FINDING THE FAULT LINES: AN EPISTEMOLOGICAL INQUIRY OF THE TRUE MEANING OF CIVIL LAW "FAULT"

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I. INTRODUCTION

"Every act whatever of man that causes damage to another obliges him by whose *fault* it happened to repair it."[1] These words

* The author wishes to express his gratitude towards Professor Nikolaos A. Davrados, who both inspired the topic of this Comment and the author's interest in academia. Thank you to Professor Monica Hof Wallace, without your tutelage and friendship my life would be on a much different path. Thank you to Professor Markus G. Puder for teaching me, among so many other things, that the study of law can be a joyous occasion. Thank you to Professor James Etienne Viator, whose first-year lectures will keep me on my toes for the rest of my life. And a special thanks to my Editor-

or their substantial equivalence are ubiquitously known throughout civil law and mixed jurisdictions.[2] After all, the civil law's fault-based system of liability is one of the peculiar features that sets Louisiana apart from its common law neighbors.[3] Yet, despite the fundamental role of fault, its definition is surprisingly elusive. Is fault, as one court suggested, "a breach of a duty imposed by law or contract"?[4] Or is it "[a]n error or defect of judgment or of conduct"?[5] Perhaps its "the psychological bond which exists between a person and an action on his part or its result which justifies the imputation of blame"?[6] Whichever definition one ascribes to—there are many—can it manifest in different ways? And, if so, what legal consequences flow from such distinctions? These are the issues this Comment endeavors to explore and clarify.

Given the central role fault plays at civil law, and its omnipresence in our everyday lives and lexicons, it may come as a surprise that these questions have plagued legal scholars for centuries.[7] So elusive are its nuances by their metaphysical nature that the acclaimed comparative law scholar W.W. Buckland once opined that strict liability is nothing more than the law's "confession of [a] practical inability to get evidence of fault."[8] Yet, despite the theoretical nature of these questions, practical consequences follow their answers. After all, fault is not just a distinguishable feature

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in-Chief, Laurel Taylor, for her patience as I rethought, rewrote, and revised my work, as well as the members and candidates of the Loyola Law Review who edited and helped shape this Comment.

1. LA. CIV CODE ANN. art. 2315(A) (2021) (emphasis added).

2. In France, for example, article 1240 of the Code Civil provides, as translated, "Any human action whatsoever which causes harm to another creates an obligation in the person whose fault it occurred to make reparation for it." CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1240 (Fr.).

3. In Louisiana, the general rule provides that liability must always be predicated on fault, whether in contracts or torts, whereas common law starts from the premise that breach of contract results in strict liability. *Compare* Angelo Pavone Enterprises, Inc. v. S. Cent. Bell Tel. Co., 459 So.2d 1223, 1226 (La. App. 4 Cir. 1984) ("Liability cannot be imposed without a finding of fault. Under general liability principles fault is a breach of a duty imposed by law or contract."), *with* Restatement (Second) of Contracts 11 Intro. Note (Am. L. Inst. 1981) ("Contract liability is strict liability. . . . The obligor is therefore liable in damages for breach of contract even if he is without fault . . . .").

4. *See Angelo Pavone Enterprises, Inc.*, 459 So.2d at 1226.

5. *Fault*, BLACK'S LAW DICTIONARY (5th pocket ed. 2009).

6. MICHAEL STATHOPOULOS, CONTRACT LAW IN GREECE 167 (2nd ed. 2009).

7. *See infra* notes 100-01 and accompanying text.

8. W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW 313 (WM. W. Gaunt & Sons, Inc. 1994) (1936).

of our unique legal system, it is a fundamental principle to which the law attaches serious consequences.[9]

Today, in the Louisiana Civil Code alone, "fault" is found in fifty-one articles and thirty-five revision comments.[10] It is a linchpin element for a number of legal dilemmas: delictual and quasi-delictual obligations,[11] the enforceability of limitation of liability clauses,[12] the respective duties of co-owners,[13] the liability for failure to perform alternative obligations,[14] and much more.[15] Notwithstanding its prevalence throughout Louisiana law, today's Civil Code provides no definition of fault.[16] And, although the Civil Code included a definition until the turn of the century,[17] it was

9. *See infra* Section IV.

10. *See generally* LA. CIV. CODE ANN. (2021).

11. *See* LA. CIV CODE ANN. arts. 2315, 2323 (2021). "Delict" is to civil law as "tort" is to common law, and "conventional obligation" is to civil law as "contract" is to common law. Thus, delictual and quasi-delictual obligations are those reparations the law requires in response to what the common law would call "tortious conduct." The terms are used interchangeably herein.

12. *See* LA. CIV CODE ANN. art. 2004 (2021).

13. *See* LA. CIV CODE ANN. art. 799 (2021).

14. *See* LA. CIV CODE ANN. art. 1814 (2021).

15. *See, e.g.*, LA. CIV CODE ANN. art. 576 cmt. (b) (2021) (explaining the relationship between a usufructuary's "fault" and the "standard of care").

16. Civil codes are, by design, intended for use by laypersons. A driving force behind Napoleon's efforts to codify France's legal system into an easily digestible written code was that all persons should be able to read the law and understand its basic principles. Rather than relying on judges or attempting to decipher a legal rule by searching through dozens of potentially relevant cases, one would be able to simply flip to the section of the code applicable to their dilemma, and read the law. *See generally* Mario Ascheri, *Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon*, 70 TUL. L. REV. 1041 (1995-1996). In Louisiana, the revision comments appended to most code articles are a vestige of this goal—they serve to ease the readers' understanding of the accompanying legal principle. But this noble goal has, as a necessary consequence, collateral damage in the form of the doctrinal concepts that underpin various legal rules. No better example of this exists than the concept of "fault." Fault lies at the very center of the Louisiana Civil Code. It is fairly said that Louisiana is a "fault-based system," because fault is a condition precedent for almost all damages, contractual or delictual. This does not hold true at common law where, for instance, the violation of a contractual agreement is the only precondition necessary to justify damages—a sense of strict liability. In Louisiana, however, damages only follow the breach of a contractual agreement if it is preceded by the obligor's fault. Similarly, damages are only allowed in the law of delict—or "tort"—if the author of the prejudicial act was at fault. *See supra* note 3.

17. The Louisiana State Legislature repealed the definition at the behest of the Louisiana State Law Institute (LSLI) without deeming it necessary to replace it. *See* 1999 La. Act 503. As explained *infra* in notes 156-58 and the accompanying text, both

woefully inadequate, contributing directly and indirectly to misapprehensions and misapplications in delicts and contracts.

In delicts, as a direct consequence of the pre-1999 definition, courts have revived the repealed definition to invoke the poorly understood concept of "very slight fault," demonstrating a risk that tortfeasors may improperly be absolved of liability.[18] In contracts, as an indirect consequence of the inadequate pre-1999 definition in conjunction with improper reliance on revision comments that are contrary to positive law, courts have altered the meaning of "bad faith" fault to deprive breach-of-contract victims of the proper quantum of damages.[19] The lack of a proper definition and understanding of fault is the *sine qua non* of these conundrums; if Louisiana recognized and codified a contemporary and clarified doctrine, courts could not reach such conclusions.[20]

So what is fault? Fault is the failure of an actor's conduct[21] to meet the relevant standard of care for a legal or contractual obligation, thereby justifying the legal imputation of liability. Whether a party is at fault is determined under an objective analysis of the circumstances, namely, the conduct in question and the level of care the obligation requires. Fault can manifest in varying degrees which bear on the extent of damages and, in contract law specifically, the burden of proof. The degrees of fault, not fault itself, speak to the psychological bond the law attaches to one's conduct when it breaches an obligation. Subjectively, there are two degrees: intentional and unintentional. But the law also provides for an objective subcategorization of unintentional faults: the gross and the negligent. Thus, while, subjectively, it is only possible for fault to

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legislative archives and LSLI records do little to reveal the impetus for the 1999 removal.

18. *See infra* Section III.

19. *Id.*

20. Louisiana, unlike common law jurisdictions, relies exclusively on positive law (legislation) and custom as binding legal authorities; jurisprudence is merely non-binding persuasive authority. *See* LA. CIV. CODE ANN. art. 1 (2021) ("The sources of law are legislation and custom"); Doerr v. Mobil Oil Corp., 2000-0947, p. 13 (La. 12/19/00); 774 So.2d 119, 128 *opinion corrected on reh'g*, 2000-0947 (La. 3/16/01); 782 So.2d 573 ("[O]our civilian tradition does not recognize the doctrine of *stare decisis* in our state."). Louisiana does, however, adhere to the doctrine of *jurisprudence constante*, which is distinguishable from the common law *stare decisis*. For a primer on the distinction, *see* James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15-16 (1993).

21. The conduct referred to is often described as *either* an act *or* an omission. For the sake of simplicity and clarity, the word "act" should be understood to refer to both.

be intended or unintended, the law recognizes a tripartite division of fault: intentional, gross, and negligent. Correlative to the degrees of fault are the different standards of care an obligor must abide. These vary according to the nature of the obligation (by law) or the will of the parties (by contract). Crucially, the degree of fault does not concern the existence of liability; fault of any degree obliges the at-fault party to repair the damage occasioned by the culpable conduct.[22]

In delict, liability for harm caused by tortious conduct flows from any degree of fault because any degree constitutes a failure to meet the standard of care prescribed by law. In contracts, liability for failure to perform is always predicated on fault, but the burden of proof depends on the type of obligation: fault is presumed when the obligation was to bring into existence some result, and it is the obligor's burden to prove that the breach was caused by something other than her fault. Liability results from the failure to meet the standard of care provided by law or as modified by contract. Furthermore, if the obligor's failure to perform was in good faith, damages for contractual liability are limited to the harm foreseeable at the time the contract was born and directly caused by the failure to perform because the law favors the more innocent, but nevertheless culpable, breaches of contract. But where an obligor's failure to perform was in bad faith, her liability is extended to all harm directly caused thereby, regardless of its foreseeability. Because the quality of her conduct is more culpable, the law holds the obligor to account for even unforeseeable harm in order to avoid unfairly punishing the presumably innocent obligee. These are the general principles of fault, to which there are of course exceptions, but from which the inquiry of liability at civil law must always begin.

Although these conclusions comport with today's Civil Code, they seem, at first blush, to be a deviation from current law.[23] This Comment takes opposite position: Louisiana's contemporary understanding of fault is tenuous at best, and is itself a deviation from both positive law and the civil law tradition. Indeed, central to this Comment's thesis is the argument that the conclusions

22. Hence, a clause that limits an obligor's liability only to gross fault does not literally absolve the obligor of liability for slight fault, even if that is the effective result; rather, it changes the standard of care to that which correlates with the degree of fault. *See infra* notes 65-72 and accompanying text.

23. *See generally* discussion *infra* Section III(b).

herein are already supported by current, albeit poorly worded, law; courts reaching contrary conclusions do so by derogating, not interpreting, positive law.[24] To reach and explain these conclusions, this Comment undertakes an epistemological inquiry into the history and evolution of how civil has understood fault over time.

Section II explores the doctrinal history of fault at civil law through the lens of Louisiana's Roman and French legal ancestry. Section III discusses Louisiana's troubled history of fault both before and after the 1999 removal of the definition from the Civil Code. Section IV elucidates a modern doctrine of fault that comports with Louisiana's civilian tradition and modern law.[25] Finally, Section V concludes by stressing the importance of codifying this doctrine and proposing a legislative solution.

II. THE ORIGINS OF CIVIL LAW FAULT

For more than 150 years, the Louisiana Civil Code included a provision that sought to define fault.[26] Until its repeal in 1999, that provision provided that, "[w]henever the terms of law, employed in this code, have not been particularly defined therein, they shall be understood as follows":

> *Fault.* There are in law three degrees of faults: the gross, the slight, and the very slight fault. The *gross fault* is that which proceeds from inexcusable negligence or ignorance: it is considered as nearly equal to fraud. The *slight fault* is that want of care, which a prudent man usually takes of his business. The *very slight fault* is that which is excusable, and for which no responsibility is incurred.[27]

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24. After all, court opinions, particularly in Louisiana where *stare decisis* is not a source of law, are just that: opinions. *See* LA. CIV. CODE ANN. art. 1 (2021) ("The sources of law are legislation and custom."). In that same vein, and echoing a warning from nearly every civil law professor this author has had, "revision comments are not law."

25. The doctrine "proposed" herein does not change Louisiana's current theory of fault; it provides clarity in order to prevent misunderstandings and misapplications. *See infra* note 128.

26. *See* LA. CIV. CODE art. 3522(17) (1825).

27. *Id.* (emphasis added). Perhaps unsurprisingly, an early edition of Black's Law Dictionary favored this particular civilian definition, defining "fault" in civil law as "[n]egligence; want of care. An improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance," and then describing the "three degrees of faults." *Fault*, BLACK'S LAW DICTIONARY (2d ed. 1910) (citing "Civil Code La. art. 3556, par. 13"). *See also* L. MOREAU LISLET, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808); LOUIS MOREAU LISLET'S

These three degrees of fault—gross, slight, and very slight—derived from the French doctrine of *prestation des fautes*, itself a progeny of the Roman *culpa*.[28] Although this definition has since been removed, the degrees of fault remain relevant in both contracts and delicts.[29]

According to the since-abandoned *prestation des fautes*, an obligor's failure to perform did not give rise to liability if her fault was of an allowable degree.[30] Instead, failure to perform produced only by "very slight fault" gave rise to liability only under exceptional circumstances.[31] But, despite the description of "very slight fault" as "excusable," scholars have long recognized that, as a general rule, fault gives rise to liability, no matter how slight.[32] The degree of fault does not determine *whether* one is liable, but rather—once fault, and therefore liability, are established—for *how much* one is liable.[33] The proper inquiry to determine whether one's conduct warrants liability requires measuring that conduct against the applicable standard of care.[34] The standard of care, in turn, can vary according to the nature of the particular obligation or the will of the parties.[35] Failure to meet the applicable standard of care establishes fault, from which liability flows. The degree of fault bears only on the appropriate quantum of damages and, where the obligation arises in contract, the burden of proof; the latter issue is a subject for another Comment and will not be discussed further herein.[36]

SOURCE NOTES (1968), *reprinted in* THE DE LA VERGNE VOLUME, 268-69 (2008) (citing the works of French jurists interpreting Roman law concepts of fault).

28. SAÚL LITVINOFF, THE LAW OF OBLIGATIONS, § 5.4, *in* 6 LOUISIANA CIVIL LAW TREATISE 105 (1999). Under French and Roman law, the three degrees of fault were as follows: *Faute lourde* or *culpa lata* (gross fault); *faute legère* or *culpa levis* (slight fault); and *faute très legère* or *culpa levissima* (very slight fault). *Id.*

29. *See infra* Section II(b)(i) & (ii).

30. LITVINOFF, *supra* note 28, at 104-05.

31. *See id.*

32. *See id.* at 105-06 (noting the "consensus among French writers," from the eighteenth and nineteenth century's Charles Bonaventure Marie Toullier to the twentieth century's Jean Carbonnier).

33. *See id.* at 106.

34. *Id.*

35. *Id.*

36. LITVINOFF, *supra* note 28, at 106. In contracts, the extent of damages is determined by whether the obligor's failure to perform was in good or bad faith, a matter of the degree of fault; damages can be reduced, however, by the obligee's failure to mitigate or by the extent to which liability is lawfully excluded by contract. *See* LA. CIV. CODE ANN. arts 1996, 1997, 2002, 2004 (2021). In delict, whether the party seeking

Thus, that fault must precede liability—again, as a general rule—is true regardless of whether the obligation is contractual or legal. In contracts, an obligor is at fault if her failure to perform, whether by non-performance or defective performance, results from conduct that falls below the standard of care commensurate with the nature of the obligation or as altered by the parties' will. Consequently, when determining if an obligor's subpar performance results in liability, "[t]he degree of his fault is . . . irrelevant."[37] The same notion prevails in delict, such that one whose fault caused a fire was liable for the resulting damage, no matter how "slight" it may have been.[38] The late Louisiana civil law scholar Saul Litvinoff recognized these core principles, but only informally recognized a rather modest definition of fault that lacks the nuance necessary to encapsulate the breadth of the concept.[39] Moreover, despite concurrence between Litvinoff and contemporary scholars,[40] the civil law concept of bad faith fault has been perverted by an erroneous revision comment.[41] Louisiana courts, in reliance thereon, have adopted a *de facto* doctrine of efficient breach,[42] despite its incompatibility with Louisiana's civil law.[43]

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damages action falls under article 2315 or 2316 is determined by the degree of fault, and the quantum of damages can be adjusted according to the degree. *See* LA. CIV. CODE ANN. arts. 2315, 2316, 2323 (2021). *See also* WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 415 (photo. reprt.1989) (1938) ("It is the failure to exercise the care (diligentia) that the particular circumstances call for, or the "due care," that care which it is one's legal duty to exerevise [sic] in any particular case, that gives rise to negligence or culpa.").

37. LITVINOFF, *supra* note 28, at 106.

38. *See* 1 JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 619 (Luther S. Cushing ed., William Strahan trans., Fred B. Rothman & Co. 1980) (1722).

39. LITVINOFF, *supra* note 28, at 106 (opining that "fault is the objective fact of the failure to perform an obligation because of reasons not alien to the obligor, or reasons that, though alien, are nevertheless imputable to him.").

40. *See generally* Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721 (2007).

41. *See* LA. CIV. CODE ANN. art. 1997 cmt. (b) (2021).

42. *See infra* note 130 and accompanying text.

43. *See, e.g.*, Olympia Minerals, LLC v. HS Res., Inc., 2013-110 (La. App. 3 Cir. 8/21/13); 123 So.3d 281 (awarding consequential damages for a party's intentional breach of a contract), *writ granted*, 2013-2717 (La. 2/28/14); 134 So.3d 1166, *and writ granted*, 2013-2637 (La. 2/28/14), 134 So.3d 1166, *and aff'd in part, amended in part, rev'd in part*, 2013-2637 (La. 10/15/14); 171 So.3d 878 (reversing in part because, although the breach was intentional, it was not malicious).

A. THE ROMAN ORIGINS OF FAULT

Louisiana's pre-1999 definition of fault was likely the result of an attempt to codify the French doctrine, which itself was a literal amalgamation of Roman legal principles.[44] These principles are still very much at play in Louisiana's civil law system, though often on a theoretical rather than practical level.[45] However, a word of caution: The history of fault at Roman law is one that has been the subject of constant revision. As one scholar quipped, "the genesis of the whole concept of *culpa* [fault] is one of the most vexing questions in the history of the Roman law."[46] Classical Roman law was not stated in widely-applicable theoretical principles, but rather by fact-specific rules, which have been and continue to be dissected by future generations of legal scholars.[47] The Roman law principles that are still "theoretically" at play come from centuries of work to extract broader principles from the fact-specific rules of Roman law, demonstrating why fault has been the subject of such vigorous debate.[48]

Generally, at Roman law, one whose act or omission infringed upon the private rights of another was obliged to repair the damage caused by his fault.[49] Such occasions fell into one of two categories: (1) those that violated the public order to the prejudice of another without a pre-existing relationship (delicts); and (2) those that violated a voluntary legal obligation between two parties (contracts).[50] Fault implied that the actor was not only "the cause of an attack upon the rights of another," but also "responsible for the injury unjustly suffered."[51] It could either be intentional (*dolus malus*)

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44. *See* LITVINOFF, *supra* note 28, at 104.

45. *See infra* Section IV.

46. BUCKLAND & MCNAIR, *supra* note 8, at 200.

47. HANS JULIUS WOLF, ROMAN LAW 66 (1951) ("As a whole, Roman legislation was employed only to cope with specific issues.").

48. *See infra* note 101 and accompanying text.

49. J. E. GOUDSMIT, THE PANDECTS, A TREATISE ON THE ROMAN LAW 209 (R. De Tracy Gould trans., 2005) (1873). The latter of these consists of both that that arise "*ex contractu* or *quasi ex contractu*," *i.e.*, directly or indirectly as a consequence of a contractual relationship. *Id.* n.1.

50. *Id.* Generally, fault existed where an act to the prejudice of another was (1) volitional, (2) not the product of force or duress, and (3) avoidable using the level of precaution the law required according to the circumstances (delict) or the nature of the obligation (contract). *Id.* at 210-11.

51. GOUDSMIT, *supra* note 49, at 211.

or unintentional (*culpa*), i.e., negligent.[52] *Culpa*[53] was then subject to further classification because the remedy for negligent acts varied according to whether the parties had a pre-existing legal relationship by contract.[54]

Because Roman law required contracting parties to take certain precautions in performing their obligations, an aggrieved party who failed to do so could be imputed with some measure of fault.[55] Therefore, liability in contractual disputes did not always depend solely on whether the actor could be properly deemed the causal and legal impetus of the questionable conduct.[56] Whereas a departure from even the lowest standard of care resulted in delictual fault, contractual fault only resulted from the departure of the standard of care for the obligation in question.[57] For example, if Boudreaux breaks his friend Delphine's vase by a negligent act, he is obliged to repay the damage under the laws of delict; but if Boudreaux only had Delphine's vase by virtue of a contract which limits liability to damage caused by intentional fault, his negligence may be insufficient to constitute fault, and therefore result in liability, if, for instance, the parties original agreement prospectively limited Boudreaux's liability to only gross of intentional faults. To address this distinction, the Roman law delineated degrees of fault.[58]

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52. *Id.* at 211-12. An important distinction is required here. *Culpa*, which is frequently translated as "fault," does not always imply a lack of intent or malice; it has been noted that *culpa* "in the limited sense of the word" means negligence. *Id.* Whereas *culpa* in the "broad sense" refers to all legal fault, whether intentional or not, thereby encompassing both *dolus* and *culpa* (in the limited sense). Thus, though it would be improper to conclude that in all cases the use of "fault" or "*culpa*" implies a lack of intent, where used in this comment *culpa* refers to the unintentional, unless stated otherwise.

53. Though the Roman concepts are analogous to later civilian legal concepts, the Roman terms are not entirely copacetic with today's terminology. Thus, in order to avoid conflating the Roman concepts with modern nomenclature, this comment will use the Latin terms when referring to Roman and French law. Roughly, these translate as follows: *culpa* generally means fault preceded by negligence, unless stated otherwise; *dolus* means either intentional fault (delict) or fraud (contract); *culpa lata* means gross fault; *culpa levis* means slight fault; and *culpa levissima* means very slight fault. *See id.* at 212-16, 214 n.1, 215 n.2; LITVINOFF, *supra* note 28.

54. *Id.* at 213.

55. *Id.*

56. *Id.*

57. *See id.*

58. *See* LITVINOFF, *supra* note 28.

Although civil law fault is often divided into three degrees, classical Roman law technically bifurcated contractual fault, resulting in two degrees: *culpa levis*[59] and *culpa lata*.[60] *Culpa levis*—slight fault—resulted from neglect to exercise the care a diligent man would habitually employ under like circumstances, *bonus paterfamilias*.[61] Whereas *culpa lata*—gross fault—resulted from neglect to exercise any reasonable care, *non intelligere quod omnes intelligunt*,[62] a discernably lower bar that today might best be equated with recklessness. Crucially, *culpa lata* was considered by many Roman jurists, if not most, as tantamount to intentional fault or fraud, *dolus*.[63] Thus, "when we are told that a party to a contract is liable for *dolus*, it must be understood that this involves liability for *culpa lata*."[64] These "degrees of fault" are more accurately described as illustrative terms which explained when an actor's conduct fell below the standard of care applicable to his obligation, which varied according to the nature of the contract. Conversely, these "standards of care" are more accurately described as the minimum level of care that must be exercised to avoid fault and the consequential imputation of liability.

The extent of precaution or "standard of care" demanded by each contract varied according to the nature of the legal relationship it created. Generally, a party who gained nothing from a

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59. GOUDSMIT, *supra* note 49, at 213.

60. *Id.* It was here, at Roman law, that the gross fault was first equated to fraud in similar fashion to the language used in the former definitional article, "*magna neglentia culpa est, magna culpa dolus est*," which translates roughly to "gross negligence is fault, gross fault is fraud." *See id*. at 214 (citing L. 1 § 1. D. si mens. Fals. Mod. (11.6)).

61. *Id.* at 213-14. These terms were incorporated into the pre-1999 definition—roughly translated, *culpa lata* is equivalent to "gross fault," and *culpa levis* to "slight fault." LITVINOFF, *supra* note 28, at 104-05. Unlike the pre-1999 definition, however, the general Roman concept of fault was bifurcated, and did not recognize the third degree for which liability was absolved. The concept of very slight fault at Roman law, *culpa levissima*, was only found once in Roman texts and in relation to the *Lex Aquilia* tort action, not in relation to contracts. MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 144 n.11 (Louisiana State Law Institute trans., William S. Hein & Co., 11th ed.2005) (1939). *See also* CHARLES BONAVENTURE MARIE TOULLIER, DROIT CIVIL FRANCAIS (1978), *reprint*ed *in* 16-22 LA. B. J. 2-4, 134 (Ben Miller trans., Robert G. Polack ed. 1968-1975).

62. W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 556 (2d ed., 1932).

63. W. W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW 290-91 (WM. W. Gaunt & Sons, Inc. 1994) (1912).

64. *Id.* This distinction will be crucial in the discussion on bad faith damages in contemporary Louisiana law, discussed *infra* notes 138-149 and accompanying text.

contract was liable for *culpa lata*[65] and, *a fortiori*, intentional fault (*dolus*).[66] *Culpa lata* resulted from the failure "to take the care which any ordinary man would, *non intelligere quod omnes intelligunt*,"[67] or, stated otherwise, "if he sh[o]ws less care than any reasonable man would."[68] For example, if Boudreaux gave Delphine his grandmother's crystal to hold and preserve gratuitously—that is, without compensation or benefit—and the vase was broken after being knocked from a shelf (*culpa levis*), Delphine would not be liable. However, a different result would follow if Delphine chose to store the vase in a particularly precarious manner, say by placing it in the bed of her truck without securing it (*culpa lata*). Then, if the vase broke in transit, Delphine would be liable because she breached her duty of care by, from an objective standpoint, showing less care than any reasonable person would under like circumstances.

On the other hand, a party who stood to gain from a contract was liable for *culpa levis* (slight fault, i.e., negligence).[69] This "degree of fault" employed the higher standard of care of the *bonus paterfamilias*, which roughly translates to "a good household

65. Some Roman sources state *culpa levis in concreto*, a subjective standard that takes into consideration the particular obligor's ordinary prudence, rather than *culpa lata*. BUCKLAND, *supra* note 63, at 290. *Culpa levis in concreto* is distinguished from ordinary *culpa levis*, more specifically referred to as *culpa levis in abstracto*, which was a standard based on objectively reasonable prudence. *See id*. Buckland noted that the conflicting references to *culpa lata* and *culpa levis in concreto* could be reconciled "by the view that one who is less careful of what is entrusted to him than he is of his own property is sh[o]wing less care than any reasonable man would." *Id.*

66. *See* BUCKLAND, *supra* note 63, at 290.

67. *Id.* at 301.

68. *Id.* at 290. *See also* BUCKLAND, *supra* note 62. For example, in the contract of gratuitous deposit of *res mobilis* (corporeal movables), the depositary was liable for *dolus* (intentional fault) but not for *culpa* (negligent fault), while the depositor—the beneficiary—was liable both for *dolus* and *culpa*. *See id.* Under the Louisiana Civil Code, the gratuitous depositary is required to provide "the diligence and prudence in caring for the thing deposited that he uses for his own property." LA. CIV. CODE ANN. art. 2930 (2021). This comports with the Roman concept of *diligentia quam in suis*, a rare example of a departure from the general rule, where the determination of fault is a subjective inquiry into the obligor's mind: "the depositor could expect the person to whom he was about to entrust some objects to display the same degree of diligence with regard to them that he would display in any event, i.e. particularly with regard to his own property." REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 212 (1992).

69. BUCKLAND, *supra* note 62

father."[70] Thus, an obligor would be liable for damage caused by his failure to show the care which an objectively prudent head of household would. Under this principle, if Boudreaux hired Delphine to paint his house and she mistakenly used old paint that contained lead, from which Boudreaux then obtained lead poisoning, Delphine would be liable for damages caused by her negligence. Conversely, because both parties stood to gain, Boudreaux would be liable if he forgot to disclose asbestos in the house which caused Delphine to become ill during her work. Thus, we see that liability for contractual fault at Roman law was delimited by each party's conduct measured against the particular *diligentia*[71]—or standard of care[72]—of their obligation.

Roman law also observed other classifications of *culpa* in an effort to accommodate particular types of contractual relationships where the bifurcated degrees of fault were considered insufficient. Chief among these were *culpa levis in concreto*[73] and *culpa levissima*.[74] *Culpa levissima*, from which the Louisiana concept of "very slight fault" likely derived, seems to be the result of an attempt to translate a concept akin to strict liability "into culpa terminology."[75] To wit, *culpa levissima* was employed where the nature of the obligation justified an even stricter standard of care than was ordinarily actionable under classical Roman contract law, such as that of the

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70. *See*, *e.g.*, LA. CIV. CODE ANN. art. 635 (2021) (providing that a person with a right of habitation is bound by the "prudent administrator" standard of care). This is the standard that evolved into the French *bon père de famile* and, in turn, into Louisiana law's "prudent administrator." *See* LITVINOFF, *supra* note 28, at 105.

71. W. W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 300 (WM. W. Gaunt & Sons, Inc. 1994) (1912).

72. GOUDSMIT, *supra* note 49, at 213.

73. BUCKLAND, *supra* note 71, at 304. *See also* BUCKLAND, *supra* note 62. *Culpa levis in concreto* was a subjective standard whereby a party was liable for failure to act as one "ordinarily did in his own affairs." *Id*. An example of *culpa levis in concreto* at Roman law is co-ownership, which can arise by contract or operation of law, where one can easily infer the policy reasons for employing a subjective standard of care. *Id.* at 540. But, due to its subjective nature, *culpa levis in concreto* has been criticized because "it might conceivably be greater or less than either" *culpa lata* or *culpa levis*, according to the care the obligor ordinarily took in his own affairs—a particularly prudent man would be held to a higher standard whereas a particularly incompetent man a lesser one. *Id.* at 301 ("This is not a third degree of *culpa*: it might be less or more than either of the others."). Nevertheless, it remains in use today, albeit sparingly. *See, e.g.*, *supra* note 68.

74. ZIMMERMANN, *supra* note 68, at 524-25.

75. *See id.* (discussing the origins of *culpa levissima*); LITVINOFF, *supra* note 28, at 104 (explaining the origins of "very slight fault"). Indeed, *culpa levissima* is rarely referenced alongside *culpa lata* or *culpa levis* in doctrinal works on Roman law.

common carrier or the borrower.[76] The correlative standard of care, *exactissima diligentia*,[77] resulted in liability where the conduct was thought to be even less imputable to the actor than ordinary *culpa levis*, such that the common carrier was liable for "[e]ven the slightest degree of negligence."[78] For example, under *culpa levissima*, if Boudreaux and Delphine order a new carriage for their baby Adelaide from Amazon, but the carriage is stolen from Amazon's delivery truck despite the utmost care, Amazon would nevertheless be liable for the loss. Thus, liability for *culpa levissima*, i.e., very slight fault, is properly understood as a necessary creature of contract law created to address situations where the ordinary standard of care is replaced with a more exacting level of precaution required of the obligor.

Outside the realm of Roman contract law, acts that caused damage in the absence of a pre-existing obligation (delicts) were subject to different rules. Where no contractual relationship preceded damage occasioned by one's act, the aggrieved had recourse under the *lex Aquilia*, a comprehensive body of law that governed compensation outside of contracts.[79] Claims under the *lex Aquilia* mandated reparations for even the "slightest" of faults, i.e., *culpa levissima*.[80] Thus, while *culpa levissima* rarely gave rise to liability in contractual relationships, in the absence of a contract one was "liable for all possible degrees of culpa, including culpa levissima."[81] For example, if Boudreaux threw a football in a public park and hit Delphine, who was already walking across the field, Boudreaux would be liable for her injuries suffered, even though his fault was very slight.[82] Therefore, the notion that a party

76. ZIMMERMANN, *supra* note 68, at 192.

77. ZIMMERMANN, *supra* note 68, at 192.

78. *Id.* at 524-25.

79. GOUDSMIT, *supra* note 49, at 213. The concept of very slight fault at Roman law, *culpa levissima*, was only found once in Roman texts and in relation to the *Lex Aquilia* tort action, not in relation to contracts. *See also id.*

80. *Id.* The concept of very slight fault at Roman law, *culpa levissima*, was only found once in Roman texts and in relation to the *Lex Aquilia* tort action, not in relation to contracts. PLANIOL, *supra* note 61; *see also* TOULLIER, *supra* note 61 at 134.

81. ZIMMERMANN, *supra* note 68, at 1027-28. *See also*, *id.* at n.197 ("It was frequently argued, though, that liability for culpa levissima was excluded if the damage had been done within a contractual relationship which, in turn did not impose such a strict degree of diligence on the parties; in other words, the special, contractual standard of diligence could modify what was generally (under the law of delict) expected of a person.").

82. Conversely, if Boudreaux threw the ball before Delphine entered the field, he would not be liable. His fault is not "slight" or "very slight," but non-existent. There,

would not be liable for "very slight fault" in delects was nothing more than a failure to understand the correlative nature between standard of care and degrees of fault, and the application of a contractual principle to delictual law.

What can be gleaned from the Roman law history of *culpa*? Perhaps the most obvious answer is that the Roman sources, though surely ahead of their time, were inconsistent at best and contradictory at worst.[83] More importantly, however, is the mercurial manner in which Roman sources switch from speaking of the degree of fault that results in liability (*culpa*) to the standard of care necessary to avoid liability (*diligentia*). In hindsight, it is more proper to define the different degrees of *culpa* not as the quality of the act that justifies imputation of liability, what is today called "fault," but rather as the level of carelessness which, when shown, falls below the applicable standards of care. Bearing this lesson in mind, it should be understood that where the various forms of *culpa* are used, one should interpret them as behavior violative of their correlative standards of care, rather than as "degrees of fault." This is perhaps most easily demonstrated in the table below, whereby the word "fault" is replaced with "carelessness" to reflect the concepts more accurately:[84]

Standard of Care	**Level of Carelessness that Violates the Standard**
Exactissima diligentia Utmost diligence	*Culpa levissima* Very slight carelessness
Bonus paterfamilias Diligence of a good household father	*Culpa levis* (*in abstracto*) Slight carelessness (objective standard)
Diligentia quam in suis Diligence one takes in one's own affairs	*Culpa levis* (*in concreto*) More carelessness than one would normally exhibit in her own affairs (subjective standard)

fault would either be imputed to Delphine or to an extraneous cause, barring recovery from Boudreaux.

83. *See infra* note 87.

84. *See generally supra* notes 52-83 and accompanying text.

Non intelligere quod omnes intelligunt	*Culpa lata*
Diligence any reasonable person would show	Gross carelessness

In summary, the theory of fault at Roman law was antecedent to our modern doctrine, but should not be sacrosanct. The Roman law rules were developed to address fact-specific dilemmas, rather than broadly applicable principles of law. To the extent that the general principles of Roman law contradict the refined theory of fault developed in the centuries following the demise of the Roman Republic and Empires, form should not be elevated over substance.

B. THE DIDACTIC WORKS OF FRENCH CIVIL LAW SCHOLARS

In France, the Code Napoleon and its progeny largely adopted these Roman concepts. But the ambitious goal of reducing complex legal concepts into layperson terminology[85] is a likely source of the confusion that has plagued scholars studying the degrees of fault ever since.[86] The French scholar Jean Domat, whose doctrinal works were the antecedent to the Code Napoleon, extracted a theory of fault that largely accorded with the underlying principles of Roman law discussed above. Domat explained that fault was determined by weighing the obligor's act against the standard of care commensurate with the nature of the obligation arising from the contract.[87] As for fault in the absence of a contract, an actor was liable to repair any damage or loss imputable to him, "whether out of imprudence, rashness, ignorance of what one ought to know, or

85. *See supra* note 16.

86. *See, e.g.*, 4 C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANCAIS 102 n.26 (Louisiana State Law Institute trans., Etienne Bartin ed., 6th ed. 1942) (1965).

87. DOMAT, *supra* note 38, at 604 (explaining that fault "that relates to covenants" is discussed in book one, entitled "Of Voluntary and Mutual Engagements by Covenant"). For example, the seller of a thing not yet delivered was liable "not only for what he may do knavishly, but for every neglect and every fault which a careful and diligent master of a family would not readily fall into." *Id*. at 207. This is the Roman standard of *bonus paterfamilias*. But Domat's standards did not always align with those at Roman law. For instance, Roman law held the gratuitous depositary liable only for *dolus*, GOUDSMIT, *supra* note 49, at 213, whereas Domat held the depositary liable for "fraud or knavery, or through any fault or negligence [according to] his usual management of his own concerns," the subjective standard if *culpa levis in concreto*. DOMAT, *supra* note 38, at 336.

other faults of the like nature, *however trivial they may be*."[88] Even where the act or harm resulted from an "unforeseen consequence of an innocent act," the actor would only be absolved of responsibility if "nothing of imprudence could be imputed to him."[89] Otherwise, the law could not "excuse either the intention or the degree of his fault."[90] Thus, liability for delict flowed from *culpa levissima*, and *a fortiori*, from *culpa levis*, *culpa lata*, and *dolus*.[91] But where obligations arose in contract, liability was determined according to the care and diligence exercised in contrast to the standard prescribed for that particular obligation by law, or that to which the parties agreed.[92]

The Roman concept of *culpa*, however, did not escape the evolution of French civil law entirely unscathed. Under the Code Napoleon, the civil law saw a noteworthy departure from the general rule by which the degree of fault was inextricably linked to the nature of the obligation.[93] No longer would a party only be liable for *dolus* and *culpa lata* when she benefited from a gratuitous act of the other party.[94] Instead, as a general rule, an obligor would be liable

88. DOMAT, *supra* note 38, at 617 (emphasis added).

89. *Id.* at 618. This is further exemplified by a subsequent article of Domat's treatise which provides that, "those through whose fault, let it be ever so slight, a fire has happened, will be answerable for all the damage it does." *Id*. at 219.

90. TOULLIER, *supra* note 61 at 2-4.

91. ZIMMERMANN, *supra* note 68, at 1008 ("The wrongdoer was liable for all possible degrees of culpa, including culpa levissima.").

92. *See, e.g.*, DOMAT, *supra* note 38, at 174. To the contrary, under the early French adaptation of the Roman concept of degrees of fault, the degrees were applied thusly: First, a debtor was liable for gross fault if the contract was solely for his benefit; second, the debtor was liable for slight fault where the contract was mutually beneficial to both parties; and third, the debtor was responsible even for very slight fault if the contract benefited only the debtor. PLANIOL, *supra* note 61. This was rejected by the Code Napoleon in favor of *culpa levis in abstracto*. *Id.* at 144-45. Thus, the French redactors rejected the application of *culpa levis in concreto*, which "favored certain debtors" by applying a *subjective* standard where the debtor was only liable for failing to exercise the care he would in his *own* affairs. *Id.* at 144.

93. PLANIOL, *supra* note 61, at 145. Before *culpa levis* was established as the contractual standard, the degrees were applied thusly: First, a debtor was liable for gross fault if the contract was solely for his benefit; second, the debtor was liable for slight fault where the contract was mutually beneficial to both parties; and third, the debtor was responsible even for very slight fault if the contract benefited only the debtor. *Id.* at 144.

94. *See, e.g.*, CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1137 (Fr.). ("The obligation of vigilance in the preservation of the thing, whether the agreement have for its object the advantage of one of the parties, or whether its object be their mutual profit, subject him who is charged therewith to apply all his care like a good father of a family.").

for slight fault under the objective standard of *culpa levis*.[95] This is evident in a variety of provisions under both the Code Napoleon and the subsequent French Civil Code which require of the debtor the care that a "prudent owner" or "prudent father" would exercise.[96] The departure from the degrees of contractual fault, however, was not absolute. Remnants are discernable in a variety of French codal provisions.[97] However, all of these instances have in common an important public policy distinction: the obligor is performing a gratuitous service, and thus the law grants her a slightly more favorable position.[98] Thus, the usual standard of care was the *bon père de famille* (*bonus pater familias*), subject to specific exceptions.[99]

Following the promulgation of the Code Napoleon, French scholars came into discord as to the extent to which the degrees of fault remained necessary. In his treatise on the civil law, Marcel Planiol began the discussion of fault by noting that, "[f]or centuries, the determination of the degree of fault on which the responsibility of the debtor should be based has raised great controversies, giving rise to the theory of the degrees of fault: but the interest in these controversies is purely doctrinal; it disappears almost entirely in practice."[100] The scholars Aubry and Rau, in their *Cours De*

Thus, the standard of care of the *bonus paterfamilias* applied under the Code Napoleon.

95. PLANIOL, *supra* note 61, at 145. The objective standard *culpa levis* is also written as *culpa levis in abstracto*, so as to distinguish it from the subjective standard of *culpa levis in concreto*. Thus, in adopting this standard, the French redactors rejected the application of *culpa levis in concreto*, which "favored certain debtors" by applying a *subjective* standard where the debtor was only liable for failing to exercise the care he would in his *own* affairs. *Id.* at 144.

96. *Id. See also, e.g.*, CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 1137 (Fr.) (regarding the obligation to give), 450 (regarding tutors), 601 (regarding the usufructuary), 1728 (regarding the lessee), 1880 (regarding the borrower), 2080 (regarding contract of sale) (Fr.) (1930).

97. Such as the rule that liability of a depositary flows only from "serious faults." *See* PLANIOL, *supra* note 61, at 145 (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 804 (Fr.) (1930)).

98. *Id.*

99. *See* LA. CIV. CODE ANN. art. 576 cmt. (b) (2021).

100. PLANIOL, *supra* note 61, at 143. The sentiment was previously observed by Toullier, who noted the limitations of practical application of the degrees of fault, stating that "the differences . . . [were] not sufficiently marked so that one will be able to properly distinguish between the one and the other. TOULLIER, *supra* note 61 at 2-4. Toullier previously asserted that the Code Napoleon rejected the degrees of fault vis-à-vis article 1137 because the injustices were so frequent that exceptions became the rule, and the rule the exception. *Id.* at 33.

Droit Civil Francais, dedicated several pages of footnotes alone to the conflict, but found the distinction still relevant between contractual and delictual fault.[101] A survey of doctrinal works from scholars of classical Roman law, French civil law, and Louisiana civil law, shows divergent views not only with respect to how the degrees should be applied in contract or delict, but also to the very existence of their relevance. The most exhausting argument—if not also the most compelling—seems to come from Planiol, who dedicated an inordinate amount of attention to the subject.

On the "duality of faults," as he called the distinction between contractual and delictual fault, Planiol asserted forcefully that "their difference in origin has no bearing on the nature of fault."[102] According to Planiol, both contractual and delictual fault are predicated on the violation of an existing obligation—the only difference being that one such obligation arises by agreement, whereas the other arises out of operation of law.[103] For centuries, jurists gave this distinction great, yet undeserved, weight because it was thought that the degree of fault generally required for contractual liability (gross fault or slight fault) was distinguished from that required for delictual liability (very slight fault). This view, however, confused the "extent of the *obligation* with the gravity of the *fault*."[104] In other words, fault exists wherever a party has breached a pre-existing obligation, regardless of whether that obligation is contractual or arises by operation of law. The provisions which govern the various types of contracts do not concern the degree of fault at all, but rather the "extent of care to which the debtor is held" in performing her obligation, just as delictual fault requires a violation of the standard of care that society holds all persons to in their everyday conduct.[105] These principles, first arising under Roman

101. AUBRY & RAU, *supra* note 86. Aubry and Rau critiqued Toullier's interpretation and ultimately rejected his premise, but not his conclusion. *Id.* Toullier had, in their opinion, conflated contractual fault with delictual fault by suggesting that the degrees of fault were rejected by the codal provisions governing offenses and quasi-offenses, which do not apply to issues arising out of contracts. *See id.* However, it should be noted that Toullier was explicit in finding the degrees of fault irrelevant in contractual obligations insofar as the degree of fault followed the beneficiary of the contractual relationship, but was much less explicit in finding that contractual fault now included the *very* slight, as it was previously understood to do only in the realm of delict. AUBRY & RAU, *supra* note 86, at 102.

102. PLANIOL, *supra* note 61, at 467-68.

103. *Id.* at 468.

104. *Id.* at 494.

105. *Id.*

law, then refined over centuries of French interpretation,[106] ring true to the civil law tradition that Louisiana's Civil Code has long sought to emulate.

III. LOUISIANA'S TROUBLED HISTORY WITH FAULT

Louisiana attempted to adopt the Roman and French concepts of fault in its 1825 codification. However, this effort fell short when the original redactors attempted to simplify such a nuanced theoretical concept into just 140 words.[107] That provision identified three degrees of fault: (1) the gross, which was considered as "nearly equal to fraud," whereby fraud means intentional fault,[108] (2) the slight, which was deemed the failure to act as an objectively prudent man would, and (3) the very slight, for which "no responsibility is incurred."[109] Though Louisiana courts seldom cited the pre-1999 definition, evidence suggests that the inadequacies of the

106. There have, of course, been authoritative doctrinal works on the subject by scholars from across the world. Nevertheless, a comprehensive survey, while surely a worthwhile endeavor, is beyond the scope of this Comment.

107. *See* LA. CIV. CODE art. 3522(17) (1825). The American Law Review discussed the inadequacies of the three degrees of fault in a publication which came only four years after the Louisiana Legislature opted to maintain the three degrees of fault in the 1870 revision of the Civil Code. *The Three Degrees of Negligence*, 8 AM. L. REV. 649 (1874). Citing French scholars, it was asserted that "the division of faults into three degrees is not exact; that the definitions of gross negligence, ordinary negligence, and slight negligence . . . have not a signification sufficiently fixed and absolute for practical application; that gross negligence and fraud, slight negligence and accident or misfortune which could not have been foreseen, are often and easily confounded; that ordinary negligence and slight negligence do not offer differences sufficiently marked and characteristic to be discerned with accuracy; the negligence is a relative term, the signification of which necessarily varies; that, to avoid the injustice which the rules established by the interpreters according to this division involved in their application, they have engrafted upon them so many exceptions that the result has been that the exceptions outnumber the rules; that often the rules do not conform to natural equity; that they are of no utility in actual practice at the bar; and that the Roman jurisconsults were not agreed upon this doctrine, which cannot be reduced to fixed and certain rules." *Id.* at 651-52.

108. A crucial distinction is required here. By "fraud," this article does not mean the vice of consent embodied in LA. CIV. CODE ANN. art. 1953 (2021). Instead, fraud is a translation from the French and Roman terms translating roughly to "intentional" breach. *See* LA. CIV. CODE ANN. art. 1997 cmt. (c) (2021). *See also* Lescale v. Joseph Schwartz Co., 40 So. 708, 709, 711 (1905) (equating the French concept of *dol* to intentional fault in stating "bad faith, or mistake so gross as to be the equivalent of (dol) intentional wrong"; interpeting the French jurisprudence on bad faith "as having application to every case where there has been either intentional fault or gross unintentional fault") (emphasis added) (internal citations omitted).

109. LA. CIV. CODE art. 3522(17) (1825).

definition were consequential.[110] At best, courts occasionally failed to grasp the concept but otherwise reached the proper conclusion; at worst, they applied theories of fault that are actually contrary to the civil law tradition and erroneous, notwithstanding their presence in the Civil Code.

In delicts, courts have relied on the definition of "very slight fault" to suggest that tortfeasors whose fault is only "very slight" are not obliged to repair the damage occasiond by their acts, and indeed their fault. The Louisiana First Circuit Court of Appeals exemplified this concern in *Savoie v. Walker*, when it incorrectly declared that "[o]nly the first two degrees of fault [gross and slight] give rise to an action for damages."[111] In contracts, the consequences are more tangible, although the nexus to the degrees of fault is less obvious: courts have chosen revision comments over positive law, thereby eschewing a proper application of the degrees of fault when addressing the appropriate quantum of damages. This error manifests in the courts' refusal to award consequential damages for an obligor who fails to perform intentionally but without malice, or by gross incompetence.[112] Thus, the lack of a coherent doctrine of fault, exacerbated by the inadequacies of the pre-1999 definition, has consequences in both contracts and delicts. These challenges are discussed below in turn.

A. PRE-1999 DELICTUAL FAULT

In delict, the pre-1999 framework created the possibility that tortfeasors could escape liability for "very slight fault."[113] Though

110. The repealed definition was so inadequate that one writer almost incredulously expressed: "Curiously enough, despite its prominent role in determining liability in Louisiana, fault is not clearly defined in the Louisiana Civil Code." Samuel N. Poole Jr., *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 LA. L. REV. 207, 209 (1979).

111. Savoie v. Walker, 183 So. 530, 533 (La. App. 1 Cir. 1938).

112. *See supra* note 43.

113. Litvinoff believed that Louisiana and French law supported Toullier's contention that very slight fault could, indeed, give rise to liability. Saúl Litvinoff, *Stipulations as to Liability and as to Damages*, 52 TUL. L. REV. 258, 275 n.97 (1977-78). Though he did not elaborate, Litvinoff seems to suggest here that if "excusable" were read as "imputable," the pre-1999 definition of very slight fault would comport with the proper understanding of fault, i.e., very slight fault *does* result in liability. The fault being "nonimputable" cannot be ascribed to one individual as the causal impetus, but he who was at very slight fault is nevertheless bound to repair the damage occasion by his or her act. "Imputable" is the adjective form of the verb "impute," which means "[t]o ascribe or attribute; to regard . . . as being done, caused, or possessed by." *Impute*, BLACK'S LAW DICTIONARY (9th ed. 2009). "Excusable," on the other hand, means that

the definition was removed in its entirety, this possibility remains a specter as courts may look to—and indeed, already have[114]—the since-removed definition in a fool's errand for clarity. Although Louisiana courts rarely cited the codal definition, a review of pre-1999 decisions demonstrates that the provision resulted in several failures to properly understand and apply the doctrine.

To wit, in *Bergeron v. Houston-American Ins. Co.*, the First Circuit Court of Appeals relied on the definition of "very slight fault" to reach the incorrect conclusion that very slight fault was "non-actionable" in delict.[115] At issue was the potential liability of a family friend who, in the course of playing with one of the plaintiff's children, accidentally knocked another child of the plaintiff's to the ground, fracturing his leg.[116] Relying on the definition of very slight fault, the court held that no liability flowed where the incident is a "'freak accident,' where the failure to guard against a remote possibility of accident . . . is held not to constitute actionable negligence."[117] Although it could be argued that the court's conclusion was right for different reasons, its reasoning was fundamentally flawed because delictual fault gives rise to liability no matter how slight.[118] A proper application of the law would have weighed the defendant's actions—knocking over the child—against his obligations, i.e., his general duty of care, and then asked whether the type of harm suffered was within the ambit of the rule which prohibits the defendant's conduct.[119] Thus, the defendant was not liable because the damage occasioned by his act did not fall within the ambit of his legal obligations under a general duty of care. It may be easier to think of the general duty of care as creating a hypothetical rule which prohibits the defendant's conduct, in this case playing with the first child in a reasonably safe manner. This

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"an illegal act or omission [is] not punishable under the specific circumstances." *Excusable*, BLACK'S LAW DICTIONARY (9th ed. 2009). Thus, Litvinoff would read the pre-1999 definition of very slight fault as, "that which is nonimputable, and for which no responsibility is incurred." While Litvinoff did not elaborate on this point, the distinction seems to suggest that the very slight fault which does not give rise to liability is that which cannot be properly assigned to the actor, and therefore it would be more accurate to say that there was merely no fault at all.

114. *See infra* notes 171-78 and accompanying text.

115. Bergeron v. Houston-American Ins. Co., 98 So.2d 723, 724-25 (La. App. 1 Cir. 1957).

116. *Id.* at 724.

117. *Id.* at 723, 725.

118. *See* LITVINOFF, *supra* note 28, at 104.

119. *See infra* notes 205-209 and accompanying texts.

hypothetical rule is designed to protect the child whom defendant was playing with, not the one injured as a result of his conduct. Though the defendant's conduct may have been the cause of the second child's injury, it does not result in liability because the defendant did not breach a general duty of care towards that particular child. This explanation is, of course, merely illustrative; one could just as easily hypothesize a broader general duty of care that would render the defendant's conduct culpable.

In another case, *Armstead v. Schwegmann Giant Super Markets, Inc.*, the Fourth Circuit Court of Appeals failed to properly apply the rule that gross fault is treated as intentional fault when it denied liability for a plaintiff whose arm was caught in a faulty meat-grinder.[120] Louisiana's workplace compensation rules limit employer liability to acts that are intentional.[121] Because "intent" requires either the conscious desire of the physical result of an act, or the belief that the results would be substantially certain, the Fourth Circuit held that the employer was not liable.[122] The dissent, however, noted that the code defined gross fault as "nearly equal to fraud," and concluded that, if the employer knew of the defect, "this type of fault should constitute an intentional act on the part of the employer."[123] Though not explicitly, this touches at the heart of the public policy considerations that warrant treating gross fault as equal to intentional fault. By showing less care than any reasonable person would, one is either subjectively aware of the possible consequences which she intentionally disregards or, alternatively, the law imputes her with intent because the level of imprudence is objectively egregious, warranting a heightened consequence.[124] This furthers one of the primary public policy goals of delictual obligations, the deterrence of injurious conduct.

These two cases exemplify the inadequacies of the pre-1999 definition of fault. In *Bergeron*, the court relied on the much-maligned definition of "very slight fault," which French scholars had already repudiated, and in *Armstead* the court ignored the definition of "gross fault" as tantamount to intentional fault, despite

120. Armstead v. Schwegmann Giant Super Markets, Inc., 618 So.2d 1140, 1141 (La. App. 4 Cir. 1993).

121. LA. STAT. ANN. § 23:1032 (A)(1)(a) (1993).

122. Armstead, 618 So.2d at 1141-42 (citing Bazley v. Tortorich, 397 So. 2d 475 (La. 1981)).

123. *Id.* at 1446 (Jones, J., dissenting).

124. *See supra* notes 62-68 and accompanying text.

centuries of support for that contention.[125] In other words, the courts applied the incorrect definition of "very slight fault," but refused to apply the correct definition of "gross fault."

B. PRE-1999 CONTRACTUAL FAULT

In contract law, the absence of a cogent doctrine of fault raises quite different concerns: to wit, what constitutes an obligor's failure to perform as "good faith" or "bad faith"—which, as will be shown, are themselves degrees of fault[126] In stark contrast to the implications that degrees of fault pose in delicts, contract law does not suffer from the same prospect that an actor might escape liability because her fault was "very slight." This is because the redactors properly enshrined the appropriate standards of care throughout the Civil Code, as the Code Napoleon had before it.[127] Thus, in contract law, liabiltiy is always determined by whether the obligor's injurious conduct fell below the applicable standard of care. However, a more serious consequence followed the adoption of two revision comments in 1984, which have drastically changed the implications of good faith and bad faith breach of contract on the quantum of damages. This, despite the adage, well-known by Louisiana civil law students, that "Revision Comments are not the law."[128]

The comments in question, surreptitiously added at the behest of the Civil Code's Revision Committee, sought to do what the

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125. *See infra* note 132, for a bevy of sources standing for the proposition that gross fault should treated as equal to intentional fault.

126. This comports with the proposition that the quantum of damages is affected by the degree of fault. While the terms "good faith" and "bad faith" do not fit cleanly within the three pre- 1999 enumerated degrees of fault, it is submitted that good faith is "simple fault" while bad faith is intentional (fraud) and gross fault. This is also supported by the Code Napoleon provision from which Civil Code article 1997 was assimilated, which provides that "[t]he debtor is only bound for the damages and interest which were foreseen or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed." CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1150 (Fr.).

127. *See, e.g.*, LA. CIV. CODE art. 2908 (1825) (adopting the *diligencia* standard for *culpa levis in concreto* by providing that the depositary must "use the same diligence . . . that he uses in preserving his own property"); *see also* LA. CIV. CODE art. 576, cmt. (b) (2019) ("The expressions 'prudent owner' and 'prudent adminstrator' in the Louisiana Civil Code of 1870, and the corresponding *bon père de famille* in the French Civil Code, reflect the notion of *homo dilgens et studiosus paterfamilias* of the Roman law.").

128. Arabie v. CITGO Petroleum Corp., 2010-2605, at p. 5 (La. 3/13/12); 89 So. 3d 307.

legislature would not: incorporate the doctrine of "efficient breach" into the civil law.[129] Efficient breach is the intentional breach of a contract and commensurate payment of damages by an obligor who determines that the benefit of breach outweighs the exposure of liability.[130] By suggesting that "bad faith breach" requires both intent *and* malice, these comments have resulted in a de facto adoption of efficient breach that is contrary not only to the civilian theory of contractual fault, but positive Louisiana law as well.[131] Proponents of efficient breach argue that the aggrieved obligee is made whole, and the obligor is in a better position than she would have been had she not breached: everybody wins. But it is an anathema to the entire notion of good faith and, as shown, has never been supported by the civil law. Moreover, because of the erroneous revision comments to article 1997, an entirely innocent obligee would be deprived of consequential damages unless she can

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129. *See* LA LA. CIV. CODE ANN. art. 1997 cmts. (b), (c) (2021).

130. *See* Scalise, *supra* note 40, at 722 ("[T]he theory of efficient breach of contract states that in some instances breaching a contract will be so profitable for the party who breaches that he will be able to compensate the other party so that neither will be worse off economically than if the contract had been performed."). Efficient breach does not exist under the letter of Louisiana's civil code because the voluntary breach of an obligation extended damages beyond losses sustained and profits deprived to consequential damages. *See* LA. CIV. CODE art. 1934(1) (1870). Though the law itself remains the same—and indeed, the first revision comment to article 1997 states that "[i]t does not change the law"—the following comments have effectively incorporated the theory of efficient breach by judicial fiat. The law itself does not, and has never, required "malice" to effectuate a bad faith breach. Nevertheless, courts have cited the provision consistently in order to deny plaintiffs the extended damages associated with bad faith breach for lack of malice. *See e.g.,* Olympia Minerals, LLC v. HS Resources, Inc., 2013-2637 (La. 10/15/14); 171 So. 3d 878 (holding that, under comment (b) to LA. CIV. CODE art. 1997, bad faith requires both intent and malice).

131. The civil and comparative law scholar, Professor Ronald Scalise, has expressed that Louisiana "refused to recognize the idea of efficient breach," citing the civil law's preference of specific performance over damages as a remedy. Scalise, *supra* note 40, at 765 (2007). Nevertheless, Professor Scalise seems to note that malice is not a necessary element of bad faith breach when, as the editor for Louisiana's Civil Code, he noted that historically bad faith was preceded by "some motive of interest *or* ill will." *See* Scalise's editorial notes to Civil Code article 1997, discussed *infra* note 178. Furthermore, his conclusion that Louisiana has not adopted specific breach seems limited to obligations "to give" or "not to do," but not for obligations "to do." The Civil Code is clear that, unlike the former two where specific performance is the preferred remedy, for "an obligation to do, the granting of specific performance is at the discretion of the court." LA. CIV. CODE ANN. art. 1986 (2021). This follows the civilian maxim "*nemo praecise cogit ad factum*," roughly translating to "no one can be forced to do a specific act," which derives from "respect for individual liberty." William Jaynes, *Obligations-Specific Performance of Obligations to Do or Not to Do in Louisiana*, 57 TUL. L. REV. 1577, 1581-82 (1983) (quoting Levine v. Michel, 35 LA. ANN. 1121, 1127 (1883)).

prove malicious intent. A proper application of the law should extend consequential damages to any breach that is intentional, regardless of malice. Moreover, because "gross fault" is tantamount to intentional fault, an obligor whose failure to perform constitutes gross fault should also be liable for consequential damages.[132]

These principles have been substantively codified in Louisiana law for almost two centuries and persist today, notwithstanding the erroneous revision comments or the undeserved deference they enjoy from the courts. Louisiana law has always limited damages for good faith failure to perform to that which the breaching party could foresee at the time the contract was born.[133] But where there was "fraud or bad faith," the obligor's liability extended to include all of "the immediate and direct consequences of the breach."[134] During the 1984 revision of the Law of Obligations, the codal provision on bad faith breach was amended into the current article 1997, which provides that "[a]n obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform."[135] The first revision comment states that the new provision "does not change the law."[136] However, to the extent the first revision comment is correct, the second revision comment apparently decided otherwise, ushering in a drastic change. That comment provides: "An obligor is in bad faith if he intentionally and *maliciously* fails to perform his obligation."[137] But this cannot be so if the new article was intended to replicate

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132. Dig. 11.6.1.1 (Ulpianus, *on the Edict* 24) ("[N]o doubt gross negligence will be held equivalent to malice."); Dig. 16.3.32 (Celsus, *Digest, book 11*) ("The statement made by Nerva that gross fault is equivalent to fraud was not accepted by Proculus but seems to me to be very true. For even if a person is not careful in the degree required by the nature of man, still, unless he shows in the deposit the care customary with him, he is not free from fraud; for good faith is not maintained if he shows less care than in relation to his own affairs."); Dig. 50.16.226 (Paul, *Handbook*, *book 1*) ("Gross negligence is fault; gross fault is bad faith."). *See also* G. H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 11 (1988) ("In CIVIL LAW, gross negligence is treated as the equivalent of deliberate wrongdoing for the purposes of contractual remedies, but the COMMON LAW no longer makes use of the concept of gross negligence for this purpose."); BUCKLAND, *supra* note 63 ("*Culpa lata* is repeatedly declared to be on a level with *dolus*, which does not of course mean that the state of mind is the same, but only that when we are told that a party to a contract is liable only for *dolus*, it must be understood that this involves liability for *culpa lata*.").

133. *See* LA. CIV. CODE art. 1934(1) (1870). The intent of this article was reproduced by today's Civil Code article 1996. *See* LA. CIV. CODE ANN. art. 1996 cmt. (a) (2021).

134. *See* LA. CIV. CODE art. 1934(1-2) (1870).

135. LA. CIV. CODE ANN. art. 1997 (2021).

136. *See id.* cmts. (a) & (b).

137. LA. CIV. CODE ANN. art. 1997 cmt. (b) (2021) (emphasis added).

its source provision, because the latter said no such thing; nevertheless, the second comment has been followed, the first has not. The amended statutory language itself, however, is devoid of any indication that the legislature intended to alter the concept of bad faith.

The source article from the Civil Code of 1870 defined bad faith as "a designed breach . . . from some motive of interest *or* ill will."[138] The disjunctive "or" makes clear that bad faith follows from intent *or* malice, *ipso facto*, the modern requirement for both intent *and* malice is categorically wrong. The aberration results largely from the subtle incorporation of a revision comment that encourages, rather than repudiates, an obligor's failure to perform so long as "the juice is worth the squeeze." If one were to analyze a question of good faith versus bad faith breach and somehow will the erroneous revision comments out of existence, diligent investigation would inescapably lead to the conclusion that malice is not a condition precedent for consequential damages. Moreover, in addition to being contrary to law, the incorporation of efficient breach is also antithetical to the civil law's preference for the remedy of specific performance over an award for damages.[139] This conundrum could be avoided altogether by properly defining fault and its degrees within the code. Any intentional breach should constitute a bad faith breach, regardless of malice. Once this truth is recognized, a second question follows: whether "gross fault" also constitutes bad faith breach, since it is tantamount to intentional fault.

It is submitted here that this question should be answered in the affirmative. As a matter of public policy, the obligor who should have known her conduct would harm the obligee should be held to account no less than the obligor who knew but cared not, who in turn should be held to account no less than the obligor who intended the harm. In such cases, the obligor has conducted her affairs in a manner worthy of condemnation, justifying the innocent obligee's recovery of consequential damages; the entirely innocent

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138. LA. CIV. CODE art. 1934(1) (1870) (emphasis added).

139. As opposed to common law, where damages are the rule and specific performance the exception, Louisiana's civil law tradition favors specific performance for most obligations unless "impracticable," a product of the importance honor played in Roman society. *See* LA. CIV. CODE ANN. art. 1986 (2021). *See also* Scalise, *supra* note 40, at 726-27 ("Civil law systems . . . prefer specific performance, and this alone would seem to be a sufficient barrier to recognition of the theory of efficient breach by the civil law scholar or judge, at least unless he were willing to reject his system's preferred theory for remedying a breach.").

obligee should not be made to suffer a loss consequential to the obligor's culpable conduct alone. This conclusion enjoys a bevy of support from Roman and French writings, as well as Louisiana's current Civil Code. Article 2004 implies as much when it declares null any contractual clause which excludes liability "for intentional *or* gross fault."[140] This example, which by no means stands alone, shows that the law treats with equal distaste intentional and gross fault. This conclusion also follows from the pre-1999 definition of fault itself: When the previous definition declared that gross fault was "nearly equal to fraud," it did not refer to that fraud which operates as a vice of consent, but rather the French *dol*, which merely means "intentional fault."[141]

This is also buttressed by Louis Moreau-Lislet, one of the original redactors of Louisiana's first digests, whose hand-written source notes of Louisiana's earliest contractual fraud provisions[142] point to Roman law, and the French jurists Domat and Pothier.[143] Domat and Pothier generally distinguished contractual fault as that which proceeds from fraud (again, intentional fault)[144] and from simple fault.[145] While Domat and Pothier may not have distinguished gross fault in this context, it is clear that, generally speaking, Roman and French scholars equated gross fault with fraud.[146] Moreover, Pothier posited that liability for damages should be limited to the foreseeable for "[s]imple fault," but

140. LA. CIV. CODE ANN. art. 2004 (2021). This article also generally demonstrates the relevancy of degrees of fault in Louisiana obligations law. Contracting parties are able to limit liability up to a certain *degree* of fault, namely "slight" fault. Thus, parties can contract away the right to recover for good faith breach of contract, but not bad faith—of course this conclusion requires one to subscribe to the argument herein that bad faith never requires malice, only intent, and that gross fault, being tantamount to intentional, is treated with equal disdain and thus constitutes bad faith.

141. *See supra* note 108.

142. Louis Moureau-Lislet was one of the original redactors of the 1808 Digest of Civil Laws. His source notes come from the d*e la Vergne Volume* of the 1808 digest, an annotated version of the earliest codification of civil laws following the Louisiana Purchase, with references to each article corresponding to the sources from whence the provisions came. This crucial piece of Louisiana legal history evaded the Louisiana academic world until 1938, when a member of the de la Vergne family informed a professor at Tulane Law School that it was in their possession, though it did not become widely available until 1958. John W. Cairnes, *The De la Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 33 (2009).

143. *See* LISLET, *supra* note 27, at 268-69.

144. *See* DOMAT, *supra* note 38, at 773.

145. *See* ROBERT JOSEPH POTHIER, A TREATISE ON OBLIGATIONS 94 (The Lawbook Exchange, LTD. 1999) (1802).

146. *See* GOUDSMIT, *supra* note 49, at 213.

extended to consequential damages for "fraud."[147] Pothier's choice to set the boundaries as intentional fault and slight fault, without reference to that gross fault which lies in between, combined with the ubiquitous understanding that gross fault is tantamount to fraud, strongly suggests that he believed consequential damages would flow from gross fault.[148] An extrapolation of an example provided by Domat is also instructive:

> If it was cattle infected with some contagious distemper, which caused not only the death of the cattle that were bought, but also of those which the buyer had before; the seller who knew nothing of this distemper would be answerable only for the loss of the cattle which he had sold. But if the seller knew of the distemper, he would be likewise liable to make good the loss of the other cattle which the buyer had before, because he ought to have warned him of the infection that was among the cattle which he sold him, and it is his knavery that has given occasion to this other loss which the buyer sustains by the death of his other cattle.[149]

But what of the seller whose fault falls between the two, i.e., the seller at "gross fault?" Under the proper application of fault, the seller should be liable for consequential damages, not just the foreseeable. This result is also desirable under the precept that a loss should not be borne by an innocent party where a guilty one can be found.

To illustrate, consider if Boudreaux knew that some of his cattle suffered from a deadly contagion, but not which ones, and yet sold some to Delphine without disclosing the potential danger to her other livestock. If the purchased cattle were indeed infected and, as a result, Delphine's livestock died of the disease, it would be due to Boudreaux's gross fault. It is submitted that, under such circumstances, Boudreaux should be liable for both the cattle sold *and* Delphine's other livestock as a consequence of his gross fault. Delphine acted diligently in her purchase and introduction of the cattle to her livestock, and so cannot be imputed with any fault of her own. Boudreaux, on the other hand, knew there was a certain possibility that the cattle sold were infected and posed a danger to Delphine's livestock. Thus, the loss should be borne by Boudreaux

147. POTHIER, *supra* note 145.

148. *See id.*

149. DOMAT, *supra* note 38, at 774.

for his failure to "to take the care which any ordinary man would."[150]

The Civil Code of 1825 also supports this rule, as it extended damages beyond the foreseeable, to any damages directly caused by fraud *or* "bad faith."[151] Bad faith, under our Roman and French civilian heritage,[152] has long encompassed gross fault—"[g]ross negligence is fault; gross fault is bad faith"[153]—and nothing in Louisiana's legal history indicates the redactors believed otherwise until the 1984 revision comment. Thus, the proper application of the law on damages and the civilian concept of contractual fault should extend liability for bad faith breach to all intentional faults, whether or not malice exists, *and* all gross faults.

Nevertheless, since the 1984 revision, Louisiana courts have not only held that intent is necessary, thereby precluding bad faith breach for gross fault, but also that the intent must be born of some malice by the breaching party.[154] Furthermore, the 1999 removal of the definition of fault may tacitly be seen as having blessed this misconception by removing the equivalency between "gross fault" and "fraud." It remains unclear why the Louisiana State Law Institute and legislature removed the codal definition,[155] but what is clear is that this decision fell short of solving the issues addressed in this Comment.

C. LOUISIANA'S UNDERSTANDING OF FAULT SINCE 1999

The uncertainties surrounding the civilian theory of fault were only exacerbated by the state legislature's decision to remove the definition at the behest of the Louisiana State Law Institute in

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150. *See* BUCKLAND, *supra* note 63, at 301. Stated differently—in more modern legal vernacular—Boudreaux sold Delphine infected cattle intentionally in a reckless disregard of a risk he was fully apprised of, or else a risk that was so blatantly obvious that the law imputes him with such awareness, and this risk is so substantial that there was a high probability that it would result in harm to Delphine. This "conscious indifference to consequences" is tantamount to "a willingness that harm should follow" from his actions. *See* Cates v. Beauregard Elec. Co-op, Inc., 316 So. 2d 907, 916 (La. App. 3 Cir. 1975), discussed *infra* note 186.

151. LA. CIV. CODE art. 1934(2) (1870).

152. *See* LISLET, *supra* note 27, at 268-69 (citing Roman law as the origin for the provision that preceded today's "bad faith" failure to perform provision).

153. Dig. 50.16.226 (Paul, Handbook 1).

154. *See, e.g.*, Castille v. St. Martin Parish School Board, 2016-1028, p. 6 (La. 3/15/17); 218 So.3d 52, 56 (referencing the revision comments to find that bad faith breach requires both intent and malice).

155. *See infra*, text accompanying notes 156-57.

1999.[156] The legislature did little justice to the centuries of debate, discussing fault so briefly during committee so as only to state that "fault is covered under [article] 2315."[157] Though the removal came at the recommendation of the State Law Institute, a review of available records reveals no discussion concerning the controversies addressed herein.[158]

As a result, we are left with an empty term-of-art, pivotal to the civilian legal tradition, without any readily available definition in the Civil Code. Of course, for any court eager to comb through a sundry of Louisiana and French treatises, a proper understanding of our "fault-based system" is only a law library and several hours of research away. But alas, as a law student seeks an outline, a court seeks precedent. And so courts have resurrected the pre-1999 definition from the grave in search of meaning, ostensibly unaware of the perils it poses. More than a decade after the definition was repealed, at least one Louisiana appeals court has looked to the pre-1999 law for guidance.[159] The fact that any court is still referencing a repealed provision may alone justify the need to revisit the issue of whether "fault" deserves a codal definition. Moreover, two panels within that circuit managed to issue conflicting opinions within a matter of two years by referencing the pre-1999 definition.[160] Thus, the post-1999 regime is so inadequate that even judges within one circuit could not come to a consensus.

In the first case, *Wadick v. General Heating & Air Conditioning, LLC*, the Fourth Circuit Court of Appeals properly referenced the pre-1999 definition to properly conclude that "[g]ross fault . . . includes not only gross negligence, but also bad faith breach of

156. *See* 1999 La. Act 503. This bill was offered, according to representatives of the state law institute, to rid the code of "deadwood definitions." *Hearing on H.B. 778 Before the H. Comm. On Civil Law & Procedure,* 1999 Leg., 25th Reg. Sess. (La. 1999).

157. *Hearing on H.B. 778 Before the H. Comm. On Civil Law & Procedure,* 1999 Leg., 25th Reg. Sess. (La. 1999). Notably, article 2315 nor its revision comments provide any clarity on what exactly is meant by "fault." *See* LA. CIV. CODE ANN. art. 2315 (2021).

158. *See October 1996 Committee Minutes*, pg. 4, no. 13; *January 1997 Draft Council Materials*, pg. 13; *February 1997 Revised Draft Council Materials*, pg. 13; *February 1997 Council Minutes*, pg. 5; *December 1998 Committee Minutes*, pg. 9; *March 1999 Council Minutes*, pg. 3.

159. *See* Wadick v. General Heating & Air Conditioning, LLC, 2014-0187 (La. App. 4 Cir. 7/23/14); 145 So.3d 586; 1000 South Jefferson Davis Parkway, LLC v. Williams, 2014-1326 (La. App. 4 Cir. 5/20/15) 165 So.3d 1211. Both of these cases concern contractual fault.

160. *See infra* text accompanying notes 161-178.

contract or fraud."[161] The trial court had erroneously granted summary judgment in favor of the defendant-contractor when the latter invoked its limitation of liability clause.[162] The plaintiffs unsuccessfully argued at trial that the clause was null under Civil Code article 2004,[163] which declares null any clause excluding liability for injury caused by intentional fault or gross negligence.[164] The trial court incorrectly suggested that article 2004 applied to tortious conduct only, whereas the plaintiffs' claim arose in contract, thus finding that the limitation of liability provision was valid and enforceable.[165] Overruling the erroneous decision, the Fourth Circuit explained that article 2004 was applicable to both contract and tort claims.[166] The court reasoned that liability in Louisiana is always based on fault, so the use of the word "fault" in article 2004 did not limit the provision's application to tort claims.[167] The pre-1999 definition of "gross fault" supported this contention because it equated "gross fault" with "fraud," a contractual term.[168] Thus, "[t]he term 'gross fault' . . . encompasses not only gross negligence, but also bad faith breach of contract or fraud."[169] Though the court did not extrapolate this conclusion so as to extend liability for gross fault beyond that which was foreseeable at the time the contract was made, the conclusion that gross fault in contracts is tantamount to bad faith is heavily supported by the civil law tradition.[170]

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161. Wadick v. General Heating & Air Conditioning, LLC, 2014-0187, p. 17 (La. App. 4 Cir. 7/23/14); 145 So.3d 586, 598.

162. *Id.* at 595. The limitation of liability provision provided, in part, that the contractor "shall not be responsible for or liable for mold . . . mildew, and/or any damage, illness or injury related to these, howsoever caused, whether arising directly or indirectly . . . as a consequen[ce] of, the workmanship, equipment, materials or design" of the contractor. *Id*. at 591.

163. "Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party." LA. CIV. CODE ANN. art. 2004 (2021).

164. *Wadick*, 145 So.3d at 590.

165. *Id.* at 595.

166. *Id.* at 597.

167. *Id.* at 597-98.

168. *Id.* at 598. However, it again must be noted that the term "fraud" as used in the pre-1999 definition was not the vice of consent, but rather a translation of the French "*dol*," and the Latin "*dolus*" before, which in this context more accurately means "intentional fault." *See supra* note 108 and accompanying text.

169. *Wadick*, 145 So.3d at 599.

170. At Roman law, it was said that "[g]ross negligence is fault; gross fault is bad faith." Dig. 50.16.226 (Paul, Handbook 1). It is also worth restating that the Civil Code of 1870 extended liability beyond the foreseeable for fraud or bad faith, LA. CIV. CODE

The very same court rejected this premise only one year later when the question of quantum of damages arose. In *1000 South Jefferson Davis Parkway, LLC v. Williams*, the Fourth Circuit, in an opinion written by a different judge of the same circuit, held that fraud (i.e., *dol*/intentional fault) can never be predicated on negligence, no matter how gross.[171] At issue was whether a party to a purchase agreement breached the contract in bad faith when the buyer failed to disclose its intent to walk away from the agreement if the property did not meet certain requirements.[172] The court pointed to a revision comment of article 1997,[173] which states that "[a]n obligor is in bad faith if he intentionally and maliciously fails to perform his obligation,"[174] and held that "[f]raud cannot be predicated upon mistake or negligence, no matter how gross."[175] The court erred by citing a decision regarding "fraud" in relation to vices of consent, which refers to "a stratagem or machination to take unfair advantage of another party,"[176] rather than that fraud which precedes a bad faith failure to perform—the French *dol* or Latin *dolus*.[177] But equally as fallible, the court reached its conclusion using the 1984 revision comment to article 1997, which is not supported in the text of the law itself or Louisiana's civil law history.[178]

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art. 1934(1) (1870), and equated gross fault as "nearly equal to fraud." LA. CIV. CODE art. 3556(13) (article 3556(13) in the Civil Code of 1870 is the exact same as article 3522(17) in the Civil Code of 1825). *See also* 4 CARBONNIER, DROIT CIVIL—LES OBLIGATIONS 277-79 (11th ed. 1982) (as cited by LITVINOFF, *supra* note 28.

171. 1000 South Jefferson Davis Parkway, LLC v. Williams, 2014-1326, p. 8 (La. App. 4 Cir. 5/20/15) 165 So.3d 1211, 1218.

172. *Id.* at 1217.

173. "An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." LA. CIV. CODE ANN. art. 1997 (2021).

174. LA. CIV. CODE ANN. art. 1997, cmt. (b) (2021).

175. *1000 South Jefferson Davis Parkway*, 165 So.3d at 1218 (internal citations and quotation marks omitted).

176. LA. CIV. CODE ANN. art. 1997, cmt. (c) (2021). The reporter's comment elucidates the distinction between "fraud" as a vice of consent, and "fraud" in terms of bad faith breach, while noting that true fraudulent failure to perform—i.e., vice of consent—"of course, would constitute bad faith" as well. Thus, fraud in terms of bad faith breach does not always amount to fraud as a vice of consent, whereas the vice of consent *always* amounts to a bad faith breach. By way of a rather cliché analogy: all toads are frogs, but not all frogs are toads.

177. *See* LA. CIV. CODE ANN. art. 1997, cmt. (c) (2021). Fraud, in the sense of bad faith, comes from the French *dol* which is merely an intentional act.

178. This incontrovertible truth is recognized by today's editors of the Louisiana Civil Code, who explain in an Editor's Note that "[p]rior article 1934(1) (1870) defined bad faith as 'a designed breach of [contract] from some motive of interest *or* ill will,'" and that the first revision comment "indicate[s] that these articles 'do not change the

While these cases primarily concern contractual fault, there is cause for concern with respect to delict as well. The proclivity of courts to seek precedent[179] creates a possibility, too dangerous to be ignored, that future courts could rely on the repealed definition of "very slight fault" to improperly absolve an at-fault tortfeasor of liability.[180] If, however, the Louisiana State Legislature resurrected and revised the definition of "fault," codifying it in conformity with the doctrine explained herein, these pitfalls could easily be avoided. A modern doctrine of fault that clarifies the centuries of confusion and a new codal definition that enshrines a proper definition in the Civil Code will prevent courts from mistakenly or improperly relieving a tortfeasor of liability for "very slight fault" or depriving an obligee of consequential damages for bad faith breach. The codification of a modernized definition of fault that more fully encapsulates the contemporary doctrine will clarify a concept central to Louisiana's civil law tradition.

IV. THE MODERN DOCTRINE OF FAULT

Fault is the quality of one's conduct which falls below the appropriate legal or contractual standard of care that justifies the legal imputation of liability for damage occasioned by the culpable conduct. The existence of fault gives rise to liability,[181] and the degree of fault bears on the quantum of damages owed to the injured party (when that fault is contractual).[182] A party at fault is liable regardless of the degree;[183] conversely, a party not at fault is not liable.[184] These two legal consequences—liability and damages—are among the most fundamental mechanisms legal systems provide a civil society, fostering equitable remedies for aggrieved persons damaged by civil wrongs or in their private dealings.

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law,'" but that, nevertheless, "[r]ecent jurisprudence . . . seems to have adopted the approach advocated by comment (b)." *See* LA. CIV. CODE ANN. art. 1997, ed. n. (2021).

179. Whether jurisprudential or by way of repealed codal provisions.

180. Recall that the former code article defined very slight fault as "excusable" and that "no responsibility [was] incurred for its author. As discussed, this is not correct and is likely the result of the attempt to put strict liability into terms of fault, whereas strict liability is, more accurately, an exception to the requirement that fault precedes liability at civil law. *Supra* text accompanying note 75.

181. LITVINOFF, *supra* note 28, at 105.

182. *Id.* at 104-05.

183. *Id.* at 105.

184. Subject to exceptions, such as an obligor who assumes the risk of a fortuitous event. *See* LA. CIV. CODE ANN. art. 1873 (2021).

Fault manifests in one of three degrees, which bear on the extent of damages an at-fault party must be held to account.[185] The "degree" of fault is the psychological bond between an actor and her culpable act that the law imputes to her according to the circumstances peculiar to that conduct. The three degrees are: (1) intentional fault, (2) gross fault, and (3) negligent fault. Intentional fault is produced by the conscious and deliberate failure to meet the standard of care required for a particular obligation, whereby the actor knows that her conduct will result in harm, a subjective inquiry. Gross fault is the failure to meet the appropriate standard of care where the consequences were not necessarily intended, but the actor's conduct was volitional and so egregious that the law presumes her to have consciously disregarded their likelihood, an objective inquiry. Because of the heightened culpability of the conduct, the law attaches to gross fault the same consequences that follow intentional fault.[186] Finally, negligent fault is the failure to meet the appropriate standard of care where the actor's conduct was not egregious, but nevertheless fell below the level of prudence required by the applicable standard of care, also an objective inquiry. The pre-1999 definition of "very slight fault" for which "no responsibility [was] incurred," was, in fact, no fault at all.[187] In contracts, this tripartite division can be simplified into the bifurcated good faith (negligent fault) - bad faith (intentional or gross fault) divide. These basic, yet elusive, principles should be reduced into a definition and codified by the legislature to clarify the law, not to change it.

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185. LITVINOFF, *supra* note 28, at 104-05.

186. *See* Cates v. Beauregard Elec. Co-op, Inc., 316 So.2d 907, 916 (La. App. 3 Cir. 1975). The Third Circuit provided an excellent analysis for why gross fault is tantamount to intentional fault. The court stated that, by gross fault, it is meant that "the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.* (citing Prosser, Law of Torts, Section 34, 187-189 (4th Ed. 1964); Sullivan v. Hartford Accident & Indemnity Company, 155 So.2d 432 (La. App. 2 Cir. 1963); Lipscomb v. New Star World Publishing Corporation, 5 So.2d 41 (La. App. 1 Cir. 1941); Jefferson v. King, 124 So. 589 (La. App. 2 Cir. 1928). The court goes on to say that gross fault is "usually accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.*

187. It has been shown, *supra* text accompanying note 75, that the Roman origin of very slight fault, *culpa levissima*, was in fact an attempt to put strict liability into term of fault, or *culpa*, when it is, in actuality, an *exception* to the rule that requires fault for liability.

A. APPLICATION IN CONTRACTUAL FAULT

In contract law, the degrees of fault bear on the extent of liability. When fault is simply negligent, the obligor is only liable for damages foreseeable at the time the contract was born. But when fault is intentional or gross, regardless of malice, the obligor is liable for all damages that are a direct and immediate consequence of her actions. Although this may appear to be a departure from current law, it is asserted here to be the proper interpretation of the law, as well as the most logical and equitable conclusion. To any extent this construction deviates from the status quo, it is only insofar as it compels courts to interpret the law itself, rather than rely on revision comments.[188]

Adopting such a new provision will not require amendments to the text of any other Civil Code articles. However, revision comments (b) and (c) to Civil Code article 1997 should be excised. These comments incorrectly assert that consequential damages require intent and malice, whereas prior law merely required intent, which was equated with gross fault.[189] The correct rule for bad faith was articulated by the source provision of the modern codal article: "a designed breach . . . from some motive of interest *or* ill will."[190] If indeed Civil Code article 1997 "does not change the law," as Revision Comment (a) clearly states, then removing the following two comments serves to correct a fundamental departure from both the civilian tradition and the letter of the law.[191] It also addresses the serious public policy concerns of the incentive that the status quo provides contracting parties to breach when doing so is economically advantageous to them, regardless of how it affects the aggrieved obligee or innocent third parties.

By way of example, consider a series of hypotheticals.[192] Boudreaux owns a farm outside of New Orleans that supplies some of

188. *See* LA. CIV. CODE ANN. art. 1997 cmt. (a) (2021) (stating that this provision does not change the law).

189. LA. CIV. CODE art. 3522(17) (1870).

190. LA. CIV. CODE art. 1934(1) (1870).

191. The 2020 Editor's note by Professor Ronald Scalise suggests much the same. "[R]evision comment (b) indicates that for an obligor to be in bad faith he must 'intentionally and maliciously' fail to perform his obligations. Prior article 1934(1) (1870) defined bad faith as 'a designed breach of [contract] from some motive of interest *or* ill will.'" *See* LA. CIV. CODE ANN. art. 1997 ed. n. (emphasis original).

192. An analogous hypothetical provided by Domat, and extrapolated here, is discussed *supra* in text accompanying note 123. Please note, for the sake of discussion, these hypotheticals only address contractual fault and damages, operating in a

the city's restaurants with lettuce. Delphine, a customer of Boudreaux's, owns an eatery in the French Quarter renowned for their surf-n-turf roast-beef and shrimp poor boys. In scenario one, illustrating negligent fault, unbeknownst to either of them, Boudreaux sells Delphine lettuce contaminated with listeria, which she subsequently uses to dress her poor boys. After several patrons get sick, Delphine is forced to close her shop for several days to investigate the cause of the illnesses. This results in the economic loss of her ordinary business income, but also prevents her from closing a deal to sell her restaurant. It turns out that Boudreaux accidentally loaded a truck bound for Delphine's shop with lettuce that had been set aside as contaminated. Boudreaux's fault is negligent because it was not intentional nor the result of egregious imprudence; nevertheless, his safety precautions fell below the necessary standard of care because a reasonably prudent farmer would not store his contaminated and uncontaminated lettuce so closely together. He will be liable to Delphine for damages that were foreseeable at the time the contract was born, but nothing more. Delphine can recover for the lost revenue, but not the failed sale.

In scenario two, illustrating intentional fault, Boudreaux is scheduled to send his regular shipment of beef to Delphine when he gets a call from another restaurant. Desperate for an immediate supply of beef among a paucity, the potential buyer offers Boudreaux thrice the normal price for prompt delivery. Feeling the offer is too good to pass up, and having exhausted his supply for the time being, Boudreaux calls Delphine to give her the bad news and directs the delivery accordingly. There is no malice in Boudreaux's choice; he bears Delphine no ill-will, and in fact hopes she will understand and do business with him in the future. The same consequences follow: Delphine cannot sell her ambrosia-like poor boys and is forced to close shop for several days, and a deal to sell the shop falls through. Under the current appreciation of contractual fault, courts would likely look to the revision comments of article 1997 and conclude that Boudreaux's failure to perform was in good faith simply because he meant her no harm. Thus, he would only liable for the lost revenue. But why should Delphine be punished for Boudreaux's intentional dereliction of an obligation? She was entirely innocent, and he went back on his word for self-serving reasons. While Boudreaux may not have intended the harm, he

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proverbial "tortious vacuum." For an unrelated discussion on the etymology of New Orlean's poor boy sandwiches, *see* https://parkwaypoorboys.com/about/history-poor-boy/.

must have decided that the benefit for him was worth whatever damage to her it occasioned. The law should not countenance such greed and injustice, and indeed does not. In the absence of these erroneous revision comments, a deliberate judiciary would properly arrive at the doctrine elucidated herein, and hold Boudreaux to account for both Delphine's lost revenue *and* missed business opportunity. A new definition of fault would simply pave the way for the proper conclusion.

In scenario three, illustrating gross fault, Boudreaux realizes that he has accidentally sorted his contaminated and uncontaminated lettuce into unlabeled receptacles and does not know which are which. While he could easily retest a sample of each, Boudreaux feels like his odds of choosing the correct one for shipment are good enough, and assumes Delphine will wash the lettuce anyway. The shipment he sends contained lettuce contaminated with listeria, resulting in the same consequences yet again. While Boudreaux did not intend the harm, he acted volitionally in a manner where the likelihood of the harm was so probable that the law imputes to him a higher degree of culpability, gross fault. He is properly held to account for a broader scope of damages such that Delphine should recover her lost revenue as well as for her lost business opportunity. Why? Because, despite knowing of the possibility that the lettuce could be contaminated, and the ease with which it could be retested, Boudreaux chose to take a gamble that exposed Delphine, not himself, to a risk of harm. This conscious disregard for the wellbeing of others is repugnant, and a manner of conducting business which society, and therefore the law, repudiates by attaching more drastic consequences.

These hypotheticals, though concededly contrived, demonstrate the proper application of the three degrees of fault in contract law. Boudreaux escapes liability for Delphine's consequential damage only where his fault is slight, i.e., mere negligence or the failure to act as an objectively prudent person would. On the other hand, where he acts with intent *or* with wanton disregard for that which is objectively prudent, the law imposes greater liability because the innocent party should not have to bear a loss for such a flagrant violation of a legal duty. The result of each hypothetical is the most equitable and just conclusion the law can provide to the parties involved. Therefore, not only is this a proper application of the law, but also a proper application of reason and good morals.

B. APPLICATION IN DELICTUAL FAULT

In delict, the possibility of a tortfeasor being improperly excused of her negligence is less palpable, but that it could occur should alone be sufficient to warrant redress.[193] Since the 1999 removal of the definition from the Civil Code, it seems that courts have yet to improperly find fault "excusable," as they did in *Bergeron v. Houston-American Ins. Co.*[194] Nevertheless, there is conclusive evidence that courts will revisit the pre-1999 definition due to the lack of a more suitable alternative, as demonstrated in *Wadick v. General Heating & Air Conditioning, LLC*[195] and *1000 South Jefferson Davis Parkway, LLC v. Williams*.[196] These cases stand for the proposition that it is only a matter of time until a courts once again improperly absolves a tortfeasor of liability because her fault is deemed only "very slight."

While at first blush it is tempting to succumb to the notion that the slightest of faults should not result in liability, this confuses the meaning of fault. Fault is the quality of an act which establishes legal culpability, creating the legally binding obligation to compensate an aggrieved person for damage caused by the violation of a legal (or contractual) standard of care. Generally, where there is no liability, there is—simply put—no fault.[197] The pre-1999 definition that ostensibly absolved one of responsibility for very slight fault was likely nothing more than a misapprehension of the Roman *culpa levissima*.[198] The civil law tradition has always held that, as a general rule, liability must be predicated on fault.[199] This rule, like any "general rule" of law, admits of exceptions where liability can attach to one not at fault, such as an obligor who assumes the risk of a fortuitous event or the rare occasions of strict liability.[200] At Roman law, where the nature of a contract required an

193. Arguably, providing clarity to the theoretical underpinning of liability and damages alone suffices as cause for redress.

194. *See* Bergeron v. Houston-American Ins. Co., 98 So.2d 723, 725 (La. App. 1 Cir. 1957); *supra* text accompanying notes 115-119.

195. *See* Wadick v. General Heating & Air Conditioning, LLC, 2014-0187, p. 17 (La. App. 4 Cir. 7/23/14); 145 So.3d 586, 598; *supra* text accompanying 161-170.

196. *See* 1000 South Jefferson Davis Parkway, LLC v. Williams, 2014-1326, p. 8 (La. App. 4 Cir. 5/20/15) 165 So.3d 1211, 1218; *supra* text accompanying notes 171-78.

197. A general rule subject to exceptions. *See supra* note 184.

198. *See* ZIMMERMANN, *supra* note 68, at 524-25.

199. *See* LA. CIV. CODE ANN. art. 2315 (2021). Article 2315, the Louisiana statute from which liability flows, and its predecessors have always been predicated on fault.

200. *See* supra n. 185 art. 1873 and ADD strict liability reference.

obligor to be liable regardless of fault, the actor was held liable for *culpa levissima*.[201] However, the actor was liable *regardless* of fault, i.e., strictly liable. "Very slight fault," therefore, was merely an attempt to describe what modern law calls "strict liability" in terms of fault, when in actuality it did not concern fault at all.[202] In those circumstances where an author of an injurious act is able to escape liability, it is a result of the scope of her duty or the extent of the standard of care rather than the degree of fault. Where the harm suffered falls outside the ambit of the actor's legal or contractual duty there is no fault and thus no liability because fault is, by its very nature, conduct that falls below the standard of care *and thereby* causes damage.

The seminal tort case of *Hill v. Lundin* exemplifies this distinction.[203] There, the plaintiff sought damages from a contractor who left a ladder leaning vertically against a house after tripping over the ladder after it was—sometime later and by means unknown—placed prone on the ground.[204] The Louisiana Supreme Court accepted as true the premise that the contractor erred in leaving a ladder leaning against the side of a house, but explained that liability only followed if the risk encountered was within the "scope of duty" of the general duty "which would prohibit leaving a ladder leaning against the house."[205] The Court concluded that the risk encountered was not one that the general duty of care that obliges the contractor not to leave the ladder against the house is designed to protect against, and therefore the contractor was not liable, e.g., not at fault. In other words, the general duty of care established a rule which prohibited the contractor from leaving a ladder against a house, and this rule might conceivably be designed to protect certain risks: like the chance that a child may climb it and fall, or perhaps that the ladder may fall on a person passing by. But the rule which says "do not leave a ladder leaning against a house" is *not* designed to prevent a person from falling over a ladder on the ground. It would be incorrect to say, as the *Bergeron* Court did, that the defendant was absolved of liability because the fault was only "very slight." Indeed, the Court did not so hold, but rather found that the risk encountered by the plaintiff fell beyond the ambit of

201. *See supra* notes 75-78 and accompanying texts; *see also supra* note 113 (discussing Litvinoff's explanation of "very slight fault" which supports this proposition).

202. *See* ZIMMERMANN, *supra* note 68, at 524-25.

203. *See Hill v. Lundin*. *See* 256 So.2d 620 (La. 1972).

204. *Id.* at 621.

205. *Id.* at 622.

the contractor's general duty of care. In other words, the injury occasioned was not caused by the defendant breaching its duty by leaving the ladder against the house, but by an intervening cause alien to that subpar conduct.[206]

Thus, in both delicts and contracts, the definition of fault is the same. Undoubtedly, delictual fault can exist in any of the aforementioned degrees. However, in contrast to contractual fault, they have no bearing on the quantum of damages because civil wrongs (delictual fault) are cabined by the scope of duty and the doctrine of comparative fault, by which a tortfeasor's liability may be reduced by the fault of the victim or a third party.[207]

C. PROPOSED SOLUTION

The Louisiana State Legislature can and should adopt a new codal definition that will enshrine the doctrine of fault in the Louisiana Civil Code. Perhaps, at the legislature's behest, the Louisiana State Law Institute can revisit the issue to provide guidance in light of the considerations addressed in this Comment, and in order to rectify the doctrinal abyss created by its recommendation to remove the definition in 1999. The legislature could reinstate this new code article under Louisiana Civil Code article 3506, which defines terms used throughout the code that warrant explanation.[208] Alternatively, the legislature could place two verbatim

206. The Court cited the late Wex Malone for the proposition that, "[a]ll rules of conduct . . . exist for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each cause as it arises. How appropriate is the rule to the facts of this controversy?" *Id.* (citing Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

207. *See* LA. CIV. CODE ANN. arts. 2002, 2323 (2021). Article 2323 codified the doctrine of comparative fault in delicts. Article 2002 provides a similar rule in conventional obligations whereby an obligee must make reasonable efforts to "mitigate" the damage caused by an obligor's failure to perform.

208. Article 3506 is the same definitional codal provision that previously housed the definition, but is cited frequently here as its predecessor under the Civil Code of 1825 as LA. CIV. CODE art. 3522 (1870). It provides that "[w]henever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows." LA. CIV. CODE ANN. art. 3506 (2021).

provisions in Book III[209] under Title IV[210] and Title V.[211] Proposed language for this provision could state:

> Fault is the legal consequence of liability that attaches to one whose act fails to meet an applicable standard of care, whether prescribed by law or contract, and thereby causes harm to another. Whether in delict, quasi-delict, contract, or quasi-contract, all liability proceeds from fault and all fault results in liability such that one cannot exist in the absence of the other, absent an express provision to the contrary. Fault may manifest in three degrees:
>
> (1) Intentional Fault – That which proceeds from an act to the prejudice of another where the actor knew the conduct to constitute a violation of a legal or contractual standard of care. In contracts and quasi-contracts, intentional fault constitutes a bad faith failure to perform.
>
> (2) Gross Fault – That which proceeds from an act to the prejudice of another where the actor knew not that the conduct would constitute a violation of a legal or contractual standard of care, but the act was nevertheless so unreasonable as to suggest a willingness that the harm should follow. Gross fault is tantamount to intentional fault, and shall be treated as such in all cases unless the law expressly states the contrary. In contracts and quasi-contracts, gross fault constitutes a bad faith failure to perform.
>
> (3) Negligent Fault – That which proceeds from an act to the prejudice of another where the actor knew not that the conduct would constitute a violation of a legal or contractual standard of care, but nevertheless failed to act as a reasonable prudent person, or prudent administrator, would in like circumstances, resulting in such a violation. In contracts and quasi-contracts, slight fault constitutes a good faith failure to perform.

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209. LA. CIV. CODE ANN., BOOK III, OF THE DIFFERENT MODES OF ACQUIRING THE OWNERSHIP OF THINGS (2021).

210. LA. CIV. CODE ANN., BOOK III, TITLE IV, CONVENTIONAL OBLIGATIONS OR CONTRACTS (2021).

211. LA. CIV. CODE ANN., BOOK III, TITLE V, OBLIGATIONS ARISING WITHOUT AGREEMENT (2021).

Adoption of such a provision will effectively codify the true meaning of fault at civil law, as intended by the civilian legal heritage from Roman law, to French doctrine, and through Louisiana's codification and civil code revisions. This new codal article should be accompanied by a revision comment which elucidates the correlative standards of care, as used currently throughout the civil code. This will have profound effects in the law of conventional obligations by ensuring aggrieved obligees are entitled to the proper measure of damages. In the law of delict, it will ensure proper analysis for posterity and prevent the resurrection of the much-maligned concept of "very slight fault."

V. CONCLUSION

The doctrine of fault is a crucial theoretical concept of civil law, the fountain from which liability flows. Louisiana's original attempt to provide a cogent definition during the 1825 revision fell short and, arguably, deserved to be repealed. This is particularly so given the lack of support for the fallacy that no liability follows "very slight fault." The notion finds no refuge in Roman law, and has been debunked time and again from Domat to Litvinoff. The repeal of the pre-1999 law did little to resolve the inadequacies of the definition. Instead, it left one of the most fundamental concepts and terms-of-art undefined, leaving the law to chance that a court might deign to undertake a doctrinal excursion in search of meaning. But just as importantly, the civilian tradition is predicated on the notion that the law should be explicitly defined and reasonably comprehensible. And even where a theoretical concept has only limited practical effects, its importance should not be overlooked. As such, this simple but fundamental conundrum warrants a solution, and one is readily available.

By adopting a new definition of fault, Louisiana can move to the forefront of civil law jurisdictions for this crucial concept. The doctrine elucidated herein will rid our civilian tradition of the heretic that is "efficient breach," and promote good morals by further disincentivizing willful and reckless breaches of contract. Of equal import, it will prevent future courts from justifying the deprivation of rightfully owed delictual damages by virtue of an improper, and since abandoned codal definition. Moving forward with this task will certainly pose political challenges, but nothing worth doing is easy. While perfection, in law or otherwise, is always an unattainable goal, its pursuit is nevertheless a worthy endeavor.