victim to be one percent at fault and the intentional tortfeasors to be eighty-five percent at fault, it reduced the plaintiff's award against the county by those percentages. *Id.* On appeal, the Supreme Court of Nebraska reversed the trial court's decision and held that the allocation of damages under the state's comparative negligence scheme applied only to negligent tortfeasors and not to those who acted intentionally. *Id.* at 619. The Nebraska Supreme Court invoked two common reasons for their holding. *Id.* at 619–20. First, the court determined that the state's comparative negligence law only applied to civil actions in which contributory negligence was a defense, and because at common law contributory negligence was not a defense to intentional torts, the court would likewise not allow comparative negligence to be a defense to an intentional tort. *Id.* Furthermore, the court reasoned that when a defendant intends to inflict harm, "there is a difference, not merely in degree, but in the kind of fault[.]" *Id.* at 619. Second, the court determined that the plain language of the statute specified the word "negligence" as the kind of tort that is appropriate for comparative fault; thus, intentional torts could not be included. *Id.* at 620. As a result, the court mandated that the plaintiff's award not be reduced by the eighty-five percent of fault attributable to the two men who raped and murdered her daughter and that the county be liable for the entire amount. *Id.* at 628.

2. States That Include Intentional Torts When Comparing Fault

Despite the trend to not allow intentional torts into comparative fault analysis, an increasing minority of states is now expanding their fault-allocating systems to include intentional wrongdoing.[91] A few states have included intentional acts by statute and have applied the principles in varying situations.[92] Other states have incorporated intentional misconduct by judicial interpretation or decree.[93] For instance, the Arizona Supreme Court upheld a jury determination in a civil case that found the city of Phoenix to be seventy-five percent at fault for the murder of the plaintiffs' children, whereas the murderer was held to be only twenty-five percent at fault.[94] The court reasoned that it could find no compelling authority requiring that intentional acts be weighed more heavily than those that are negligent.[95]

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[91] *See supra* notes 78–79 and accompanying text (listing authority for states that have adopted comparative fault systems that include intentional torts).

[92] *See supra* notes 77–80 (listing all the statutes in the various states); *see also* Hansen v. Scott, 645 N.W.2d 223 (N.D. 2002) (allocating fault between the murderer of the plaintiffs' mother and the Department of Criminal Justice for failing to fully disclose a parolee's criminal background and for failing to adequately supervise the parolee); Joseph v. Alaska, 26 P.3d 459 (Alaska 2001) (holding that in the case of an inmate committing suicide, because the jail was in a custodial relationship, the intentional act of suicide could not bar the plaintiff from recovering under negligence, even if such negligence was not foreseeable); Rausch v. Pocatello Lumber Co., 14 P.3d 1074 (Idaho 2000) (allowing comparisons between the fault of a defendant who caused injury to the plaintiff when he intentionally and jokingly pulled a chair out from under the plaintiff); Coffman v. Rohrman, 811 N.E.2d 868 (Ind. Ct. App. 2004) (allowing comparisons, where a real estate agent intentionally did not disclose that the plaintiff would have to assume costs associated with access road construction); Lamp v. Reynolds, 645 N.W.2d 311 (Mich. Ct. App. 2002) (allowing defendant's intentional misconduct to be compared when a motor-cross racer hit a concealed tree stump on the perimeter of a racetrack and sustained injuries resulting from the accident); Comeau v. Lucas, 90 A.D.2d 674, 674–75 (N.Y. App. Div. 1982).

[93] *See supra* note 79 (listing the jurisdictions that adopted this approach through judicial decree).

[94] Hutcherson v. Phoenix, 961 P.2d 449, 453 (Ariz. 1998). In *Hutcherson*, the City of Phoenix received a telephone call from a young woman worried about being assaulted by her former boyfriend. *Id.* at 450. After hearing the woman explain that her ex-boyfriend had been pursuing her all night and threatened her, the 911 Operator twice said that she would send an officer as soon as she could. *Id.* Twenty-two minutes after the 911 phone call, the ex-boyfriend entered the house where the woman was hiding and fatally shot her and her current boyfriend before turning the gun on himself. *Id.* at 450–51. The mothers of the victims brought a wrongful death action against the city because the operator had categorized the emergency call as Priority 3, the average response time of which is 32.6 minutes. *Id.* at 451.

[95] *Id.* at 452–53. The court also quoted the dissenting opinion from the lower appellate court on this same matter that stated:

> The murderer's culpability is enormous, the operator's is slight. He committed deliberate homicide; she misjudged the severity of the call.

States that have adopted this approach have not done so uniformly.[96] Colorado permits the inclusion of intentional torts between joint defendants, but does not permit it when comparing the fault of a plaintiff to that of a defendant.[97] Louisiana, on the other hand, allows a plaintiff's fault to be compared to a defendant's intentional act, but only when the plaintiff also acted intentionally.[98] Furthermore, Tennessee has a limited approach of applying comparative fault to intentional torts that applies only between defendants and only when both are named parties to the lawsuit.[99] Tennessee requires this to prevent what is known as the "empty chair" defense.[100]

> And when it comes to contribution to causation, at first blush, the imbalance again weighs heavily toward the murderer. When you add relative timing into the picture, however, the balance starts to shift. The operator has notice of a potentially imminent harm and a chance to avoid it. This is a proper factor for the fact finder to weigh. It is also proper for the fact finder to weigh the operator's responsibility for foresight and avoidance. It enters into the weighing of relative degrees of fault.

Id. at 453 (quoting Hutcherson v. Phoenix, 933 P.2d 1251, 1265–66 (Ariz. Ct. App. 1996) (Grant, J., dissenting)).

[96] *See supra* notes 78–79 (listing authority for states that have adopted comparative fault systems that include intentional torts).

[97] *See* Toothman v. Freeborn & Peters, 80 P.3d 804, 815–16 (Colo. Ct. App. 2002). In *Toothman*, the plaintiffs alleged that the defendants intentionally defrauded investors by organizing, promoting, and selling interests in fifty-three limited liability partnerships. *Id.* at 807. In deciding that the fault of the intentionally tortfeasing defendants could not be reduced by the plaintiff's negligence, the court determined that

> the [Colorado] supreme court has ruled that the pro rata statute requires apportionment of damages among the several defendants even when one of the tortfeasors commits an intentional tort that contributes to an indivisible injury. However, we disagree . . . [that this] mandate[s] apportionment among plaintiffs when the underlying action alleges intentional . . . conduct by the defendants.

Id. at 815–16 (citation omitted).

[98] Landry v. Bellanger, 851 So. 2d 943, 953–54 (La. 2003). The Louisiana Supreme Court concluded that that a negligent plaintiff who is injured by the fault of an intentional tortfeasor will not have his damages reduced by his percentage of the fault. *Id.* at 953. However, this "applies only when plaintiff's contributory fault consists of negligence and does not apply where the plaintiff's fault is intentional." *Id.* at 954.

[99] *See* Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 86–87 (Tenn. 2001). *But see* Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998), *rev'd in part on other grounds*, 954 P.2d 644, 662 (Haw. 1998) (using Hawaii's pure form of comparative negligence broadly to apportion fault between a defendant's intentional murder, the negligence of another defendant, and the victim of the murder). In *Ozaki*, the jury found the murderer to be ninety-two percent at fault, the owner of the apartment complex where the murder took place to be three percent at fault, and the victim to be five percent at fault. *Id.* at 657. On appeal, the Hawaii Supreme Court affirmed the allocation, reasoning that every person who had any contributory fault should be included because such would "accomplish a fairer and more equitable result" and "fairness and equity are

But the most groundbreaking expansion of comparative fault to include intentional torts comes from the Supreme Court of New Jersey.[101] In *Blazovic v. Andrich*, a group of men assaulted and injured the plaintiff outside of a bar after the plaintiff verbally tried to stop them from throwing rocks at a nearby sign.[102] The jury at trial found that the owner of the bar where the assault took place, the intentional assaulters, and the plaintiff all contributed to the plaintiff's injuries.[103] The trial court nevertheless instructed the jury to compare only the relative fault of the plaintiff and the bar owner because it understood the comparative fault law to exclude intentional actors.[104]

On appeal, the trial court's decision was reversed, and the fault of the intentionally tortfeasing defendants was included in the allocation of liability.[105] The New Jersey Supreme Court determined that it did not

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more important than conceptual and semantic consistency[.]" *Id.* at 660 (citing Kaneko v. Hilo Coast Processing, 654 P.2d 343, 352 (Haw. 1982)). *See also Garcia*, 98 P.3d at 1047 (explaining that, "[p]ure comparative negligence denies recovery for one's own fault; it permits recovery to the extent of another's fault; and it holds all parties fully responsible for their own respective acts to the degree that those acts have caused harm.").

100 *Compare Limbaugh*, 59 S.W.3d at 86–87 *with* Hansen v. Scott, 645 N.W.2d 223, 229 (N.D. 2002) (stating that the North Dakota's comparative negligence statute "contemplates an 'empty chair' defense, which specifically permits an allocation of fault to each person who contributed to an injury even though that person may not be a party to the action[]"). *Id. See* E-mail from Phillip W. Dyer, Attorney at the Law Offices of Phillip W. Dyer in Salt Lake City, Utah, to Senator Ross I. Romero, Utah Legislator (February 5, 2007, 5:58 p.m. MST) (on file with author) (commenting on this "empty chair" defense, and stating that this defense leads to the victim being victimized twice).

101 *See* Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991).

102 *Id.* at 224. The facts of the case are that while in the parking lot of a bar the plaintiff asked a group of men to stop throwing rocks at a nearby sign. *Id.* However, this fact was in dispute because the defendants claimed that the plaintiff repeatedly swore at them. *Id.* Nevertheless, both sides agreed that a member of the group of men began a physical confrontation that resulted in the plaintiff being pushed to the ground and significantly beaten. *Id.*

103 *Id.* Specifically, the fault attributed by the jury to each party was that the intentional tortfeasors assaulted the plaintiff, the bar failed to provide adequate lighting and security in the parking lot, and the plaintiff provoked the assault. *Id.* at 233.

104 *Id.* at 224.

105 *Id.* at 225, 233. The procedural posture in this case is that the lower appellate court reversed the trial court, and the State Supreme Court affirmed the lower appellate court on this specific issue. *Id.* Discussing the reasoning behind the holding in *Blazovic* and other cases that have relied on *Blazovic*, Theresa L. Fiset stated that the opinions were based on the premise that comparative fault was developed "to achieve a fairer distribution of loss in negligence actions by equating liability with fault." Theresa L. Fiset, *Comparative Fault As a Tool to Nullify the Duty to Protect: Apportioning Liability to a Non-party Intentional Tortfeasor in Stellas v. Alamo Rent-A-Car, Inc.*, 27 STETSON L. REV. 699, 713 (1997). As a result, the courts in these decisions determined that the legislatures intended all tortious conduct to be included under comparative fault; therefore, "a jury must apportion liability for damages among intentional and negligent tortfeasors because they are all at 'fault[.]'" *Id.* at 713–14.

view intentional wrongdoing as different-in-kind from negligence, but merely different-in-degree.[106] The court further reasoned that because the plaintiff's comparative fault would reduce only his recovery of compensatory damages, the punitive damage award would remain intact to provide the necessary deterrent for intentional wrongdoing.[107] In short, the court expressed the view that fairness required a proportionate allocation of fault to all culpable parties.[108]

Blazovic is significant because it illustrates the situation contemplated in the hypothetical above where a defendant commits an intentionally violent act and reduces his liability by the negligence of the plaintiff that he injured.[109] Describing this issue further, Professor William Westerbeke stated, "Reduction of my obligation to pay damages in proportion to your contributory negligence may be appropriate if I am merely negligent in running my car into your car. The reduction is far less appropriate if I intentionally crash into your car."[110] Therefore, the

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[106] Blazovic v. Andrich, 590 A.2d 222, 231 (N.J. 1991). The court further explained that acting intentionally "involves knowingly or purposefully engaging in conduct 'substantially certain' to result in injury to another." *Id.* On the other hand, "wanton and willful conduct" differs in that it "poses a highly unreasonable risk of harm likely to result in injury." *Id.* Nevertheless, the court decided that even those differences between intentional conduct and negligence did not preclude comparisons by a jury. *Id.* The court reasoned that the jury will reflect the different levels of culpability inherent in the different types of conduct. *Id.* The court also reasoned that by including intentional torts, "we adhere most closely to the guiding principle of comparative fault—to distribute the loss in proportion to the respective faults of the parties causing that loss." *Id.*

[107] *Id.* at 231–32. The court explained that the design of punitive damages is "to punish the wrongdoer, and not to compensate the injured party[.]" *Id.* at 232. As a result, punitive damages are not subject to apportionment or contribution among joint tortfeasors. *Id.*

[108] *Id.* at 233. *See also* Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998), *rev'd in part on other grounds*, 954 P.2d 644, 662 (Haw. 1998) (stating that including intentional torts when comparing fault accomplishes fairer and more equitable results). In *Ozaki*, the decedent was murdered by her boyfriend in her apartment. *Id.* at 655. Before the murder, the boyfriend came to the complex and asked the security guard to let him in to wait for the decedent. *Id.* The security guard allowed the boyfriend to enter, and the next day the decedent was found dead in her apartment due to either suffocation or strangulation. *Id.* The plaintiff, who was the decedent's executor of the estate, and the decedent's sister brought multiple claims including seeking damages for physical, mental, and emotional pain and suffering, future earnings, and loss of pleasure of being alive. *Id.* at 655–56. The Hawaii Supreme Court held that the fault of both the boyfriend and the apartment complex could be apportioned under comparative fault. *Id.* at 662. The court reasoned that, "where a defendant's intentional conduct, a co-defendant's negligence, and the plaintiff's negligence combine to cause the plaintiff's damages, 'pure comparative negligence principles' should be applied and the plaintiff's recovery should reflect the relative degrees of fault of all culpable parties as determined by the jury." *Id.*

[109] *See supra* notes 1–3 and accompanying text (offering the hypothetical situation of a rapist reducing his civil liability by the negligence of the plaintiff).

[110] Westerbeke, *supra* note 87, at 190. But Professor Westerbeke goes on to say that "[b]ecause contributory negligence rarely arises as a serious defense to an intentional tort,

decision in *Blazovic* may seem radical to those states that characterize the comparison of fault between a negligent plaintiff and a defendant acting intentionally as an absurdity.[111]

3. States That Are Undecided as to Whether to Include Intentional Torts in Their Comparative Fault Systems

Although few in number, there are a handful of states that have yet to clearly decide whether to include intentional torts in their comparative fault schemes.[112] Utah, in particular, has unsuccessfully tried to resolve this issue in a recent series of state supreme court cases.[113] First, in *Field v. Boyer Co.*, the Utah Supreme Court discussed whether it should include the fault of an unknown sexual assailant who raped the plaintiff on the property of a store owned by the defendant.[114] Upon reviewing the language of the statute that defines the word "fault," the plurality of the court decided that "fault" included intentional conduct.[115] The court

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comparative fault reductions would probably be infrequent and small[.]" *Id.* Westerbeke explains in his discourse that his view is that including intentional torts in comparative fault creates judicial economy and administrative efficiency. *Id.* He argues that most states extend comparative fault to reckless acts, and that such acts require some form of intent. *Id.* Therefore, he states that, "Little if any public policy gains will result from burdening courts and attorneys with the need to try these tort actions under both 'all or nothing' and comparative responsibility principles until the trier of fact decides whether defendant's conduct was intentional or merely reckless." *Id.* at 190–91.

111 *See* Field v. Boyer Co., 952 P.2d 1078, 1083 (Utah 1998) (Stewart, J., concurring in part and dissenting in part). Furthermore, Ellen M. Bublick describes that some areas of the law could be dramatically impacted by allowing intentional tortfeasors to reduce their liability by the plaintiff's negligence. *See* Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 435 (2003). In her article, Bublick stated that comparing a defendant's intentional and negligent fault reduces the intentional tortfeasor's liability to the plaintiff. *Id.* However, she suggests that allowing these comparisons may seem unimportant because many intentional tortfeasors will be absent or insolvent. *Id.* Nevertheless, Bublick states that there are large categories of cases in which comparing the fault of the defendant and plaintiff when intentional torts are involved will have a significant financial impact, such as intentional environmental harm. *Id.*

112 *See supra* note 80 (listing states that are undecided on this issue).

113 *See Field*, 952 P.2d at 1078–90; Jedrziewski v. Smith, 128 P.3d 1146, 1146–51 (Utah 2005).

114 *Field*, 952 P.2d at 1079. In this case, the plaintiff was an employee of a department store located in the plaza owned by the defendants. *Id.* On a particular night, the plaintiff left work and walked to her car in the parking lot outside the store. *Id.* As she passed a set of stairs, someone assaulted her from behind by wrapping a rope around her neck, choking her to unconsciousness, and then physically and sexually assaulting her. *Id.* The plaintiff sued the store and the owners of the plaza for failing to provide adequate security for employees and customers. *Id.* The defendants moved to include the fault of the plaintiff's unknown assailant into the jury's apportionment of fault. *Id.*

115 *Id.* at 1080. UTAH CODE § 78-27-37(2) states that "Fault" under the statute means:

reasoned that intentional acts could be compared because the statute contemplated any act proximately causing or contributing to the injury or damage.[116]

After the *Field* decision, many believed that the court had decided the issue in favor of allowing intentional torts into Utah's comparative fault scheme.[117] However, in 2005 the Utah Supreme Court declared unequivocally that "the solution to the riddle of *Field* is that whether the . . . [Utah comparative fault statute] applies to intentional torts remains an open question. . . ." and that "the legislature may, if it elects, answer

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> any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all [of] its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

Id.

[116] *Field*, 952 P.2d at 1080. The court continued, "[c]learly an intentional tort such as battery is an act that proximately causes or contributes to injury or damage. Thus, we conclude that the legislature included intentional acts in its comparative fault scheme." *Id.* However, Justice Stewart wrote a scathing dissent discussing the injustice created by permitting an intentional actor to reduce his liability by a plaintiff's negligence:

> The legal obligation not to assault or rape is absolute. The law does not impose on a victim a duty to avoid a criminal act by another. How can . . . [the] lead opinion countenance the proposition that a rapist's liability can be reduced because the victim imprudently let the rapist into her home after a date? How can the lead opinion countenance the proposition that a murderer's liability in a wrongful death action can be reduced because a landlord failed to repair an apartment building's locks? If, as must surely be law, the rapist who assaulted [the plaintiff] should not be allowed to reduce his liability by the . . . defendants' negligence, it is not logically possible to permit the…defendants to reduce their liability by offsetting the assailant's criminal, intentional fault against their negligence[.]

Id. at 1088. Furthermore, Justice Stewart articulated the inherent unfairness to the plaintiff created by allowing a comparison of intentional fault in this case when he stated that

> [g]iven defendants' duty to provide a safe workplace and their breach of that duty, it would be patently unfair to allow their liability to a faultless, injured plaintiff to be reduced or even eliminated by the culpability of an intentional wrongdoer, thereby depriving the faultless plaintiff of an adequate remedy or any remedy at all. Such an application of comparative principles would eviscerate defendants' duty to prevent such a wrong.

Id.

[117] *See* Jedrziewski v. Smith, 128 P.3d 1149, 1148 (Utah 2005) (stating that many people, other than the members of the Utah Supreme Court, believed that the issue was resolved in the *Field* opinion).

it."[118] Despite a number of proposed bills, the state legislature has yet to resolve this issue for Utah.[119]

C. *Attempts at Uniformity: the Uniform Comparative Fault Act and the Restatement*

States that are undecided or wish to change their methodology may look to the Uniform Comparative Fault Act or the Restatement of Torts for guidance in deciding whether to include intentional torts when comparing fault.[120] The Uniform Comparative Fault Act is clear, stating, "[t]he Act does not include intentional torts."[121] Comparatively, the Restatement is less exclusive in its approach.[122]

Recognizing the many issues inherent in including intentional torts in comparative fault, the Restatement deals cautiously with this issue.[123]

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[118] *Id.* at 1151. In *Jedrziewski*, one evening thirty students from a local high school went to the home of the plaintiff looking for students of a rival high school in hopes of retaliating for a series of previous altercations between the two groups. *Id.* at 1147. After breaking several windows on the plaintiff's house and chasing a number of students, the group caught up with the plaintiff and brutally beat him with baseball bats. *Id.* At the time the group caught up with the plaintiff, the plaintiff was involved in an altercation with a member of the group who had previously hit the plaintiff's female friend in the face. *Id.*

[119] *See* H.R. 45, 57th Leg., Gen. Sess. (Utah 2007) (proposing the inclusion of intentional torts into Utah's comparative fault scheme). Nevertheless, this Bill did not pass and its sponsor has since left the legislature.

[120] *See* UNIF. COMPARATIVE FAULT ACT § 1 (1977); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1.

[121] UNIF. COMPARATIVE FAULT ACT § 1, cmt. a (1977). The Act defines "fault" as:

> [A]cts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id. at § 1(b).

[122] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. c.; *see also* Ellen M. Bublick, *supra* note 111, at 435 (describing the restatement as it applies to intentional torts in comparative fault).

[123] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. c. The comment to §1 articulates very well the issues that are created by including intentional torts in comparison schemes:

> Whether intentional torts should be included raises two principal issues as well as some subordinate ones. First, should a plaintiff's negligence reduce the plaintiff's recovery against an intentional tortfeasor? Second, when one of two or more defendants is liable for an intentional tort, should a percentage of responsibility be assigned to that tortfeasor? Such an allocation could affect: (a) the plaintiff's own

For instance, it specifically states that it takes no position on whether to allow comparisons between a negligent plaintiff and a defendant who commits an intentional tort.[124] But if the plaintiff also commits an intentional act, his fault may be compared to that of other intentional actors.[125] Furthermore, the Restatement allows the fault of a negligent defendant to be compared with that of an intentional actor only when the former breached a special duty to protect the plaintiff from the injury caused by the intentional act.[126] This concept is known as the "very duty" rule.[127] Therefore, even though the Restatement includes intentional torts when comparing fault, it suggests a limited approach.[128]

D. Public Policy Bases of Tort Law

When analyzing any issue founded in tort law, it is crucial to recognize that this legal area has been shaped by "the pursuit of a variety

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> percentage of responsibility and thereby reduce the plaintiff's recovery against other defendants, including nonintentional tortfeasors, (b) whether to impose joint and several liability on various defendants, (c) the allocation of responsibility to other defendants, (d) whether a different defendant should bear liability for responsibility assigned to the intentional tortfeasor, (e) the rules governing settlement, and (f) contribution and indemnity.

Id.

[124] *Id.* The Restatement states that "[a]lthough some courts have held that a plaintiff's negligence may serve as a comparative defense to an intentional tort, most have not. This Restatement takes no position on that issue." *Id.*

[125] *Id.*

[126] *See id.* § 14; *see also id.* § 12 (stating that intentional tortfeasors are jointly and severally liable, even if joint and several liability has been abolished in a particular jurisdiction).

[127] *See* Bublick, *supra* note 111, at 423. Describing this rule, Bublick states that "a negligent tortfeasor cannot reduce its liability to the plaintiff if it is liable for a 'failure to protect the [plaintiff] from the specific risk of the intentional tort.'" *Id.* (quoting the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14). The very-duty rule is described well in the case of *Bexiga v. Havir Manufacturing, Corp.*, 290 A.2d 281 (N.J. 1972). In this case, the plaintiff lost his fingers after his hand was crushed by a push-press at work. *Id.* at 282. In rejecting the defendant's claim that the plaintiff was contributorily negligent, the New Jersey Supreme Court decided the following:

> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against. We hold that under the facts presented to us in this case the defense of contributory negligence is unavailable.

Id. at 286 (citations omitted). Therefore, because the defendant's duty was to manfacture this device to prevent the specific harm that the plaintiff suffered, the court denied the use of the defense of contributory negligence. *Id.*

[128] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. c.

of ends[.]"[129] One goal already mentioned is the need to provide relief to injured plaintiffs.[130] But other aims that tort law seeks to accomplish must also be considered in deciding whether intentional torts should be included in comparative fault analysis. Vincent Johnson and Alan Gunn provide the following list of additional policy goals:[131]

1. "Liability should be based on fault."[132]
2. "Liability should be proportional to fault."[133]
3. "Liability should be used to deter accidents."[134]
4. "The costs of accidents should be spread broadly."[135]
5. "The costs of accidents should be shifted to those best able to bear them."[136]
6. "Tort law should foster predictability in human affairs."[137]

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[129] VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 4 (Carolina Academic Press 1994). The authors continue by explaining that the many goals of tort law are "sometimes-congruent, sometimes-conflicting public policies." *Id.* But understanding them helps to explain the rules of law and to evaluate "tort standards by clarifying the interests advanced or sacrificed through adherence to a given position." *Id.*

[130] *See supra* notes 16–17 and accompanying text (discussing the priority of plaintiff recovery in the American tort law system).

[131] *See* JOHNSON & GUNN, *supra* note 129, at 4–7. Not discussed in this Note are four other policy goals also provided by Johnson and Gunn: "Those who benefit from dangerous activities should bear the resulting losses[;]" "Tort law should facilitate economic growth and the pursuit of progress[;]" "Tort law should discourage the waste of resources[;]" and "Courts should accord due deference to co-equal branches of government." *Id.* These policies deal with issues outside the scope of the topic of this Note, such as products liability or strict liability.

[132] *Id.* at 4 (internal quotations omitted). This policy attempts to place liability on blameworthy conduct and is generally applied where harm is caused by a failure to exercise care or intentionally tortious conduct. *Id.*

[133] *Id.* This policy has two parts: (1) liability should not be placed on an individual tortfeasor, even under the showing of fault, if the individual tortfeasor would be liable for a disproportionate burden; and (2) when two or more persons contributes to the harm, liability should be allocated among the tortfeasers in accordance with the degree to which their conduct caused the damage. *Id.*

[134] *Id.* at 4–5. According to this policy, tort law should function in such a way as to discourage individuals from engaging in conduct that carries with it excessive risk of personal injury or property damage. *Id.*

[135] JOHNSON & GUNN, *supra* note 129, at 5. The goal of this policy is to favor situations where the financial burden imposed by liability can be spread broadly so that no person is forced to pay a large portion of the damages. *Id.* For example, in the case of a defective product, it is argued that liability should be placed on the manufacturer because it can distribute the loss to a large segment of the pubic by adjusting the price of its product. *Id.*

[136] *Id.* This policy seeks to shift liability in such a way that one with substantial resources bears the greater burden of the loss. *Id.* The rationale for this is that the impact of the liability will be less-severely felt by one with substantial resources than by one with limited wealth. *Id.* As a result, proponents of this principle would argue that an accident victim with $100 in assets should not have to bear a $100 loss, but rather should be able to shift that burden to a defendant with over a million dollars in assets. *Id.*

7. "Tort law should be administratively convenient and efficient, and should avoid intractable inquiries."[138]
8. "Accident victims should be fully compensated."[139]

Part III applies the foregoing list of policies to the issues that arise when comparative fault is expanded to include intentional misconduct.[140] By employing a policy-based approach, a deeper understanding of the effects of expanding comparative fault—particularly a plaintiff's ability to recover full and adequate compensation—may be achieved.[141]

III. ANALYSIS

The American legal system has been described as an "aesthetic enterprise."[142] This characterization expands the definition of "aesthetic" beyond mere beauty and art to encompass a "description of those recurrent forms that shape the creation, apprehension, and identity of law."[143] One form is the dimension of doctrines and rules promulgated

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[137] *Id.* at 5–6. This policy may be used to support a variety of views, such as requiring tort law to provide clear notice of the type of conduct encouraged and prohibited, to carve out objective standards, rather than subjective, when applying tort principles, and to fashion bright-line rules when possible, rather than flexible guidelines that may make jury decisions difficult. *Id.* at 6.

[138] *Id.* The goal of this policy is to mold tort rules in such a way as to ensure efficient use of the money spent on accident compensation by creating legal standards that are not so complex or uncertain that the expending of judicial resources and litigation costs become unnecessary. *Id.*

[139] *Id.* at 7. Public policy demands that accident victims obtain the financial resources needed to overcome their injuries and, therefore, the goal of this principle is to encourage tort rules to be fashioned and applied in furtherance of these policy demands, even if it is at the expense of other tort policies, such as fault apportionment. *Id.*

[140] *See infra* Part III.A (analyzing this issue by applying the Johnson and Gunn policy goals). However, note that these policies often come into conflict with one another when applied to varying situations. *See* Robert F. Blomquist, *Re-enchanting Torts*, 56 S. C. L. REV. 481, 497–500 (2005); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) (discussing public policies as the energy aesthetics that sometimes compete with one another).

[141] *See infra* Part III.B (arguing that the result of including intentional torts will be to return to the harsh realities of contributory negligence that prevented plaintiffs from fully recovering for their damages).

[142] Schlag, *supra* note 140, at 1049. Describing this statement further, Schlag wrote, "B]efore the ethical dreams and political ambitions of law can even be articulated, let alone realized, the aesthetics of law have already shaped the medium within which those projects will have to do their work." *Id. See also* Blomquist, *supra* note 140, at 490–505 (discussing Schlag's characterization of the American legal system as an aesthetic enterprise).

[143] Schlag, *supra* note 140, at 1051. In his article, Schlag describes four aesthetics of American tort law: the grid aesthetic, the energy aesthetic, the perspective aesthetic, and the dissociative aesthetic. *Id.* at 1051–52. The grid aesthetic sees law as divided into

by courts and legislatures.[144] Another is the realm entailing the principles, policies, and values advanced by these laws.[145] Because "[p]recedents expand or contract in accordance with the push and pull of policy and principle[,]" Part III.A analyzes, in the context of Johnson and Gunn's list of public policy goals, the inclusion of intentional torts when comparing fault.[146] Afterward, Part III.B reviews the policy reasons that caused courts to move away from contributory negligence when developing comparative fault and examines whether including intentional torts furthers this aim.[147]

A. A Policy-Based Approach to Deciding Whether to Include Intentional Torts When Comparing Fault

Part II provided background for the many legal bases that courts have proffered for either including or not including intentional torts when comparing fault.[148] In order to determine the practical consequences of each approach, Part III analyzes the arguments for and against inclusion, within the context of the policy goals that tort law seeks to advance.[149] The discussion that follows entails all forms of intentional tort inclusion—whether between a plaintiff and defendant, or between joint defendants.[150] Accordingly, Part III discusses the goal of tort law—to compensate injured victims, along with the other policy-based goals of tort law provided by Johnson and Gunn, to set forth a

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doctrines and rules that are subdivided into elements that make up the bright-line rules, approaches, and definitions of the law. *Id.* at 1051. The energy aesthetic sees law as conflicting policies, principles, values, and politics that interact to shape our legal system. *Id.* at 1051–52. The perspective aesthetic views law as shaping and changing in its identity in relation to point of view. *Id.* at 1052. Finally, the dissociative aesthetic is where the former three aesthetics collapse into one another rendering the law without determinable identities, relations, or perspectives. *Id.*

144 *See id.*

145 *See id.*

146 *Id.* at 1051–52; s*ee also infra* Part III.A (analyzing the policy goals of tort law provided by Johnson and Gunn).

147 *See infra* Part III.B (describing the conceptual failure of allowing intentional torts to be included in comparative fault analysis).

148 *See supra* Part II (providing a comprehensive background to the development of comparative fault and its expansion to include intentional torts by some states).

149 *See infra* Parts III.A.1–6. Note that in the interest of efficiency, some of these policies will be discussed in tandem with one another in this Note.

150 *See supra* notes 1–9 and accompanying text (describing the hypothetical situations of both types of comparisons when intentional torts are included in comparative fault).

framework for deciding whether states should include intentional torts in their comparative fault systems.[151]

1. Liability Should Be Based on, and Be Proportional to, Fault

The first two policy goals of tort law proposed by Johnson and Gunn are that liability should be both based on, and in proportion to, fault.[152] These goals prioritize the interests of defendants by seeking to ensure that they are not disproportionately liable for a plaintiff's damages.[153] As a result, the inclusion of intentional torts seems to greatly advance these two aims by holding all culpable parties accountable, regardless of the type of tortious act committed.[154]

However, if "proportionate fault" is viewed not just as an issue of percentages but as a matter of moral culpability, then including intentional torts does not further these two policies.[155] Some states argue that "[w]here society wants certain conduct absolutely prohibited and discouraged, apportionment of fault is not appropriate."[156] This contention relates back to the view that intentional torts are different in kind than negligent acts because they require a purposeful state of mind and warrant higher accountability.[157] To compare the two, then, is "conceptually incoherent[.]"[158]

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[151] *See supra* notes 132–39 and accompanying text (listing the twelve tort-law policies set forth by Johnson and Gunn). *See also* Geistfeld, *supra* note 17, at 585 (discussing the priority in tort law—to compensate victims).

[152] *See supra* notes 132–33 and accompanying text (explaining that the goal of tort law is to have liability based on fault and to allocate it proportionally to one's fault).

[153] *See supra* notes 132–33 and accompanying text (describing the aims of these two goals in making defendants liable for their proportionate share of fault).

[154] *See* Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. Ct. App. 1998), *rev'd in part on other grounds*, 954 P.2d 644, 662 (Haw. 1998) (stating that including intentional torts accomplishes a fairer and more equitable result).

[155] Prosser and Keeton explained that the development of tort law has been shaped by the moral aspect of a defendant's conduct. KEETON ET AL, *supra* note 18, at 21. The authors provided the following commentary:

> The oppressor, the perpetrator of outrage, the knave, the liar, the scandal-monger, the person who does spiteful harm for its own sake, the selfish aggressor who deliberately disregards and overrides the interests of neighbors, may expect to find that the courts of society, no less than the opinion of society itself, condemn the conduct.

Id.

[156] Florenzano v. Olson, 387 N.W.2d 168, 175–76 (Minn. 1986); *see also supra* note 87 (discussing the opinion in *Florenzano*).

[157] *See* Parret v. Unicco Serv. Co., 127 P.3d 572, 576 (Okla. 2005) (explaining the argument that intentional torts are different in kind, from negligence, and not just different in degrees); *see also supra* note 85 (discussing the *Parret* decision). *But see* Westerbeke, *supra* note 87, at 189. Westerbeke noted in his article that "not all intentional torts fit the 'high culpability' stereotype." *Id.* at 190. Describing a situation where this would be the case, he

To illustrate, returning to the hypothetical situations in Part I, the rapist who committed a purposeful act of violence against the victim should not be allowed to shift any liability, even though the victim may have been negligent, because his act was far more egregious according to standards of morality.[159] The same would be true in the hypothetical scenario also presented in Part I, involving joint defendants.[160] The rapist who deliberately injured the victim should not be permitted to benefit by shifting liability to the owner of the property who merely failed to comply with a duty.[161] When viewed in this light, inclusion of intentional torts does not further the goals of tort liability that suggest that liability should be based on, and in proportion to, fault.[162]

2. Tort Law Should Deter Accidents

Some critics have argued that the goal of deterring wrongful conduct is weakened when intentional torts are included in comparative fault analysis.[163] Theoretically, where an individual knows that he cannot

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stated that a person may act under a reasonable but incorrect belief that he needs to use force to protect himself. *Id.* For example, a property owner might detain another whom the owner incorrectly believes stole his personal property. *Id.* The mistaken belief to use force may also arise when a person "resorts to force to defend himself in response to an unreasonable, but not malicious or reckless, belief in the need for such force." *Id.* Furthermore, "the acts of children, insane persons and others may meet the technical definition of intentional despite a virtual lack of any moral culpability." *Id.* The situations described by Westerbeke are likely the exception rather than the rule. Therefore, most cases of intentional misconduct will involve acts of higher moral culpability than negligence.

158 Shin v. Sunriver Preparatory Sch., Inc., 111 P.3d 762, 776 (Or. Ct. App. 2005); *see also supra* note 84 (discussing the opinion in *Shin*).

159 *See supra* Part I (presenting a hypothetical situation of a man raping a woman and trying to shift liability by claiming that she was negligent).

160 *See supra* Part I (discussing a second hypothetical situation in which the plaintiff is not at fault, but where there are two defendants—one who committed the intentional act and one who acted negligently).

161 Davies v. Butler, 602 P.2d 605, 611 (Nev. 1979) (stating that intentional tortfeasors should not be able to reap the benefits of comparative fault by reducing their own liability by the negligence of a joint defendant).

162 *See* Poole v. City of Rolling Meadows, 656 N.E.2d 768, 771 (Ill. 1995) (holding that the plaintiff's negligence could not be compared to the defendant's intentional act because there is a "qualitative difference" between willful and wanton misconduct and simple negligence).

163 *See* Wright, *supra* note 48, at 561. Wright stated that "comparing the fault of intentional and negligent actors under a comparative fault approach leads to under-accountability for the intentional actors, because an intentional wrongdoer's fault can be reduced." *Id.* Wright continued, "[i]f an actor intended the wrong, it is unfair to mitigate responsibility for the damages because the location of the intended event is poorly maintained." *Id.* Therefore, Wright maintains that intentional tortfeasors will not be held properly accountable "if the consequences of an intentional act are reduced by another's

shift liability under comparative fault to either the plaintiff or to another defendant, he will be less likely to commit an intentional harmful act.[164] Potential negligent actors will likewise be deterred because anticipating that liability may be shifted to an intentional tortfeasor eviscerates the negligent defendant's duty to prevent harm.[165]

Nevertheless, intentional misconduct can be deterred using other methods, even when intentional torts are included in comparative fault.[166] The New Jersey Supreme Court determined in *Blazovic* that the punitive damage award was not subject to allocation and existed solely to punish the intentional tortfeasor.[167] Many intentional acts, such as assault and battery, are subject to criminal sanctions.[168] Therefore, the deterrence argument against including intentional torts seems to be weakened, at least with respect to intentional actors.[169]

Negligent tortfeasors, on the other hand, will likely continue to be under-deterred if intentional misconduct is included in comparative fault analysis.[170] In the hypothetical situation above, where the rapist and owner of the property are both at fault for the plaintiff's injuries, if the owner knows that he can shift most of the liability to the rapist, he has less incentive to protect future victims from harm.[171] Furthermore,

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negligent conduct." *Id.* *See also Davies*, 602 P.2d at 611 (stating that intentional tortfeasors should not be able to benefit by shifting responsibility to others parties).

164 *See* Wright, *supra* note 48, at 561.

165 Field v. Boyer Co., 952 P.2d 1078, 1088 (Utah 1998) (Stewart, J., concurring in part and dissenting in part). Justice Stewart stated as follows:

> Given defendants' duty to provide a safe workplace and their breach of that duty, it would be patently unfair to allow their liability to a faultless, injured plaintiff to be reduced or even eliminated by the culpability of an intentional wrongdoer, thereby depriving the faultless plaintiff of an adequate remedy or any remedy at all.

Id. He continued by admonishing, "[s]uch an application of comparative principles would eviscerate [the] defendant[']s[] duty to prevent such a wrong." *Id.* *See also* Brown & Morgan, *supra* note 88, at 510 (stating that if intentional torts are included in comparative schemes, "[t]he negligent defendant's incentive to protect will be diminished because his amount of apportioned fault will likely be minimal.").

166 The other methods of deterring intentional misconduct include punitive damages and criminal sanctions. *See* Blazovic v. Andrich, 590 A.2d 222, 231–32 (N.J. 1991).

167 *Id.*

168 For instance, intentional torts such as battery, assault, or false imprisonment are also considered criminal misconduct and are subject to prosecution in criminal courts.

169 *See Blazovic*, 590 A.2d at 231–32; *see also supra* notes 101–08 and accompanying text (explaining the facts and holding in this opinion).

170 Wright, *supra* note 48, at 561; *see also supra* note 163 (discussing how intentional tortfeasors become under-deterred when intentional torts are included).

171 *See supra* Part I (discussing a second hypothetical situation in which the plaintiff is not at fault, but where there are two defendants—one who committed the intentional act and one who acted negligently); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14; Bexiga v. Havir Manufacturing, Corp., 290 A.2d 281 (N.J. 1972). This is the

unlike the rapist who can be punished with punitive damages and criminal liability, the owner is subject to no other sanctions.[172] Therefore, including intentional torts fails to deter all potential tortfeasors, whereas not including them provides motivation for both negligent and intentional actors to refrain from tortious conduct.[173]

3. The Costs of Accidents Should Be Spread Broadly and Shifted to Those Best Able to Bear Them

Public policy also seeks to spread the costs of injuries broadly and to allocate such costs to those best able to bear them.[174] The idea underlying this goal is that certain parties have more resources than others in the form of money, assets, and ability to shift their burden to a larger segment of the population.[175] In a products liability case, for example, the manufacturer of the defective product is likely in the best position to assume the costs of liability because it is probably a company with monetary resources that can spread its burden to its customers by increasing the prices of its goods.[176]

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situation contemplated by the "very-duty rule" used to deter negligent defendants who fail in their duty to protect a plaintiff from the type of intentional harm giving rise to the plaintiff's injuries.

172 *See* KEETON ET AL., *supra* note 18, at 9–10 (stating that negligence is not enough to give rise to punitive damages). Detailing what gives rise to an award of punitive damages, Prosser and Keeton stated that "[s]omething more than the mere commission of a tort is always required for punitive damages." *Id.* at 9. In order to give rise to punitive damages, the circumstances must rise to something more akin to aggravation, outrage, spite, malice, or fraud. *Id.* The defendant must have "a fraudulent or evil motive" and must possess "a conscious and deliberate disregard of the interests of others[.]" *Id.* (footnotes omitted). Furthermore, even though negligence can reach "gross" degrees, because negligence is not deliberate and wanton, it is not enough to constitute punitive damages. *Id.* at 10.

173 Brown & Morgan, *supra* note 88, at 511–12 (discussing that the duty to prevent harm will be diminished by including intentional torts).

174 *See supra* notes 135–36 and accompanying text (detailing these policy goals and the rationales behind their purposes).

175 JOHNSON & GUNN, *supra* note 129, at 5 (explaining the rationale behind this policy goal).

176 *See id.*; *see also* KEETON ET AL., *supra* note 18, at 24. Speaking about such defendants' ability to bear the loss, Keeton and Prosser stated as follows:

> This is not so much a matter of their respective wealth, although certainly juries, and sometimes judges, are not indisposed to favor the poor against the rich. Rather it is a matter of their capacity to avoid the loss, or to absorb it, or to pass it along and distribute it in smaller portions among a larger group.

Id. The authors describe the defendants in many tort cases as "public utilities, industrial corporations, commercial enterprises, automobile owners, and others who by means of rates, prices, taxes or insurance are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization." *Id.* (footnote omitted).

Applying this reasoning to the hypothetical situation in Part I, involving the two defendants, the owner of the property is likely the party with the most money and greatest ability to spread its burden to a larger segment of the population.[177] The rapist, on the other hand, could very well be insolvent or absent from the litigation because his identity is unknown.[178] Therefore, if the victim brings a negligence claim against the owner and intentional torts are included when fault is compared, the owner will shift his liability to the rapist who cannot bear the costs of the plaintiff's damages, thus leaving the victim without means of recovery.[179] But if the owner cannot shift his liability to the rapist, he will assume the costs of damages and spread them broadly by increasing the prices of his goods, raising the rents of his tenants, or by other means.[180] Including intentional torts when comparing fault results in an impediment both to spreading costs broadly and to spreading costs to those best able to bear them.[181]

4. Tort Law Should Be Predictable, Efficient, and Convenient

Another goal of tort law is to create a system with predictable and workable standards so that societal costs and judicial resources are not unnecessarily expended.[182] Some commentators have argued that including intentional torts in comparative fault furthers this goal by making it so that judges do not have to determine whether an act was intentional or merely reckless in order to include it when allocating fault.[183] Including intentional acts is said to clear up confusion and allow courts to operate more effectively.[184]

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177 *See supra* notes 1–9 and accompanying text (explaining this hypothetical situation).

178 Speaking to cases where the intentional actor is insolvent or unknown, Prosser and Keeton stated that, "[r]ather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants." KEETON ET AL., *supra* note 18, at 24. In other words, courts traditionally negatively view denying a plaintiff means of recovery.

179 *See* Brown & Morgan, *supra* note 88, at 511–12 (stating that "the policies of spreading the burden of loss and fairly compensating the injured plaintiff, which legislatures and courts sought to advance with the adoption of comparative fault, are undermined[when intentional torts are included]."); *see also* Davies v. Butler, 602 P.2d 605, 611 (Nev. 1979) (stating that intentional tortfeasors should not be able to reap benefits of comparative fault by shifting any of their liability).

180 *See* JOHNSON & GUNN, *supra* note 129, at 5 (describing this result with respect to defendants such as manufacturers).

181 *See* Brown & Morgan, *supra* note 88, at 511–12.

182 *See* JOHNSON & GUNN, *supra* note 129, at 5.

183 Westerbeke, *supra* note 87, at 190–91 (stating that including intentional torts when comparing fault reduces confusion by making it so that judges do not have to classify an act as intentional or merely reckless). For cases that have involved a combination of intentional and negligent torts, see, for example, Coffman v. Rohrman, 811 N.E.2d 868 (Ind.

However, including intentional torts creates uncertainty because it is applied in varying forms and degrees.[185] Some states include intentional misconduct only when comparing the fault of joint defendants, whereas others include intentional misconduct when comparing fault between plaintiffs and defendants.[186] Other states include intentional torts when comparing fault only if the negligent actor breached a special duty to protect the plaintiff from intentional harm, or when culpable parties are all named as defendants.[187] Consequently, due to varying approaches among the states, intentional tortfeasors will not know to what degree they will be accountable, nor will negligent defendants understand the extent of their duties or their liability for breaching those duties.[188] The

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2004) (comparing failure to disclose with intentional fraud); Landry v. Bellanger, 851 So.2d 943 (La. 2003) (comparing the intentional battery at a bar fight with the negligence of the bar for not providing adequate security); Hanson v. Scott, 645 N.W.2d 223 (N.D. 2002) (comparing the intentional killing by the defendant with the Department of Criminal Justice's negligence in not disclosing the defendant's criminal background); Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73 (Tenn. 2001) (comparing an intentional assault on a resident of a nursing home with the nursing home's failure to adequately supervise the assailant); Joseph v. State, 26 P.3d 459 (Alaska 2001) (comparing a decedent's intentional suicide with the jail's failure to properly supervise him); Rausch v. Pocatello Lumber Co., 14 P.3d 1074 (Idaho 2000) (comparing an employee's intentional prank with the negligence of the employer's lack of supervision); Hutcherson v. Phoenix, 961 P.2d 449 (Ariz. 1998) (comparing an intentional murder with the city's 911 emergency operator's failure to timely notify the police of impending danger); Field v. Boyer Co., 952 P.2d 1078 (Utah 1998) (comparing the intentional physical and sexual assault on the plaintiff with the negligence of the owners of the mall on which the assault took place); Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) (comparing the plaintiff's negligence in provoking a confrontation and the restaurant's failure to provide adequate lighting and security, to the defendants' intentional assault on the plaintiff); Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652 (Haw. App. 1998) (comparing the intentional killing of the plaintiff's daughter with the negligence of the apartment complex for allowing the killer to enter the decedent's apartment); Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. App. Ct. 1998) (comparing the intentional sexual assault of one defendant with the negligent hiring of the tortfeasor by the other defendant); and Comeau v. Lucas, 455 A.D.2d 674 (N.Y. App. Div. 1982) (comparing an intentional assault with the negligence of both the plaintiff and the host of a party).

184 Westerbeke, *supra* note 87, at 190–91.

185 *See supra* notes 77–80 and accompanying text (describing the different approaches throughout the states when comparing intentional torts in comparative fault schemes).

186 *See supra* notes 78–79 and accompanying text (detailing the different approaches in several states that include intentional torts when comparing fault).

187 *See supra* notes 98–99 and accompanying text (giving two examples of states that have adopted these more narrow approaches to comparing intentional fault).

188 *See* JOHNSON & GUNN, *supra* note 129, at 5–6 (stating that this policy exists so that persons are not forced to act at their own peril because they do not know what the law requires of them, and also stating that clear instruction should be provided as to what conduct is expected).

legal consequences of particular conduct thus become difficult to predict.[189]

Furthermore, an efficient and convenient tort system accomplishes the task of compensating victims when they have suffered injuries.[190] As demonstrated more fully in Part III.A.5, including intentional torts can significantly impede a plaintiff's ability to recover from liable defendants.[191] Suffice it to say that by including intentional torts in comparing fault, plaintiffs will often not receive full compensation for their injuries.[192] Therefore, to include intentional torts in comparative fault gives rise to a less-efficient and unpredictable tort system.[193]

5. Victims Should Be Fully Compensated for Their Damages

Johnson and Gunn incorporate into their list of policy goals the need to compensate victims, which is one of tort law's highest priorities.[194]

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[189] *See* JOHNSON & GUNN, *supra* note 129, at 5. The goal of this policy is to not create legal standards that are so complex or uncertain that costs and judicial resources are unnecessarily expended. *Id.* Including intentional torts can give rise to complexity and uncertainty in that some situations warrant allocation and others not, and also the fact that intentional actors will often times be absent from the litigation. *Id. See also* KEETON ET AL., *supra* note 18, at 23. Moreover, as Prosser and Keeton stated:

> [i]t does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that there must be some selection of those more serious injuries which have the prior claim to redress and are dealt with most easily.

Id. As a practical matter, the ability to effectively administer the law may have to exist at the expense of other competing policies. *See id.* In comparative fault analysis, for instance, it may be necessary for complete fairness and accuracy in allocating fault to give way to administrative convenience and efficiency. *See id.* However, *compare id. with* Westerbeke, *supra* note 87, at 190–91 (discussing the confusion caused by excluding intentional torts).

[190] *See supra* notes 16–17 and accompanying text (discussing scholars that maintain that tort law prioritizes plaintiff compensation).

[191] *See infra* Part III.A.5 (analyzing the policy in tort law of compensating victims for their injuries).

[192] *See infra* notes 220–24 and accompanying text (illustrating how plaintiffs are denied compensation when intentional torts are included in comparing fault).

[193] *See* JOHNSON & GUNN, *supra* note 129, at 6 (stating that tort law discourages "the pursuit of what might be called intractable inquiries, matters where the facts are such that even after expenditure of considerable time and money, there is a substantial risk that an erroneous result will be reached.").

[194] *See supra* note 139 and accompanying text (discussing Johnson and Gunn's description of this policy goal); *see also* Geistfeld, *supra* note 17, at 585 (describing the need to compensate plaintiffs as being one of the highest priorities in tort). *But see* JOHNSON & GUNN, *supra* note 129, at 185–86 (illustrating how the goals of compensating victims and deterring tortious behavior conflict with one another). In the context of a hypothetical case where a defendant causes the death of young children, Johnson and Gunn show how

Victims run a greater risk of not being fully compensated when intentional torts are included in comparative fault for two reasons.[195] First, including intentional torts allows the intentional actor to reduce his liability by the plaintiff's negligence.[196] Second, including intentional torts leaves victims without recourse because intentional actors are often insolvent or unknown.[197] In the latter situation, the negligent defendant can shift his liability to the intentional actor and leave the plaintiff without recovery.[198] The result of either of these situations is that the plaintiff becomes "victimized twice."[199]

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prioritizing the goal of deterring tortious behavior above the goal of compensating victims, or vice versa, reaches different outcomes. *Id.* at 186. If the only goal were compensation of victims, the measure of damages would be nothing because, although the parents are heart-broken, they lost nothing financially. *Id.* In fact, for the parents to receive compensation in such an instance would not make them whole and may even cause them to suffer emotional distress by knowing that they benefited from the death of a child. *Id.* If deterrence of tortious behavior is the priority, the death of these children should amount to very high damages because of the egregious nature of the harm caused. *Id.* Therefore, even though some commentators and scholars have maintained that compensating victims is the highest priority of tort law, there may be instances when it should yield to other priorities. *See id*.

195 *See* Field v. Boyer Co., 952 P.2d 1078, 1088 (Stewart, J., concurring in part and dissenting in part) (stating that including intentional torts in comparative fault "depriv[es] the faultless plaintiff of an adequate remedy or any remedy at all.").

196 *See supra* notes 101–08 and accompanying text (discussing the *Blazovic* case that permitted a group of defendants to reduce their liability to an amount equivalent to the plaintiff's negligence).

197 *See* Brown & Morgan, *supra* note 88, at 511–12 (stating that including intentional torts often results in plaintiffs not recovering because the defendants are insolvent or unknown). The authors of this article stated that in most cases, including intentional torts in a comparative fault and several liability jurisdiction will deny the plaintiff recovery. *Id.* In such a situation, the jury will apportion fault to the negligent and intentional defendants, with the greater amount of fault attributed to the intentional tortfeasor. *Id.* As a result, "[t]his effectively precludes the plaintiff from recovering for his injuries because the intentional tortfeasor will most likely be insolvent or unavailable." *Id.* at 511.

198 This situation illustrates the 'empty chair' defense[.]" *See supra* note 100 and accompanying text (discussing this concept). Describing this defense, the North Dakota Supreme Court determined that, "an 'empty chair' defense is applicable when there is, or may be, a viable theory for assessing fault against a nonparty, i.e., a 'person' under [the statute], but for some reason that person is not a party to the lawsuit or recovery is not permitted against that person." Hanson v. Scott, 645 N.W.2d 223, 229 (N.D. 2002). The obvious result of using this defense in jurisdictions that allow it is that a defendant can potentially reduce his liability by a great degree by shifting fault to an unidentifiable or immune contributor to the plaintiff's damages. By not allowing intentional torts to be compared to negligent torts, plaintiffs can recover their entire damages from a negligent actor.

199 *See* E-mail from Phillip W. Dyer, Attorney at the Law Offices of Phillip W. Dyer in Salt Lake City, Utah, to Senator Ross I. Romero, Utah Legislator (February 5, 2007, 5:58 p.m. MST) (on file with author). In lobbying the Utah Legislature to exclude intentional acts from the comparative fault statute, members of the Utah Trial Lawyers Association have

In states that do not include intentional torts, however, the negligent defendant can be liable for the entire amount of the victim's damages.[200] This provides the plaintiff with a known and solvent party through whom he can be compensated.[201] Critics of this result argue that it gives rise to over-accountability for negligent defendants.[202] In response to this contention Ellen M. Bublick has stated:

> [S]light negligence can produce great harm and, therefore, great liability. But tort law is designed to provide compensation for wrongful injuries, and until some rule of nature prevents plaintiffs from being injured out of proportion to defendant's fault, compensation to injured plaintiffs must continue to be based on the actual harm caused by that fault.[203]

In other words, the high priority of a victim's need to be compensated for all harm caused outweighs the unfairness created by holding a culpable defendant accountable for more than his proportional share of the fault.[204] Therefore, in the interest of advancing the goal to compensate injured victims, states should not include intentional torts in their comparative fault systems.

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stated that including intentional torts "will produce a fundamentally unsound result—victims of otherwise preventable [tortious] misconduct will be victimized a 'second time'. . . inasmuch as the [intentional tortfeasor] will not be brought to justice and the victim will be deprived of compensation because that [tortfeasor] escaped justice!" *Id*. Moreover, Justice Stewart of the Utah Supreme Court argued the same when he eloquently provided the following commentary:

> Given defendants' duty to provide a safe workplace and their breach of that duty, it would be patently unfair to allow their liability to a faultless, injured plaintiff to be reduced or even eliminated by the culpability of an intentional wrongdoer, thereby depriving the faultless plaintiff of an adequate remedy or any remedy at all.

Field v. Boyer Co., 952 P.2d 1078, 1088 (Stewart, J., concurring in part and dissenting in part).

200 *See* Brandon v. County of Richardson, 624 N.W.2d 604, 628 (Neb. 2001) (holding the county liable for all of the damages caused by the murderers of the plaintiff's daughter).

201 *See supra* note 139 and accompanying text (discussing the need for this policy and how it furthers a system of tort law).

202 *See* Ozaki v. Assoc. of Apartment Owners of Discovery Bay, 954 P.2d 652, 662 (Haw. App. 1998) (reasoning that including intentional torts in comparative fault accomplishes "a fairer and more equitable result[]").

203 Bublick, *supra* note 111, at 435.

204 *Id.* at 437–38. However, in her article, Bublick suggests that the issue of inadequate victim recovery inherent in including intentional torts can be remedied by expanding victim compensation programs. *Id.* at 437. Bublick also recommends that legislatures rethink laws that bar insurance coverage for intentional torts. *Id.* As a result, these suggestions could provide other avenues for plaintiff recovery. *See id*.

Tort law places great emphasis on this policy of compensating victims.[205] To more fairly pay damages to injured plaintiffs was the reason courts moved away from common law contributory negligence.[206] As a result, a tort system that fails to adequately provide relief may be said to wane in its utility for a civilized society.[207] In Part III.B, this concern is developed further with respect to the consequences of including intentional torts in comparative fault analysis.[208]

B. Rethinking the Conceptual Failure of the All-or-Nothing Approach to Apportioning Fault

The doctrine of contributory negligence created by *Butterfield* was a system of all-or-nothing.[209] After this decision, plaintiffs who were free from fault received full compensation,[210] but plaintiffs who contributed to their injuries in any way recovered no percentage of their damages.[211] Lou Dobbs characterized this harsh consequence as a "conceptual failure" on the part of nineteenth-century judges.[212]

If a modern court applying comparative fault instead of contributory negligence was to decide the case in *Butterfield*, the result would be undoubtedly different.[213] Depending on the comparative fault system adopted, such a court would likely apportion a certain amount of the liability to the plaintiff who rode his horse too fast and the remaining liability to the defendant who left the obstruction in the road.[214] The

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[205] *See supra* notes 16–17 and accompanying text (discussing one of the main priorities of tort law: to provide relief to injured victims).

[206] *See* Blazovic v. Andrich, 590 A.2d 222, 226 (N.J. 1991) (stating that the legislative decision to adopt comparative negligence was aimed at ameliorating the harsh results of contributory negligence).

[207] *See infra* notes 16–17 and accompanying text (discussing the Restatement and other authorities that state that one of the primary functions of tort law is to provide compensation to accident victims).

[208] *See infra* Part III.B.

[209] *See supra* notes 35–39 and accompanying text (discussing *Butterfield* and its holding).

[210] *See supra* notes 35–39 and accompanying text (discussing the doctrine of contributory negligence).

[211] *See supra* notes 42 and accompanying text (discussing the harsh results of contributory negligence).

[212] DOBBS, *supra* note 31, at 234; *see also supra* note 43 and accompanying text (discussing Dobb's analysis in more detail).

[213] *See supra* notes 38–39 and accompanying text (explaining the holding and reasoning in *Butterfield*).

[214] *See supra* notes 36–38 and accompanying text (giving the facts of this case). Of course, under different systems, such as the forty-nine percent system, the plaintiff could still stand to recover nothing if the jury found his fault to be equal to or greater than that of the defendants. *See supra* notes 49–52 and accompanying text (discussing modified systems of comparative fault). Or, under the slight-gross system, if the court decided that the plaintiff's negligence was gross, he would also recover nothing. *See supra* notes 53–55 and

plaintiff would then be able to recover at least a percentage of his damages.[215] For the plaintiff, this outcome is far more equitable than receiving no compensation at all merely because the plaintiff was riding his horse too fast and, thus, caused a slight percentage of his own injury.[216]

In order to fulfill comparative fault's goal of ameliorating the harsh results of contributory negligence, any system of fault apportionment adopted by a state must adequately compensate injured plaintiffs.[217] If a state's comparative fault system fails in this task and renders plaintiffs without relief, it returns to the stringent all-or-nothing system that comparative fault eviscerated.[218] Stated another way, if including intentional torts when comparing fault produces harsh results for plaintiffs, then adopting that approach amounts to a "conceptual failure."[219]

When intentional torts are included in comparative fault, injured plaintiffs will suffer severe consequences because they will not be fairly compensated.[220] In the context of joint defendants, the negligent defendant will be able to shift a greater portion of liability to the unknown or insolvent intentional tortfeasor and deny the plaintiff adequate recovery.[221] The result is also harsh when a defendant who intentionally injures the plaintiff is able to reduce his liability by the plaintiff's negligence because of the moral disparity between the two types of conduct.[222] Returning to Justice Stewart's dissent in the Utah Supreme Court decision of *Field v. Boyer Co.*, this differentiation is

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accompanying text (discussing the slight-gross system of comparative fault). Nevertheless, regardless of which system is implemented, the plaintiff will have a more equitable chance of recovery than if contributory negligence is employed.

215 *See supra* notes 46–55 and accompanying text (discussing the different approaches to comparative fault in the United States).

216 *See supra* note 42 and accompanying text (discussing the harsh results of contributory negligence).

217 *See* Blazovic v. Andrich, 590 A.2d 222, 226 (N.J. 1991) (stating that the adoption of comparative negligence was aimed at ameliorating the harsh results of contributory negligence).

218 *See supra* notes 42–58 and accompanying text (discussing the all-or-nothing approach of comparative fault and tort law's development beyond that doctrine).

219 DOBBS, *supra* note 31, at 234; *see also supra* notes 43 and accompanying text (discussing Dobb's characterization of contributory negligence as a conceptual failure).

220 *See supra* notes 195–99 and accompanying text (describing how plaintiffs are denied compensation when intentional torts are included in comparative fault analysis).

221 *See supra* note 197 and accompanying text (explaining that the archetypical situation involves an intentional tortfeasor who is insolvent or absent).

222 *See supra* note 85 and accompanying text (describing states that do not include intentional torts based on the differences in moral degrees and accountability of negligence and intentional conduct).

described by Justice Stewart when he discussed the plurality's opinion and stated:

> Chief Justice Zimmerman says that where a plaintiff sues a defendant for assault, battery, conversion, libel, or any other intentional tort, the law countenances a shifting of liability to the victim of the tort because the victim may have been careless. Put more concretely, his position is that a man sued for rape could reduce his liability for the injury he caused because the woman invited the rape by her failure to take reasonable precautions for her own safety. The same principle dictates that a person who steals another's property can reduce his liability because the victim failed to take sufficient precautions to protect his property. Chief Justice Zimmerman's view turns both morality and the law on their heads. The [Utah] Legislature never intended such an absurd result.[223]

Because of the deliberate nature of intentional acts, any system that allows an intentionally tortfeasing defendant to reduce his liability by the victim's negligence results in inequitable compensation for that victim.[224]

The foregoing analysis of the inclusion of intentional torts in the context of Johnson and Gunn's tort policy goals, coupled with the fact that the American tort system assigns a high priority to plaintiff compensation and actually moved away from contributory negligence to further that goal, leads to the conclusion that intentional torts should not be included in comparative fault analysis.[225] When they are included, the aims of tort law are compromised and cease to be accomplished.[226] Furthermore, the results on victims are too harsh because they will often be denied equitable compensation for their injuries.[227] States will better fulfill the objectives of tort law by not including intentional torts when comparing the fault of culpable parties.

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[223] Field v. Boyer Co., 952 P.2d 1078, 1083 (Utah 1998) (Stewart, J., concurring in part and dissenting in part).

[224] *Id.*

[225] *See supra* Parts III.A–B (using the framework of policy goals to analyze whether intentional torts should be included in comparative fault analysis).

[226] *See supra* Parts III.A.1–5 (analyzing the inclusion of intentional torts by applying a number of policy goals).

[227] *See supra* Part III.B (discussing that including intentional torts produces harsh results for plaintiffs).

IV. CONTRIBUTION

In light of the foregoing contention that intentional torts should not be included in comparative fault analysis, legislatures should draft laws that draw distinct lines between negligent and intentional misconduct. Even though most states continue to exclude intentional torts from comparative fault, many do not set forth explicit divisions between negligent and intentional misconduct in their statutes.[228] The following amendments and propositions to Utah's comparative fault statute illustrate how such divisions may be accomplished.[229]

§ 78-27-37: Definitions

. . . (2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product. *"Fault" does not mean intentional or willful acts under this section. "Fault" means an intentional or willful act only under section 78-27-38A.*

Comment

The amendments to § 78-27-37 are to make clear that under this section intentional torts are excluded from the definition of fault. Only under the specific instance described in section 78-27-38A can an intentional act be included in a definition of fault. Nevertheless, under no circumstances can negligent-type acts be compared to intentional or willful misconduct when allocating fault under this statute.[230]

§ 78-27-38: Comparative Negligence

(1) The fault of a person seeking recovery may not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under subsection 78-27-39(2).

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228 *See supra* note 77 and accompanying text (listing the states that do not include intentional torts when comparing fault).

229 *See* UTAH CODE ANN. § 78-27-37 et seq. The contributions by the author of this Note are italicized to distinguish them from the original text of the statute. *See id.*

230 *See supra* notes 77–80 and accompanying text (listing decisions in most states that decided this issue under statutes that were not very clear as to whether or not intentional torts were included in comparative fault).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under section 78-27-39.

(4)(a) The fact finder may, and when requested by a party shall, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under subsection 78-27-41(4) for whom there is a factual and legal basis to allocate fault. *However, when the cause of action is based on fault as defined in section 78-27-38(b), fault cannot be allocated to any party who acts intentionally. Intentional torts can only be allocated under the circumstances described in section 78-27-38A.*[231] In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery from a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

Comment

This section applies exclusively to causes of action based on fault as defined in subsection 78-27-37(b). The 78-27-37(b) fault can properly be described as "negligent-type" conduct that includes products liability and strict liability. The important distinction is that these acts do not require a willful state of mind. Intentional or willful torts, on the other hand, are not included under this section and can only be compared with other intentional or willful acts as described in section 78-27-38A. The amendments to this section are to make clear that if a plaintiff brings a negligence claim for an injury that resulted from an intentional act, but was also caused by a breach of duty, then the negligent defendant cannot shift liability based on the fault of the intentional actor. Conversely, if a plaintiff brings a claim alleging an intentional tort against a defendant, that defendant cannot shift liability based on the fault of a negligent actor.

Furthermore, these amendments make clear that the fault of an intentional actor can never be reduced by the fault of a negligent plaintiff. A fact finder may include the fault of an intentional actor only when all the tortfeasors are found to have acted intentionally as described in section 78-27-38A.

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[231] *See supra* Part III (describing the unfortunate consequences of allowing intentional torts to be included when fault is compared).

§ 78-27-38A: Comparative Intentional Fault

(1) "Fault" under this section includes only intentional torts and applies only when all allocated fault is based on intentional or willful misconduct. "Fault" as defined under subsection 78-27-37(b) is not included in this section.

(2) A defendant who is found to have acted intentionally or willfully in causing harm to a plaintiff, or whose intentional or willful act was a substantial factor in causing harm to the plaintiff, may be jointly and severally liable for his or her portion of the damages only in comparison to one or more defendants who are also found to have acted intentionally. The fault of an intentional tortfeasor defendant cannot be compared with the fault of another defendant as defined in subsection 78-27-37(b).[232]

Comment

This section is to make clear that intentional torts are to be compared within their own sphere of liability and not to be mixed with other forms of fault. If a plaintiff is bringing a claim based on an intentional act, then any allocation of fault is subject to this section within the confines of intentional tort analysis. In other words, this section seeks to create two spheres of comparing fault: one between intentional acts and the other between negligent-type conduct.

V. CONCLUSION

The creation of contributory negligence in the Nineteenth Century was radical and had detrimental affects on a plaintiff's ability to recover damages. In its wake, courts have extracted the progressive idea of comparing fault and developed it into the more equitable apportionment systems utilized today. But expanding comparative fault to include intentional torts results in a return to the harshness that contributory negligence wrought upon plaintiffs. By including intentional torts in comparative fault analysis, plaintiffs are denied fair and just compensation and are forced to suffer because the aims of tort law cannot be accomplished.

Returning to the first hypothetical situation presented in Part I, if the rapist's intentional fault is reduced by the victim's negligence, the victim is not equitably compensated. A willful and intentional act, such as committing rape, carries a higher moral culpability than the victim merely failing to take precautions or wearing suggestive clothing. Moreover, to permit the rapist to shift liability to the victim results in legitimizing the violent act and forcing the victim to defend in court something that she did. This results in a tort system that does not provide justice proportional to fault, nor would it adequately deter

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[232] *See* H.R. 45, 57th Leg., Gen.F Sess. (Utah 2007) (suggesting similar language as this proposed amendment to Utah's Comparative Fault Statute).

intentional misconduct, create efficient and predictable standards, or adequately compensate the victim for her injuries.

Likewise, in the second hypothetical scenario presented in Part I, if the rapist or the owner is permitted to shift liability to the other, the aims of tort law are not accomplished and the victim is denied compensation. First, the rapist and the owner are under-deterred by knowing that they can reduce liability by the others' fault. Second, this situation results in unpredictable and inefficient standards because the rapist does not know to what degree he will be accountable, nor does the owner understand the extent of his duties or of his liability for breaching those duties. Third, if the owner is permitted to shift his liability to the rapist, the costs of compensating the victim are not spread broadly or allocated to the party best able to bear them. Finally, when the rapist is unknown or insolvent, the victim is left without compensation because the owner attributes the greatest proportion of fault to the rapist.

In short, states should maintain clear distinctions between acts that are negligent and acts that are intentional when comparing fault. By so doing, the primary aims of tort law may be maximized in their utility for the benefit of American societies.

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